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The Laws of Transparency in Action

A European Perspective

Edited by
Dacian C. Dragos · Polonca Kovač
Albert T. Marseille

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Governance and Public Management
ISBN 978-3-319-76459-7 ISBN 978-3-319-76460-3 (eBook)
https://doi.org/10.1007/978-3-319-76460-3

Library of Congress Control Number: 2018936323

Printed on acid-free paper

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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CHAPTER 1

From the Editors: The Story of a Data-Driven Comparative Legal Research Project on FOIA Implementation in Europe

Dacian C. Dragos, Polonca Kovač, and Albert T. Marseille

1 Freedom of Information Acts (FOIAs): From Rules to Practice

Transparency and freedom of information is a topic that most think they know about, but in reality, it has multiple facets that cannot be gauged so easily. There are many publications giving account of the way access to public information is regulated, but not as many investigate, the way FOIA actually works in practice.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_1

This book attempts for the first time to engage in a comparative assessment of implementation challenges facing FOIAs in the administrative law of several European jurisdictions and at the level of European Union law. It then tries to analyze both empirically and comparatively, also for the first time, selected FOIA topics in the different administrative justice systems.

Transparency is a multidimensional concept. This research looks at the issue of free access to information as part of the openness and transparency principle. As a rule, the conduct of public administration should be transparent and open. Only exceptionally should matters be kept secret or confidential, such as those truly affecting the national security or similar issues. Likewise, personal data should not be disclosed to third parties. Free access to public information has always heated debate and generated controversy, probably more than other aspects of contemporary government and administration. The concept typically means having access to files, or to information in any form, in order to know what the government is up to.

Administrative reform is directly connected to the democratic development of the society. Openness and transparency are key concepts of reforming public administration; their importance in the process is tremendous.

Transparency and openness partake a double nature: they are both a norm and an instrument. As a norm, transparency and openness are part of the value systems of liberal democracy and of human rights, which provide for a right of citizen to know what is going on in the public sector and for a duty of government to be transparent and open. As an instrument, it strives toward more efficiency and effectiveness, by forcing governments to be more attentive so as to stand public scrutiny.

Many countries in Europe have freedom of information laws from a long time ago (Nordic countries, for instance); others have adopted them later on (Western Europe) or have experienced with such laws only after the fall of communism (Central and Eastern European countries), while there are even examples of rather new FOIAs (the UK and Germany, for instance). The EU has got also from 2001 a regulation on access to public documents. The problems that occur in the implementation of FOIAs are different due to the legal and institutional context; nevertheless, patterns of best practices and malfunctioning are comparable.

The book analyzes in comparative and empirical legal perspective the main challenges that are facing the implementation of FOIAs in practice but also best practices suitable for cross-fertilization. The existing doctrine

is concentrating mainly on legal provisions and not offering much in terms of practical difficulties in applying the FOIAs. The book will try to cover this gap by providing practical insights into how effective the legal provisions really prove to be.

2 The Background of the Research Project

The team of authors contributing to this book is based in most part on the network of researchers established under the umbrella of the Permanent Study Group X "Law and Public Administration" of the European Group of Public Administration.[1] The study group joins together at every annual EGPA conference in September to discuss and share research ideas related to the field of public law, but with a broader multidisciplinary perspective. Thus, the group is a permanent meeting place for scholars and practitioners from different fields: social scientists, jurists and economists working in academia and public institutions, as well as civil servants working in national and supranational institutions. It tries to combine external and internal perspectives on law in a public administration context. Internal perspectives on law relate to juridical analysis and efforts to improve legal (sub)systems from the perspectives of rules and legal history, jurisprudence and comments. The external perspectives can be of different kinds, as they confront (administrative) law with motives that often are external to law, like efficiency and timeliness of administration, the accountability of public agencies, transparency of government and citizen's participation in decision-making.

The group has produced already a research published as an edited work, D. C. Dragos, B. Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law*, Springer 2014, and this is the second endeavor, of a similar scale.

The topic *Transparency laws in practice* was discussed at the EGPA conference in Utrecht (September 2016) and gathered an initial enthusiastic support and commitment from the members of the group. Many papers on the topic were presented during the annual EGPA conferences in Utrecht (2016) and Milan (2017). The book was completed with the participation of other well-established scholars in the field of administrative law, most of them members of the RENEUAL network (Research Network of European Administrative Law).[2]

[1] http://www.iias-iisa.org/egpa/e/study_groups/law/Pages/contact.aspx.
[2] http://www.reneual.eu/.

3 Scope of the Research and Structure of Chapters

The research underpinning this book aims at examining the general legal framework, and the case law, as well as the empirical evidence of enforcement of the main elements of the freedom of information laws in 13 jurisdictions from Continental Europe and in the EU legal system. The research combines approaches from law, public administration, in order to offer a wider picture on FOIAs. Each chapter follows a similar structure, except for the special reports on Austria and Denmark, which is constructed as a succinct analysis of the reforms undergoing in this country.

First, the contributors looked at beneficiaries of access to information (citizens, NGOs, mass media): who seeks more public information and which are the vectors for dissemination of that information? Does it help to have information disseminated ex officio and which are the main instruments to do that—bulletins, websites, newsletters? Which legal requirements and which sanctions for not complying with the law on ex officio publication? Is there a special regime for the access of Mass Media to the information of public interest? What about the special regime for access to environmental information based on the Aarhus convention? Are there differences from access to regular public information?

For these sections, empirical insights into the categories of persons asking for public information using secondary data have been used. The role of NGOs in promoting the right to public information among citizens and legal entities, as vectors of transparency, and, further, in litigation was also analyzed. At the other end, we analyzed the categories of entities which are bound by the law—the concept of "public authorities/bodies" and the challenges arising from such categorization, how are they organized—departments and public officials in charge with providing access to public information, their professionalization. In addition, the administrative oversight by other public bodies was taken into consideration.

A second perspective is procedural: the request for access and the ensuing response. The research questions here looked at formalities imposed by the national law, to best practices in comparative perspective and in national administrations, taking into account the requirement of clarity and precision and solutions for dealing with it. One matter that was analyzed is the vexatious or repetitive requests and how to deal with them, as well as dealing with applications erroneously addressed to a non-competent public authority. As to the response/answer, we analyzed

conditions of lawfulness, structure and mandatory content, substance and motivation. Issues of communication were also addressed alongside with the legal effects of administrative silence.

A very important issue in the analysis of FOIAs is the distinction between documents and information: should administration release documents as such or information extracted from documents? Should they be obliged to compile new documents from the existing information? The obligation to create new documents or to release information instead of a document is also related to rules for record keeping.

A critical part of the FOIA regime is the relation to exempted information. The tendency of keeping secrecy over administration activity is a natural one, taking into account that despite such restrictions, when the actions of public servants are more visible, so are their mistakes. An important aspect of all countries' legal framework of providing access to public information is the restrictions or exceptions where the information is not provided to the public. The scope of the exceptions is very important, in the context of the relation with special legislation like Official Secret Acts or acts on protection of personal data. This section of the national chapters discusses the overall approach to secrecy in a given jurisdiction and its relation to the FOIA.

A special attention is given to the *non-existence* of the document as an exception to freedom of access. Different approaches to the application of so-called Glomar doctrine (relating to some exempted information, a public authority may refuse to confirm or deny the existence or non-existence of requested information whenever the very fact of their existence or non-existence is itself classified or can jeopardize the secrecy of the information requested). In addition, we analyze in detail the practices of partial disclosure instead of refusal to disclose a document.

As to the other categories of excepted information, official/state secrets, international relations/foreign policy, defense/national security, third-party consent, the economy of the state, monetary and financial issues of the state, the national chapters assess the content of the concept, the case law and administrative practice.

The exceptions most used in refusing access are the protection of personal information and privacy, protection of commercial interest/business secrets, protection of decision-making or formulation of public policy, protection of ongoing proceedings and investigations, where the discussion evolves around the issue of access to final documents or decisions versus access to preparatory information.

For exceptions that are not absolute, the *public interest test* allows some excepted information still be released if the institution considers that there is an overriding public interest in disclosure.

Timeframes for answering the requests are also important, in terms of effectiveness. The timeframes reflect a balance between three types of interests. Firstly, there is the interest of applicants, who would like a rapid and complete disclosure, effective penalties and sanctions applied to public authorities reluctant to implement the provisions of the Freedom of Information Act. Secondly, there are public authorities, which are interested in more time for complying with requests for public information and often speculate every chance to refuse disclosure. Thirdly, there are the third parties, interested at their turn in the procedure of consultation before disclosure. The different legal systems try to ensure a balance between these competing interests; consequently the solutions envisaged are different and the practices differ alike. All national chapters relate to the timeframes and to the administrative practices on observing such timeframes.

In cases where access is denied, administrative and judicial remedies (administrative appeal, Ombudsman and Information Commissioners, judicial review) help to enforce the fundamental right to information. We analyze also the role and the effect of alternative dispute resolution systems in this field.

Another issue is the fees and costs of accessing information—the cost of printing, copying the information, searching and compiling the information—but also the regime of re-using public information.

The chapters are ending with an overall assessment of the effectiveness of the FOIA as regards increased public accountability, reduced corruption and trust in government in analyzed jurisdictions.

Each section has been looked at from different angles: regulations, case law and practice. The research was approached using a combination of methods—firsthand legal research—the inventory of legal rules and descriptions of their functionality in national literature; research of reports on this matter, and of evaluation studies; and secondary data analysis of statistics emanating from public sector authorities on administrative proceedings. This helped us to map what data are available and what kind of research is necessary to develop next to a comparative juridical, a comparative empirical perspective on administrative proceedings. Empirical insights into the practice—analysis of already collected data, interviews—have been provided in order to validate/invalidate the conclusions drawn on

regulation/case law/practice. The interviews with practitioners with experience in conducting FOIA proceedings were instrumental in understanding the practice of the law and not only its provisions.

The national chapters are following a common outline given in the questionnaire while paying attention to the specifics of the jurisdiction analyzed. They are followed by comparative chapters, which summarize the main findings from the national chapters as regards the parties and procedure, exceptions and remedies.

Part I deals with EU FOIA, followed by Part II dedicated to national profiles of FOIAs and their implementation, in Western Europe—France, Belgium, the Netherlands, Germany, Italy—in Central and Eastern Europe, Slovenia, Croatia, Hungary, Czech Republic, Romania, Serbia and two special reports on attempted reforms in Austria and transparency in Denmark. In the end, Part III comprises two comparative chapters on parties, procedure and exceptions and legal remedies, respectively.

4 Expected Impact

We hope the book will stir interest of students and academics, as the freedom of information topic is one of great interest for different fields such as law, public administration, political sciences, sociology, communication sciences, all over Europe and elsewhere.

Additionally, it will benefit practitioners from public administration in charge with applying or overseeing transparency laws, as the chapters will explain how comparable provisions from otherwise different jurisdictions are interpreted in practice. Legislators and initiators of legislation (members of Parliament and of the government) could use the book in designing FOIA provisions and procedures that are effective in practice, taking into consideration comparative experiences.

Last but not least, lawyers should be interested in comparative examples of how FOIA provisions are interpreted, because many FOIAs are similar in terms of how provisions are drafted, and cross-fertilization of legal principles and best practice may find a fertile ground here.

The editors wish to thank contributors to this book for their efforts to the European Group of Public Administration (Edoardo Ongaro and Fabienne Maron) for enabling the research and the publication of its findings, and to Palgrave Macmillan (Jemima Warren) for considering our proposal in a timely and accommodating manner and for an excellent cooperation during production of the book.

PART I

The EU FOIA

CHAPTER 2

Freedom of Information in the European Union: Legal Challenges and Practices of EU Institutions

Bogdana Neamtu and Dacian C. Dragos

1 Introduction

1.1 The Challenge of Transparency for the EU

Governments worldwide are faced with increasing demands for opening up and making their decision-making processes more transparent and accessible to their citizens. The European Union is also subject to this demand, especially due to the fact that law and policy processes seem to be cumbersome and are perceived to take an inordinate amount of time.[1]

[1] S. van Bijsterveld, 'Transparency in the European Union: A Crucial Link in Shaping the New Social Contract between the Citizen and the EU' (Transparency in Europe II, proceedings of conference hosted by the Netherlands during its Chairmanship of the EU Council, 25 and 26 November 2004) <https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Agenda__Bijsterveld-Paper.pdf> accessed 30 September 2017, p. 2.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_2

The right of access to documents is one important aspect/dimension of transparency.[2]

The principle of free access to administrative documents has become extremely widespread in Europe and throughout the world,[3] being regarded as a precondition and standard practice for well-functioning democracies. The European Union, one of the most fascinating constitutional projects in the world today, also faces challenges regarding the relationship between public authority and the citizen but in a way that is quite different from what we are used to in the context of the national states.[4] Despite the fact that it is quite hard to draw direct comparisons with national approaches in the realm of free access to documents, the fact that EU is perceived as rather opaque may be a reason for concern. After the release of the 2014 European Commission's report on public access to institutional documents in the summer of 2015, several critical voices argued that despite the somewhat positive outlook cast by the figures in the report, the European Union is less transparent than many of its Member States, at least with respect to access to legislative documents.[5] There are at least two main reasons for concern from the perspective of transparency. First, there is a general lack of access to information about EU decision-making and limited interest on the behalf of the EU institutions with regard to proactive disclosure of such documents, including documents outlining the negotiating positions of the three EU institutions or 'four column documents' when they meet behind closed doors during 'trialogues'.[6] Second, the institutions must do more to ensure that already published documents can actually be found. In the EU Integrity Study published in 2014, 78% of the requested documents were already in the public domain but the applicants could simply not find them.[7]

[2] European Ombudsman, 'Good Administration in Practice: The European Ombudsman's Decisions in 2013' (2014), <http://www.theioi.org/downloads/9d5gm/EU_OM_Good%20administration%20in%20practice_Oct%202014_EN.pdf> accessed 30 September 2017, p. 6.

[3] Right2Info, 'Access to Information Laws: Overview and Statutory Goals' (20 January 2012) <http://www.right2info.org/access-to-information-laws> accessed 30 September 2017.

[4] van Bijsterveld (note 1).

[5] Transparency International, 'EU Institutions are less Transparent than Many Member States' (EurActiv.com, 02 September 2015) <http://www.euractiv.com/sections/trade-society/eu-institutions-are-less-transparent-many-member-states-317240> accessed 30 September 2017.

[6] Ibidem.

[7] Ibidem.

1.2 Evolution of Right to Access to Documents in the EU

In the European Union, the journey toward more transparency and openness has involved the transition from access to documents seen as a challenge to be surmounted by Community institutions to access as a right of the individual.[8]

Prior to the Maastricht Treaty, a general right of public access to documents was almost unconceivable under the Community legal order. Each institution could decide by itself whether or not to grant access, and it could with relative ease decide that all documents were secret, except those which were already released to the public.[9] Pressure coming from two main directions determined a change in this culture of secrecy: On the one hand, there was the 'no' vote in the Danish referendum on Maastricht Treaty, which led leaders to think about how to bring EU institutions closer to the citizens. On the other hand, accession of Sweden and Finland to the Union in 1995 brought an impetus for transparency and free access, which have been for a long time embedded into their own national legal regimes.[10]

The evolution of regulations regarding free access to documents in the European Union started with the Maastricht Treaty (1992), which in Article 255 enshrines the principle of public access to European Parliament, Council, and Commission documents; a declaration on the right of access to information was annexed to the Treaty. According to the Declaration, transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. Also, the Declaration states the recommendation for the Commission to draw a report on measures designed to improve public access to the information available to the institutions.

Two Commission communications on transparency and access to documents were then published, followed by a 'Code of Conduct' adopting the principle of public access to Council and Commission documents.[11]

[8] H. Labayle, 'Openness, Transparency and Access to Documents and Information in the European Union' (2013) <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT%282013%29493035_EN.pdf> accessed 30 September 2017, p. 5.

[9] V. Tiili, 'Transparency: An Everlasting Challenge for the European Union', in P. Cardonnel, A. Rosas, N. Wahl, *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, (Hart Publishing: 2012) pp. 473–474.

[10] Ibidem.

[11] Labayle (note 8) p. 7.

The Code was a response to the Recommendation enclosed in the Maastricht Treaty. It was implemented through two separate regulations (Council Decision 93/731 and Commission Decision of 8 February 1994). The Code had a number of shortcomings, such as no possibility to gain partial access to documents and the lack of provisions for establishing records of documents by the European institutions.[12] The shortcomings were addressed later by the European Court of Justice in cases such as *Hautala v Council of the European Union*[13] and *Kuijer v Council of the European Union*.[14] The Code remained in force until 2001 when a new Regulation was adopted by the Council of the European Union. During the timeframe when the Code of conduct was in place, a series of court cases agitated the easy life of European Union institutions.[15] These include *Carvel and Guardian Newspapers Ltd. v. Council of the European Union*,[16] *Svenska Journalistforbundet v. Council of the European Union*,[17] *Hautala v. Council of the European Union*,[18] and *Kuijer v. Council of the European Union*.[19] These cases, which are discussed in other sections of the chapter, all represent important contributions via the case law to the development of the free access to documents regime in the European Union.

In 1997, the Treaty of Amsterdam enshrined these principles into primary law,[20] consecrating public access to documents as an EU citizens' right[21] (Article 255 TEC):

[12] L. Rossi and P. Vinagre e Silva, *Public Access to Documents in the EU* (Hart Publishing: 2017), pp. 9–15.

[13] ECJ, 19 July 1999, case T-14/98, *Hautala* v *Council*.

[14] ECJ, 6 April 2000, Case T-188/98, *Kuijer* v *Council*.

[15] S. Peers, 'From Maastricht to Laeken: the Political Agenda of Openness and Transparency in the European Union', in Deckmyn, ed., *Increasing Transparency in the European Union?* (EIPA, 2002), pp. 7–33; C. Naôme, 'The Case-Law of the Court of Justice and of the Court of First Instance of the European Communities on Transparency: From Carvel to Hautala II (1995–2001)', in Deckmyn, V., (ed.), *Increasing Transparency in the European Union?* (European Institute of Public Administration, Maastricht, The Netherlands, 2002), pp. 147–198.

[16] ECJ, 19 October 1995, Case T-194/94.

[17] ECJ, 17 June 1998, Case T-174/95.

[18] See (note 13).

[19] See (note 14).

[20] Labayle (note 8) p. 7.

[21] M. Mihaylova, 'Implementation of the Concept of Transparency by EU Institutions: Access to Documents' (2013) <http://campus.hec.fr/global-transparency/wp-content/uploads/2013/10/Mihaylova-Implementation-of-the-concept-of-transparency-by-EU-institutions.pdf> accessed 30 September 2017 p. 2.

> any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents (…); general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, (…) within two years of the entry into force of the Treaty of Amsterdam. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

Regulation No 1049/2001 regarding public access to European Parliament, Council, and Commission documents was adopted in order to give content to this right. The Regulation, a very short and concise document unlike other freedom of information laws, was designed to 'give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty' (Recital no. 4). Specifically, the Regulation is intended to help create a culture of openness that enables citizens to assume more active roles in the decision-making processes and general life of the European Union. The effect was immediate. The Regulation, which became applicable on 3 December 2001, has led to a steep and sustained increase in requests for access to documents—at least in the first years after its adoption, the Commission estimates that the number of access requests was increasing with around 50% every year. Since on average two thirds of requests were granted, it can be argued that the Regulation had opened to the public a considerable amount of previously unpublished document.[22] Before the adoption of this regulation, only a few years before, the Union institutions had operated on the basis that confidentiality was the rule and that giving access to information and documents was a discretionary exception to that rule.[23]

Regulation No 1049/2001 introduced a number of innovations which have considerably changed the regime of access to public information: the right of access has been extended to all documents held by the institutions concerned, including documents from third parties, thus excluding the 'originator rule' under which only documents issued by the public

[22] European Commission, 'Public Access to Documents Held by Institutions of the European Community, A Review (Green Paper 2007)< http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0185&from=EN> accessed 30 September 2017 p. 2.

[23] J. Sant'Anna, 'The European Ombudsman as the Guardian of Transparency' (Presentation for the conference Europe 2020—the Civic Visions, Sofia, 29–30 January 2010), <http://old.europe.bg/en/htmls/page.php?category=397&id=26997> accessed 30 September 2017.

authority could be disclosed upon request. Another novelty, this time not in the interest of applicants was the insertion of a new specific exception intended to cover defense and military matters. A very important provision allows some exceptions to be overridden as a result of a public interest test. Thus, the Regulation states that the protection of certain interests must be balanced with the public interest in disclosure, and if there is an overriding public interest in disclosure, the document will be made accessible even if an exception is applicable to the right of access. According to Regulation No 1049/2001, each institution must establish a public register of documents that can be consulted on the Internet. In addition, the Regulation lays down the objective that the documents should, where possible, be made directly accessible in electronic form. Finally, the Regulation imposes shorter time limits for replies: the one-month time limit for replies was reduced to 15 working days, with the possibility of an extension of 15 working days in duly justified cases.

Furthermore, the Court of Justice has extended through its jurisprudence the exceptions to include also legal opinions (*Carlsen and others v. Council*[24] and *Ghignone and others v. Council*[25]). On the other hand, a principle laid down in case law (*Hautala v. Council*) now forms part of the Regulation (Article 4(6)). Thus, all parts of a document not covered by an exception must be disclosed, unless the selection of passages to be disclosed represents a disproportionate administrative burden compared with the value of the information contained in these passages.

In accordance with the obligation imposed by the Article 17 of the Regulation, the Commission, the Council, and the European Parliament have submitted annual reports that provide a general overview how each institution implemented the Regulation in the previous year.[26] They encompass the number of cases in which the institution refused to grant access to documents, the reasons for such refusals, and the number of sensitive documents not recorded in the register. It is worth noted that though the information included is quite similar, some different reporting methods prevent one from comparing the three institutions.

[24] ECJ, 3 March 1998, Case T-610/97 R.

[25] ECJ, 8 November 2000, Case T-44/97.

[26] Parliament: Review of the implementation within the European Parliament of Regulation (EC) No 1049/2001(PE 324.892/BUR.); Commission: Report from the Commission on the application in 2002 of Regulation (EC) No 1049/2001 (COM (2003) 216, 29.4.2003); Council: Annual report of the Council on the implementation of Regulation (EC) No 1049/2001 (6353/03, 7.3.2003).

After the adoption of the 2001 Regulation, each institution has revised or adopted rules of procedure for granting access to own documents: Bureau Decision C 2001/374/01 for Parliament,[27] Decision 13,465/01 of amending the Council's Rules of Procedure for the Council of the European Union, respectively, the detailed rules for the application of Regulation (EC) No 1049/2001 for the Commission.[28] During a review of all the regulations establishing the agencies, a provision was included in the founding instruments making Regulation No 1049/2001 applicable to the agencies and stating that the latter should adopt implementing rules by 1 April 2004. As a result, some agencies have adopted their own regulations: Decision 2004/508/EC of the Administrative Board of the European Agency for Safety and Health at Work[29]; Decision 2004/605/EC of the Translation Centre for the bodies of the European Union[30]; Decision 2004/321/EC of the Administrative Board of the European Foundation for the Improvement of Living and Working Conditions[31]; and rules on public access to documents 2002/C 292/08 of the European Investment Bank[32]; the Committee of the Regions adopted a system of access to its documents on 11 February 2003[33] which is appreciated by the Commission to be 'quite in line with the provisions in Regulation No 1049/2001'.[34] The Economic and Social Committee adopted a similar system on 1 July 2003.[35] The Court of Auditors, the European Investment Bank, and the European Central Bank apply rules on access to their documents that are more restrictive than Regulation No 1049/2001.[36] As judicial bodies, the Court of Justice and the Court of First Instance have not adopted rules on access to their documents.

Lisbon Treaty has brought important changes with regard to the right of access to documents in the European Union. First of all, the Charter of Fundamental Rights makes this access a fundamental right.

[27] Official Journal of the European Communities C 374/1, 29.12.2001.
[28] Official Journal of the European Communities L 145, 31.5.2001.
[29] Official Journal L 210, 11/06/2004 P. 0001–0003.
[30] Official Journal L 272, 20/08/2004 P. 0013–0015.
[31] Official Journal L 102, 07/04/2004 P. 0081–0083.
[32] Official Journal C 292, 27/11/2002 P. 0010–0012.
[33] Decision No 64/2003, OJ L 160, 28.6.2003, p. 96.
[34] European Commission, 'Report on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council, and Commission documents' (2004) <http://ec.europa.eu/transparency/regdoc/rep/1/2004/EN/1-2004-45-EN-F1-1.Pdf> accessed 30 September 2017, p. 9.
[35] Decision No 603/2003, OJ L 205, 14.8.2003, p. 19.
[36] European Commission (note 34).

Article 42 under the heading 'Right of access to documents' states that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium'. As it can be observed, this provision expands the realm of entities which should provide free access to documents beyond the three main institutions of the Community. This provision is also reinforced by the TFEU. The TFEU itself has also changed the legal environment of the right of access. Article 15(3) states in more precise terms than Article 255 TEC the ways of exercising the right of access to documents on a compulsory basis.[37]

In light of Lisbon Treaty, Regulation (EC) No 1049/2001 needs to be revised. In addition, the revised Regulation should include the experience achieved so far in its application, initiatives that the European institutions themselves have adopted in recent years to favor transparency and access to documents, and also the case law doctrine of the Court of Justice of the European Union (CJEU) in this area.[38] Though various initiatives have existed over the last years, a revised version of it is still to be achieved in the future.

2 Free Access to Documents in the EU: Interplay Among Various Rules/Regulations and Actors

Free access to documents in the EU cannot be understood without taking into consideration at least two additional regulations: European Code for Good Administrative Behavior and Regulation No 45/2001. In addition, interaction with the Aarhus Convention is also important.

The European Code of Good Administrative Behavior proposed by the European Ombudsman in 1999 to the European institutions and then approved through a resolution by the European Parliament on 6 September 2001 represents the main tool detailing the rules and principles against which the European Ombudsman could assess cases of maladministration. Some of the principles from the Code are clearly derived and/or overlap with Community law; others have an extra-legal character, especially those referring to 'care and consideration in how citizens

[37] Labayle (note 8), p. 11.

[38] S. de Greuges de Catalunya, 'The Right of Access to Public Information' (Monographic Report, March 2012) <http://www.sindic.cat/site/unitFiles/3151/Report%20access%20to%20public%20information.pdf> accessed 30 September 2017, p. 7.

are treated' and 'the good functioning of the administrative service'.[39] The Code is a non-legally binding document, explaining in more detail what the Charter's right to good administration enshrined in Article 41 should signify in practice.[40] In addition, the Code was intended to serve two other main purposes: to provide a guide for the staff of Community institutions and bodies regarding their relationship with the public and to inform the citizens about their rights and the standards of administration they may expect.[41] Article 22 regards requests for information, while Article 23 deals specifically with requests for public access to documents. It is important to note that from the perspective of the concept of good administration, access to documents and information can be categorized from several different perspectives. Thus, it can be considered a procedural right if it refers to access to file, enshrined in Article 41(2) first indent or to the right of access to documents under Article 15(3) TFEU. Or, it can be considered a non-legal rule if the information requested is not covered by Regulation No 1049/2001 or by the rules applicable to access to the files, but its availability is regarded to favor good administration (as reflected in Article 22 of the Code).[42]

Regulation No 45/2001 becomes relevant as EU institutions must keep a fair balance between transparency and the protection of an individual's privacy and integrity throughout their processes. There are currently numerous requests for public access to EU institutions documents containing personal data.[43] In its ruling in the *Bavarian Lager* case,[44] the Court of Justice noted that the two regulations do not contain any provisions granting one regulation primacy over the other. In principle, 'their full application should be ensured'. However, when a request based on Regulation No 1049/2001, in fact, 'seeks to obtain access to documents

[39] M. E. de Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration', *EPL*, 17/2 (2011), p. 355.

[40] A. M. Moure Pino, 'The European Ombudsman in the Framework of the European Union', *Revista Chilena de Derecho*, 38/3 (2011) p. 426.

[41] J. Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behavior' (EUI Working Papers, September 2009) <http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3&isAllowed=y> accessed 30 September 2017, p. 1.

[42] Ibidem, p. 6.

[43] E. Pecsteen, 'Public access to documents: effective rear guard to a transparent EU?' (European Law Blog, 2015), < https://europeanlawblog.eu/2015/12/30/public-access-to-documents-effective-rear-guard-to-a-transparent-eu/> accessed 30 September 2017.

[44] ECJ, 29 June 2010, Case C-28/08 P.

including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety' (para 63).[45] Regulation No 45/2001 requires the consent of the data subject, grants access only to the applicant, and requires reasons for the application.[46]

Aarhus Convention is also relevant when trying to grasp the full picture of the legal regime governing access to information in the European Union. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in Aarhus, Denmark, on 25 June 1998. It is one of the environmental agreements that have substantially contributed to a more conscious and responsible approach toward environmental protection. The Aarhus Convention is not directly about the protection of the environment; it is rather a unique environmental agreement[47] in the sense that it not only covers obligations of parties toward one another but also obligations that parties have to the public as regards access to information, public participation and access to justice. The Aarhus Convention links human rights and environmental rights by giving precise procedural rights, such as access to information, public participation and access to justice in the environmental field to citizens and their organizations. The Aarhus Convention, by virtue of its ratification by the EU in 2005 through Decision 2005/370/EC,[48] is part of EU law. The access to information provisions of the Convention are found in Article 4 on access to environmental information and Article 5 on the collection and dissemination of environmental information. Article 4 sets out the general right of persons to gain access to existing environmental information upon request, also known as the passive right to access to information. Article 5 imposes an obligation on Member States (parties to the Convention) to actively collect and disseminate information, involving an 'active' access to information.

The other main instrument that needs to be highlighted is the Aarhus Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and

[45] D. Curtin and P. Leino-Sandber, 'Openness, Transparency and the Right of Access to Documents in the EU', (2016), <http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf>, accessed 30 September 2017, pp. 16–17.

[46] Ibidem.

[47] V. Koester, 'The Compliance Committee of the Aarhus Convention—An Overview of Procedures and Jurisprudence', *Environmental Policy and Law*, 37/2–3 (2007).

[48] OJ L 124, 17.5.2005, p. 1–3.

Access to Justice in Environmental Matters to Community institutions and bodies.[49] This establishes special rules for access to documents containing environmental information as compared to Regulation No 1049/2001. Regulation No 1367/2006 is meant to apply the requirements of the Convention to Community institutions and bodies, and it forms an attempt to deal with the three pillars of the Aarhus Convention, namely, access to information, public participation in decision-making and access to justice in environmental matters in one piece of legislation while retaining common provisions regarding objectives and definitions.[50]

The lex specialis character of access to environmental information is underlined by Article 2(6) of Regulation No 1049/2001 stating that its provisions are without prejudice to those acts implementing instruments of international law and by an explicit reference in Aarhus Regulation (Article 6) to the exceptions in Regulation No 1049/2001 and how they should be interpreted when the requested information is about the environment.

In the literature there are opinions claiming that Regulation No 1049/2001, compared to Aarhus Regulation, is unnecessarily restrictive with regard to both parties enjoying access rights and to the bodies from which the granting of access may be sought.[51] The Aarhus Regulation grants rights of access to anyone irrespective of nationality and place of residence and from all Community institutions and bodies (Article 2 (a, b, c)).

Table 2.1[52] summarizes the interplay between the two regulations providing general access and, respectively, access to environmental information in the European Union.

But the legal regime of access to documents in the EU is not only at the intersection of various regulations and rules; it also depends upon the interplay between the European Ombudsman and the Union's courts, which are the two main actors in this area. Due to the outdated

[49] See Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.

[50] M. Rossini, 'Council of the European Union/European Parliament: Regulation on the Application of the Aarhus Convention to Community Institutions and Bodies', (IRIS 2006–9: Extra) <http://merlin.obs.coe.int/iris/2006/9/article110.en.html>, accessed on 30 September 2017.

[51] H. Hofmann, G. Rowe, and A. Türk, *Administrative Law and Policy of the European Union*, (Oxford University Press: 2011), p. 478.

[52] Table can be found in Labayle (note 8) p. 13 and Hofmann, Rowe and Türk (note 51), p. 479.

Table 2.1 Interplay of various regulations forming the access to documents regime in the EU

Legal framework	*Institutions and bodies covered*	*Scope and beneficiaries*	
		EU citizens and residents	*Any natural and legal person*
Regulation (EC) No 1049/2001 + Regulation (EC) No 1367/2006	Parliament Council Commission Agencies	Any document	
Non-compulsory rules + Regulation (EC) No 1367/2006	European Court of Auditors European Central Bank Investment Bank European Economic and Social Committee Committee of the Regions European Ombudsman	Any document	Only environmental information
Regulation (EC) No 1367/2006	European Data Protection Supervisor (EDPS) Court of Justice (except for appointment to judicial office)	Only environmental information	

character of Regulation No 1049/2009, we are currently witnessing an interesting give-and-take between the courts and the European Ombudsman, whose decisions and other tools are currently replacing legislative action. Curtin and Leino-Sandber[53] criticize this situation, arguing that neither the courts nor the European Ombudsman can replace the systematic character of revisions that would be brought by an update to Regulation No 1049/2001; nonetheless, the role of the courts and of the European Ombudsman is significant. The European Ombudsman usually takes a legalistic approach that mirrors case law, certainly with respect to aspects that are the subject of a rich case law and settled based on legal principles (e.g. exceptions from disclosure). In these situations, the European Ombudsman's decisions merely cite case law, and its own contribution is rather limited. The European Ombudsman's real contribution, however, can be seen with regard to aspects that have not been exhaustively addressed in case law (language

[53] Curtin and Leino-Sandber (note 45) p. 5.

rights, transfer of applications, how to offer replies in a polite manner, timeliness, etc.). It is in these decisions that one notices the difference between the courts and the European Ombudsman. In these cases, the European Ombudsman employs norms of good administration pertaining to courtesy, duty to be service-minded, fairness. The European Ombudsman has often suggested strategies for resolving complaints informally—for example, negotiation in the event of a request is highly complex, implying that the applicant will have a long wait before a reply is given. The courts in the area of free access to information mostly deal with substantive issues, such as exceptions.

3 Main Aspects Pertaining to the Legal Regime of Free Access to Information in the EU: Selected Aspects

3.1 Data and Method

This section is based on the analysis of the relevant legal provisions, mostly resulting from Regulation No 1049/200; statistical data (secondary data) provided by the three core institutions, namely, the Commission, the Council, and the European Parliament in their annual reports dealing with the implementation of Regulation No 1049/2001 for the period 2011–2015; the jurisprudence of the European Ombudsman (over 550 decisions from 2010 to 2017) analyzed directly by the authors; the jurisprudence of the EU courts (over 50 decisions analyzed directly by the authors and over 35 decisions based on other authors' interpretation/summaries).

3.2 Beneficiaries of Access to Information

As a liberal approach rule, any person should be granted the right to request information from a public authority, so that citizens, non-citizens, and legal entities can benefit equally from these provisions of the law. At the level of the EU institutions, Article 2(1) of Regulation No 1049/2001 guarantees free access to citizens and residents of the European Union and to all legal persons whose registered offices are located in a Member State. However, Article 2(2) permits the institutions to extend the right of access to other categories of persons. Taking advantage of this permission, the Council and

the Commission[54] have extended in their implementing rules the right to access documents held by European institutions to all natural and legal persons, the relevance of this being the enclosure of non-European Union residents or legal entities not established on the Union's territory. The European Parliament has provided for a similar extension of access in its rules of procedure, but emphasizing 'where possible'.[55] Although this wording gives theoretically the Parliament discretionary powers, the institution has in practice responded to applications from citizens from non-European Union countries who are not residents in the European Union. Most agencies, in their implementing rules of Regulation No 1049/2001, also provide for an extension of free access to all applicants.[56] The Economic and Social Committee and the Committee of the Regions, which voluntarily apply the principles of Regulation No 1049/2001, have not provided for the extension of the right of access to citizens of third countries and to people who are not residents in the European Union. The European Ombudsman also strives to provide all applicants, irrespective of nationality and residence, with the possibility to lodge an action before the institution. Thus, when a Ukrainian NGO alleged that the European Investment Bank has failed to proactively disseminate environmental information, the European Ombudsman launched an own inquiry into the matter.[57] This is based on the Memorandum of Understanding between the European Ombudsman and the Bank which provides that 'whenever the only reason not to inquire into a complaint alleging maladministration by the EIB is that the complainant is not a citizen or resident of the EU, the European Ombudsman is committed to using the own-initiative power to open an inquiry into the matter'.

In the special area of environmental information, on the other hand, the beneficiaries are known with more clarity, as already discussed. Since the Aarhus Convention does not allow the right of access to be limited to

[54] See, for example, Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714) < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001D0937>, accessed 30 September 2017.

[55] Rules of Procedure of the European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20170116+RULE-116+DOC+XML+V0//EN&navigationBar=YES>, accessed 30 September 2017.

[56] See, for example, Innovation and Networks Executive Agency (INEA) < https://ec.europa.eu/inea/sites/inea/files/download/key_agency_documents/access_documents/decision_sc_2008_001_of_30_09_2008.pdf >, Executive Agency for the Public Health Programme < http://ec.europa.eu/chafea/documents/about/impl_rules_PHEA_public_access_to_documents_03_02_2006.pdf>, accessed 30 September 2017.

[57] Case: OI/3/2013/MHZ.

citizens and residents of the European Union, bodies and agencies are bound to grant the right of access to all natural and legal persons ('the public'), when such application concerns environmental information.[58]

One misconception in the context of applications for free access to information is that journalists are the largest category of applicants.[59] This is sometimes based on the existence at the level of Member States of special access conditions (e.g. such as reduced time limits in Romania) for journalists. Also, it happens that sometimes institutions are faced with concerted actions of journalists, all requesting the same type of documents (31 journalists made applications in 2015 with the European Parliament), thus making them more visible. Even so, this is often not true at the level of the Member States, and it is also not supported by data at EU level. Statistics offered by EU institutions show that those who benefit from the right to access are citizens mainly belonging to very specific groups: the academic world (for research purposes) which represents the biggest requester for all the three EU institutions analyzed and professional sectors (such as lawyers wanting to find out information to defend the interests of their clients). Civil society also represents a stakeholder whose interest in accessing EU documents is on the rise in the last five years. Table 2.2 offers a summary of the occupational profile of the applicants for year 2015. A more detailed situation for each of the three EU institutions for the time interval 2011–2015 is included in Appendix 1. Data should be approached carefully because in the case of the Commission, for example, over 20% of the applicants did not disclose their professional background.

3.3 Entities Which Are Bound by the Law

Regulation No 1049/2001 was intended to cover free access to the documents held by three institutions, namely, European Parliament, Council, and Commission. From 1 April 2004, it was also applicable to all agencies. As already mentioned, other EU institutions decided to voluntarily follow some or all of the rules comprised in Regulation No 1049/2001. After the adoption of Lisbon Treaty, Regulation No 1049/2001 becomes applicable to all EU bodies. The Court of Justice, the European Central Bank,

[58] See Article 4 of the Aarhus Convention.

[59] P. Birkinshaw, *Freedom of information. The Law, the Practice and the Ideal,* 3rd edition, (London: Butterworths, 2001).

Table 2.2 Breakdown of initial requests by the occupational profile of applicants in 2015 (%)

	Commission	*European Parliament*	*Council*
Academic sector	22.33	30.00	33.30
Lawyers	13.06	9.00	33.00
Civil society (interest groups, industry, NGOs, etc.)	15.64	25.00	16.60
Public authorities (other than EU institutions)	6.38	6	0.00
Other EU institutions	12.56	–	5.60
Journalists	7.03	12.00	5.60
Others	0.00	18.00	0.00
Not specified	22.99	0.00	5.60

Source: Authors' own compilation, based on 2015 annual reports on the implementation of Regulation No 1049/2001 by the Commission, European Parliament, and the Council

and the European Investment Bank are subject to this provision only when exercising their administrative tasks.

At the EU level, in order to determine which entities are bound by law, it is important to discuss the notion of EU institutions as owners of documents. The European Parliament has specified in its Rules of Procedure what must be understood by a 'Parliament document': documents drafted or received by the members holding a mandate; by the bodies, committees, and delegations; and by the Secretariat.[60] The documents drafted by other members or by political groups are Parliament documents when they have been lodged in accordance with the Rules of Procedure. Parliament therefore considers that the documents drafted by members or by political groups that have not yet been lodged, and the documents by third parties held by members do not come within the scope of the Regulation.

Other institutions have not followed the same pattern. Thus, the Council has not defined in its Rules of Procedure what should be understood by 'Council document'. However, it has clarified the distinction between Council documents per se and Member State documents, consequently refusing the disclosure of state documents without the respective state's permission, approach confirmed by the courts. The Commission

[60] Rules of Procedure of the European Parliament (note 55).

has not given any definition of 'Commission document' in its implementing rules; nevertheless, in its reports, it suggested that any document held by the president, by a vice-president or by a member of the Commission, or by a member of a cabinet is to be regarded as a Commission document in the same way as documents held by one of its departments.[61] In accordance with the case law (*Rothmans v. Commission, 1999*),[62] the documents drafted by the committees which assist the Commission in the performance of its duties are regarded as Commission documents.

As to the role of the Ombudsman in clarifying the notion of 'institution' within the meaning of the 2001 Regulation, we can mention the 2002 complaint by the European Citizen Action Service against the European Convention (charged with drafting the Constitution of the European Union) and the Council concerning the refusal of an application for access to the agendas and minutes of the Presidium of the Convention. Although the Ombudsman did not find any maladministration against the Council or the Convention, his decision established that the Convention is a Community body which falls within the scope of the access to documents regulation. As a consequence, the Ombudsman's own initiative inquiries have resulted in extending the scope of rules on public access to documents as a matter of good administration beyond the classic institutions—and this decision extended that scope still further.[63]

3.4 The Request for Access

One challenge encountered by EU bodies when confronted with requests for information has to do with the clarity and precision of the application for information. Article 6 of Regulation No 1049/2001 states that applications shall be made in any written form, including electronic form, in one of the languages of the EU, and in a sufficiently precise manner to enable the institution to identify the document. The concept of 'sufficiently precise manner' offers a wide range of discretion to EU bodies, which often motivate their refusal to provide access on the ground of unclear application. In the last years, the number of requests for bulk applications (all documents per-

[61] See European Commission, 'Report from the Commission on the application in 2014 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents Brussels, 6.8.2015, COM(2015) 391 final'.

[62] ECJ, 19 July 1999, Case T-188/97, *Rothmans International BV* v *Commission of the European Communities.*

[63] European Ombudsman Case: 1795/2002/IJH, 11 Mar 2003, 12 Jun 2003.

taining to a certain case, topic, etc.) has increased, therefore institutions have even more reasons to reject applications based on the lack of clarity of the request. Since case law in this area is limited, the contribution of the European Ombudsman is significant. In a further remark in a case, it stated that 'if the Commission takes the view that a request for public access to documents is not sufficiently precise, it should inform the applicant of its view and assist the applicant in clarifying its request. Once a request for public access has been sufficiently clarified, the Commission should immediately commence its processing thereof. If only part of a request for public access has been clarified, the Commission should immediately commence processing that part of the request'.[64] Not only does the European Ombudsman require institutions to try to clarify the request, but it also instructs upon partial disclosure of the parts of the request which are already clear.[65] Partial disclosure of documents will be emphasized in a different section as good administrative practice endorsed by the European Ombudsman also in the case of the documents covered by the exceptions from Article 4 of Regulation No 1049/2001. In other cases, the European Ombudsman stressed that it accounts as maladministration if institutions interpret the requests too narrowly or refused access, as the result of lack of any explanatory inquiries addressed to the applicants.[66]

Vexatious or repetitive requests represent often a ground invoked by EU bodies for turning down requests for access—this is recognized as a valid ground by the Code of Good Administrative Behavior. In its recommendations, the European Ombudsman referred to 'an appropriate level of service-mindedness, diligence and objectivity', the lack of which amounts to maladministration. Consequently, the EU bodies were encouraged to adopt guidelines in order to deal with complex requests of information that are not obviously abusive. The refusal to grant access should be based on an objective approximate estimation of the time or resources that the services would otherwise have to invest to meet the information request. The contribution of the European Ombudsman is also important in that it stated that refusal to grant access must be based

[64] European Ombudsman Case: 465/2010/FOR, 30 November 2010.

[65] Case: 272/2014/OV; see also the case law of the CJEU on partial disclosure: CJEU, 14 November 2013, Joined Cases C-514/11 P and C-605/11 P *Liga para a Protecção de Natureza (LPN) and Finland* v *Commission*, paragraph 67.

[66] European Ombudsman Case: 671/2007/PB, 12 July 2010; Case: 465/2010/FOR, 30 November 2010; Case: 2293/2008/(BB)(FOR)TN, 17 December 2012; Case: 1453/2011/MMN, 29 August 2013.

exclusively on the exceptions to the 2001 Regulation[67] and denial of access due to repetitive request is an exception and the burden placed on the institution needs an assessment in the context of each application.

Regulation No 1049/2001 does not have rules for transferring incorrectly addressed requests. However, some decisions[68] seem to suggest that such an obligation was extended by the European Ombudsman as a matter of good administration through the Code of Good Administrative Behavior (Article 23). The Ombudsman found that failure of the Commission to forward to its Secretariat-General the complainant's request for access is also an instance of maladministration.[69] In another section of the decision, the Ombudsman conceded that at the very least the complainant should have been informed of where to submit his request, as a matter of courtesy, a principle enshrined in Article 12(2) of the Code of Good Administrative Behavior. Case law on these issues is for the most part absent; therefore the European Ombudsman plays an important role.

One interesting development regards the reasons for which applicants seek access to documents. From the complaints lodged with the European Ombudsman and the courts it is clear that applicants seek access to their own files under Regulation No 1049/2001. This means that the right of the general public to gain access to documents held by the institutions is in practice used by parties to individual administrative or judicial proceedings. This demonstrates that privileged access—which parties should enjoy in relation to their own files and protected under Article 14 of the Charter—is currently not secured in Union legislation.[70] Often even the EU institutions fail to recognize that access should be assessed under the right to access to the own file.[71]

It is important to examine some statistical data regarding the volume of requests handled by the three institutions (Tables 2.3, 2.4, and 2.5).

In order to assess the volume of work faced by the EU institutions in the area of access to documents, both the number of initial requests and the number of documents requested at the initial stage are important. In the case of the Commission, the number of total requests increased from 2014 to 2015 with 8.43%. However, the total number of request considered under Regulation No 1049/2001 increased only with 3.22%. In the case

[67] European Ombudsman Case: 2493/2008/(BB)(TS)FOR, 23 March 2012.

[68] European Ombudsman Case: 2632/2009/(SIT)(PF)JF, 12 August 2011; Case: 3163/2007/(BEH)KM, 05 January, 2010.

[69] European Ombudsman Case: 2493/2008/(BB)(TS)FOR 23 March 2012.

[70] Curtin and Leino-Sandberg (note 45) pp. 6–7.

[71] European Ombudsman Case: 1871/2014/EIS, 15 Mar 2016.

Table 2.3 Commission: Applications received and handled. Results

	2011	*2012*	*2013*	*2014*	*2015*
# of initial requests	6477	6014	6525	6227	6752
# of replies pursuant to Regulation No 1049/2001	6055	5274	5906	5637	5819
Full access (%)	80.20	74.48	73.43	72.8	68.8
Access denied (%)	12.18	16.91	14.45	11.87	15.91
Partial access (%)	7.62	8.61	10.68	15.36	15.29

Source: Authors' own compilation based on European Commission (2016), 'Annex to the Report from the Commission on the Application in 2015 of Regulation (EC) No 1049/2001 regarding Public Access to European Parliament, Council and Commission documents'

of the Council, the number of request increased with 13.86% while the number of documents requested increased with 11.65%. In the case of the Parliament, the number of requests in 2013 and 2015 are similar. Compared to 2014, in 2015 there is an increase of 10.72%. The increase in the volume of requests needs to be interpreted in conjunction with the existence of electronic registers for all three institutions, whose number of documents has grown significantly. More efficient and rich in document registers should lead over time to a decrease in the number of requests.

It is also worth discussing the rate of success applicants enjoy at the initial stage. For the Commission, there has been a constant decrease with regard to full access from 2011 to 2015. However, this needs to be interpreted in conjunction with the partial disclosure rate, which doubled for the period 2011–2015. This means that often the applicants who do not get full disclosure may get partial access to the requested documents. For the Council, there is also a declining rate of success at the initial stage—if in 2011 it was 88.22%, in 2015 it went down to 85.69%, with a peak of 21.32% in 2013. The European Parliament's rate of disclosure, close to 100%, should not be compared to the rates of the Commission and the Council because the nature of the activity performed by the three institutions is quite different. By default, due to its legislative responsibilities, the Parliament is expected to be perhaps the most transparent EU institution.

3.5 The Response

Regulation No 1049/2001 does not contain any specific provisions on how replies/responses to request for access to Community documents should be drafted. Specific provisions are comprised in the Code of Good

Table 2.4 Council: Applications received and handled. Results

	2011	*2012*	*2013*	*2014*	*2015*
# of initial requests pursuant to Regulation No 1049/2001	2116	1871	2212	2445	2784
# of documents requested by initial request	9641	6166	7564	10,839	12,102
# of documents release at the initial stage	8506 (88.22%) Full: 7403 (87.03%) Partial: 1103 (12.96%)	4858 (78.78%) Full: 3860 (79.45) Partial: 998 (20.54%)	5951 (78.67%) Full: 5084 (85.43%) Partial: 867 (18.56%)	8964 (82.70%) Full: 8188 (91.34%) Partial: 776 (8.65%)	10,371 (85.69%) Full: 9277 (89.45%) Partial: 1094 (10.54%)
# of documents for which access was denied at the initial stage	1135 (11.78%)	1303 (21.21%)	1613 (21.32%)	1875 (17.29%)	1731 (14.31%)

Source: Authors' own compilation based on the Council of the European Union (2016), 'Council Annual Report on Access to Documents – 2015'

Table 2.5 European Parliament: Applications received and handled. Results

	2013	*2014*	*2015*
# of total applications	447	401	444
Full access	439 (98.21%)	391 (97.5%)	400 (90.09%)
Access denied	5	8	40
Partial access	3	2	4

Source: Authors' own compilation based on European Parliament Annual Reports on Access to Documents, 2013–2015. Note: For 2011 and 2012, the data are in a different format and do not allow for comparisons. However, in 2016, the rate of full disclosure was 88.5% and partial access was 6.5%

Administrative Behavior. Most of the complaints regarding inappropriate replies are lodged by applicants with the European Ombudsman. The overarching principle stressed by the Ombudsman concerning how institutions should reply to requests for access to documents is courtesy, as enshrined in Article 12 of the Code of Good Administrative Behavior. In cases where communication with the complainant has been conducted in an improper manner,[72] the European Ombudsman has stressed that not only does the dispute need to be resolved on merits but also that the institution's conduct

[72] European Ombudsman Case: 884/2010/VIK 17 February 2011.

with respect to the applicant is of great importance. A courteous attitude on the part of the staff of institutions will serve to enhance trust between citizens and the European public administration. Institutions should take the necessary measures to sensitize their staff to the above requirements. Courtesy must also be observed if the institution itself is not able to fulfill the request directly, although the requested information can be retrieved from other sources known to it.[73] The courtesy obligations even apply to non-traditional means of communication, such as social media.[74] Other rules employed refer to language rights[75]—Article 13 of the Code, for example, comprises the obligation to respond to the applicant in his/her own language.

3.6 The Relation Between Documents and Information

In the comparative literature, there is the distinction between 'public information' and 'public document'. It is evident that the widest scope of any Freedom of Information Act from the applicant's point of view is assured by granting access to 'public information', not to 'public documents' because in this way the public authority is required to provide the public information even when it is enclosed in a document not entirely open to the public or, more important, search for the information not enclosed in a single document or make a new document for the purpose of the request. However, many jurisdictions restrict access only to information structured in an existing document, with no possibility to ask for the compilation of a new document for the purpose of the request.[76]

Regulation No 1049/2001 provides for access to 'documents of the institutions'. 'Document', according to Article 3(a), means 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

In 2008, the European Ombudsman had a significant contribution in this area, when, as a result of an own inquiry, a practice has evolved according to which the result of a normal search in the database is considered a

[73] European Ombudsman Case: 2470/2009/(TS)TN 02 December 2011.
[74] European Ombudsman Case: 947/2016/JN 24 July 2017.
[75] European Ombudsman Case: 1972/2009/ANA 11 December 2012.
[76] Birkinshaw (note 59).

document in the sense of Regulation No 1049/2001.[77] The specific background to this action was a complaint submitted by a Danish-German journalist in 2005, which concerned a request for access to national reports on EU farming aid. The reports submitted to the Commission by the national administrations were transmitted electronically to a database. When the reports 'arrived' at the Commission's database, their content was instantly 'absorbed' by various parts of that database. Their content thereafter only existed in the form of dispersed data within the database. The Commission therefore argued that the complainant's request for access did not fall within the EU's access legislation because it did not concern a 'document'. The question, therefore, arose as to whether the request concerned access to documents or access to information. The key legislation on openness in the EU administration only gives a right of access to documents, which means that it does not give citizens a general legal right of access to information held by the EU administration. The case made one thing abundantly clear: If the content of electronic databases falls outside the scope of the EU's most important legislation concerning openness in the EU administration, the very purpose of that legislation can probably not be fulfilled. As a result of the inquiry of the Ombudsman, a practice has evolved according to which the result of a normal search in the database (…) is considered a document in the sense of Regulation No 1049/2001. However, the Commission was not willing to modify the existing search parameters of the database in order to be able to retrieve the information requested. In other decisions, the European Ombudsman reiterated that any 'meaningful' set of 'content' recoverable from a database constitutes an individual 'document'.[78] The case law is a little bit more nuanced. Thus, an electronic database only constitutes a document in the sense of Regulation No 1049/2001 if the data can be extracted through a normal or routine search.[79]

The expansion of the term document proposed by the European Ombudsman in this case is in line with the case law. The distinction of document/information was addressed by the court in the *Hautala* case.[80] The Advocate General Léger[81] argued that

[77] European Ombudsman, 'Public Access to Information in EU Data Bases', (2008), <https://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/4160/html.bookmark> accessed 28 August 2017.

[78] European Ombudsman Case: 2493/2008/(BB)(TS)FOR 23 March 2012.

[79] CJEU, 2 July 2015, case T-214/13, *Typke* v *European Commission*.

[80] ECJ, 6 December 2001, Case C-353/99 P, *Council of the European Union* v *Heidi Hautala*.

[81] Opinion of Mr. Advocate General Léger delivered on 10 July 2001, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CC0353> visited 28 August 2017.

> the distinction between documents and information seems to me to be purely formal. The right of access to a document concerns the content of the document and not its physical form. No one can claim that when making a request for access to documents he is seeking the document itself and not the information it contains. When applying for the disclosure of a document, the applicant implies that he is seeking all of the information contained in the document, which leaves him free to ascertain the information which is of particular interest to him.

Further, he argued: 'The nuance introduced by the Council imposes a somewhat artificial distinction between the container and the content or between the medium and the information'.

In the context of the same discussion of document versus information, the European Ombudsman took the view that an annex to a document to which access is requested is not a separate document, but forms an integral part of the document to which it is attached, so the assessment as to whether or not it may be disclosed should thus be made at the same time as the one concerning the main document.[82] The European Ombudsman also made it clear that institutions cannot decide that a certain part of an existing document constitutes a 'sub-document' or another document simply because it contains a different kind, or type, of information. Furthermore, references to attachments should be treated as forming part of the document concerned and should, therefore, not be excluded from an institution's analysis when dealing with a request for access to the document.[83] Internal documents, emails, or other correspondence drafted in preparation of an official letter may also represent public documents.[84] The literature also supports this view. Holkeri claims that access to information pertaining to issues of general importance is a prerequisite for the social debate that precedes or explains decision-making. Thus, the principle should be that all the preparatory documents relating to the decision-making come into the public domain, at the very latest when the decision has been made. Within these preparatory documents, of a great importance are the studies, statistics, and other research related to a project of general interest.[85]

[82] European Ombudsman Case: 1111/2012/AN 13 June 2013.

[83] European Ombudsman Case: 1633/2008/DK 07 June 2011.

[84] European Ombudsman Case: 122/2014/PMC 19 February 2015.

[85] K. Holkeri, 'Public Scrutiny and Access to Information in Finland', in *Public Sector Transparency and Accountability: Making it Happen*, (OECD, Paris: 2002).

3.7 Proactive Provision of Information/Documents: Role of Online Registers

There has been a growing trend in the last decade to make EU institutions more open and transparent by making available online extensive information about their tasks, their organizational structure, their activities, the agenda of their meetings, and more generally information on the most important documents under discussion in that context.[86]

In recent years, the European Ombudsman has been instrumental in advancing the duty of EU institutions to provide information on their own initiative about procedures or activities that could be of relevance to the general public. This recommendation is particularly important with regard to highly sensitive information which generally tends to be regarded by institutions as exempted from disclosure. Proactive disclosure and communication means that the institutions can in certain cases select the information that is suitable for publication, thus opening policy areas that in the past have been marked by secrecy (US-EU negotiations, trialogues, etc.) to the public.

There are two different developments taking place under the proactive approach to transparency: On the one hand, the documents disclosed online were already considered as within the public domain, and by posting them online they would merely become readily available to a wide variety of users. Subsequently, these documents are published elsewhere. On the other hand, various EU institutions have started to develop registers which include documents developed at an early stage in the decision-making process and not published somewhere else.[87] The registers are more likely to offer a glimpse into the inner working of EU bodies.

Article 12 from Regulation No 1049/2001 states the obligation of EU bodies to disclose documents through the register. This obligation is more stringent with regard to 'legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible' (Article 12(2)).

For example, the Commission has several registers, including one on expert groups which assist the Commission in preparing legislative initiative and policies. The main register contains a number of document types, with a focus on legislative documents: documents with references

[86] D. Curtin, Executive Power of the European Union: Law, Practices, and the Living Constitution, (Oxford University Press: 2009), p. 220.

[87] Ibidem.

including COM, C et SEC, and other types, including agendas and minutes of Commission meetings.[88] Moreover, the Commission is often empowered to implement EU legislation with the assistance of committees composed of representatives from EU countries. The comitology register contains background information and documents relating to the work of these committees, including all documents forwarded to the EU Parliament for information or scrutiny.[89] In April 2008 the comitology register was substantially improved for documents relating to committee meetings and written consultations after 1 April 2008.

The statistical data offered by the three core EU institutions in their annual reports on implementation of Regulation No 1049/2001 offer a quantitative picture with regard to the development of their registers. Clearly, the total number of documents included in the registers is steadily increasing year after year. For the 2011–2015 period, the following evolutions took place: For Parliament the number of EP document references increased from 414,169 in 2011 to 606,256 in 2015; for Council the number of documents in all languages rose from 1,729,944 in 2011 to 2,492,257 in 2015; for Commission the number of original documents increased from 244,876 in 2011 to 344,628 in 2015. It is important to mention how many of the documents from the register are also available directly on the website for downloading: In the case of the Parliament, approximately 95% of the documents from the register can be consulted online. For the Council, of the total number of original language documents listed in the register, 69% are public and available for downloading. No data are available in the annual reports for the Commission on this issue. It is important to note also if sensitive documents are included in the register. The Council is the only institution among the three ones analyzed which included sensitive documents in the register. In 2015, the Council issued 19,506 documents upon circulation, issued 14,400 LIMITE documents, and added to the register 725 documents partially available to the public. The Council also issued 634 classified documents of which 382 are listed in the register and 252 were not included.[90] No sensitive documents were created or received by the Commission or by the Parliament in 2015.

[88] Please see < http://ec.europa.eu/transparency/regdoc/>.

[89] Please see < http://ec.europa.eu/transparency/regcomitology/index.cfm>.

[90] Council of the European Union, 'Council Annual Report on Access to Documents – 2015', (2016)
<http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-council-access-documents/> accessed 30 September 2017, p. 4.

The demand side of transparency in the case of registers needs to be highlighted as well. For the Council, we have a steady increase in the number of unique visitors from 2011 to 2015 (from 557,391 to 802,953). For the Commission, the number of unique visitors is drastically decreasing, from 41,408 in 2011 to 15,525 in 2015. For the European Parliament, the trend is less clear—we have a peak in 2014 with 433,576 new visits and then a decrease to 82,612 in 2015. In 2013 there were 106,604 new visits. Appendix 2 includes more detailed information on this aspect for all three institutions.

These figures by themselves can be misleading and more in-depth; qualitative analyses are required. There are not many such empirical analyses available in the literature. One that is more than a decade old looked at the comitology register. The conclusions at that time were not very encouraging. Thus, 65% of the agendas and 54% of the membership lists were available through the register; 67% of the summary records were available through the register, and the quality of the summaries was rather limited, providing only brief information about the discussions within the committees; voting records were available for 87.3% of the votes, but only 5.5% of the draft measures were available through the online register.[91] Such a research on all registers of the three institutions would shed more light on this issue.

3.8 Exceptions

3.8.1 Types and Scope of Exceptions

Regulation No 1049/2001 provides in principle the widest access possible to documents,[92] while at the same time allowing for a number of exceptions to be defined in quite broad terms. It is no wonder that the very interpretation of these exceptions represents the core of the case law of the Court of Justice and the General Court.[93] Regulation No 1049/2001 includes two types of exception, absolute and relative. The

[91] Curtin (note 86) p. 227.

[92] CJEU, 21 July 2011, C-506/08 P, *Sweden and MyTravel* v *Commission*, paragraph 73 and CJEU, 17 October 2013, C-280/11 P, *Council* v *Access Info Europe*, paragraph 28.

[93] See, for example, CJEU, 29 June 2010, C-139/07 P, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 51; CJEU 28 June 2012, C-404/10 P, *Kommission* v. *Éditions Odile Jacob*, paragraph 111; CJEU, C-477/10 P, *Commission* v *Agrofert Holding*, paragraph 53; CJEU, 21 September 2010, C-514/07 P, C-528/07 P, and C-532/07 P, *Sweden e. a.* v *API and Commission*, paragraphs 69 and 70; CJEU, 14 November 2013, C-514/11 P and C-605/11 P, *LPN and Finland* v *Commission*, paragraph 53.

absolute exceptions are found in Article 4(1)(a and b), while the relative ones are found in Article 4(2) and (3). The interests covered by absolute exceptions include public interests such as public security, defense and military matters, international relations, financial, monetary or economic policy of the Community or a Member State as well as private interests such as privacy and the integrity of the individual. Interests covered by relative exceptions include the protection of commercial interests; court proceedings; for the purpose of inspections, investigations, and audits; as well as documents for internal use in ongoing decision-making processes. For absolute exceptions, there is a two-step test: the document must be covered by an interest as outlined in the Regulations No 1049/2001, and disclosure would undermine the protection of that interest. The institution carries the burden of proof—it needs to show how and why the protected interest would be undermined. While doing this, it needs to strike a balance between the interests at stake. For the relative exceptions, a three-step test is required. The first two steps are similar but it additionally needs to be determined if an overriding public interest exists in the disclosure, which again calls for a balancing of interests.[94] The European Ombudsman employs the same test put forward in the case law.[95]

Exceptions must be interpreted and applied strictly according to the case law.[96] In its decisions, the Ombudsman adheres to the principle that 'According to the settled case-law of the Community Courts, the exceptions to public access must be construed and applied strictly so as not to defeat the application of the general principle of access enshrined in Regulation No 1049/2001'.[97]

According to the case law, when institutions deny access to a document, they need to show that disclosure would specifically and actually undermine the protected interests[98] and also that there has to be a foreseeable

[94] The test was developed in ECJ, 1 July 2008, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council*, paragraph 43, in relation to legal advice.

[95] European Ombudsman Case: 2293/2008/(BB)(FOR)TN 17 December 2012.

[96] ECJ, 18 December 2007, *Kingdom of Sweden* v *Commission*, C-64/05 P, paragraph 66; ECJ, 1 July 2008, *Kingdom of Sweden and Maurizio Turco* v *Council*, C-39/05 P and C-52/05 P, paragraphs 34, 35 and 36; see also ECJ, 1 February 2007, *Sison* v *Council*, C-266/05 P, ECR p. I-1233, paragraph 63.

[97] European Ombudsman Case: 582/2005/PB 11 July 2006; Case: 119/2015/PHP 04 November 2015.

[98] CJEU, 3 July 2014, *Council* v *Sophie in't Veld*, C-350/12 P, paragraph 52.

and not purely hypothetical risk/threat that the protected interest is undermined.[99] The European Ombudsman employs similar arguments.[100]

While this is the general rule, in the literature various authors[101] have discussed the so-called 'general presumptions' doctrine, according to which the Court of Justice has allowed a number of exceptions to the institutions' obligation to examine specifically and individually the documents to which access has been requested. In particular, the Court has ruled that 'it is in principle open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, and provided that the institution establishes in each case that the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose'.[102] The Court of Justice has so far expressly acknowledged the possibility of relying on such general presumptions in a number of cases, namely, in procedures for reviewing State aid,[103] merger control procedures,[104] and proceedings pending before the EU Courts.[105] The General Court has further found that a similar general presumption can be relied upon for documents that pertain to infringement procedures.[106] The European Ombudsman upholds this doctrine by simply citing the relevant case law and by assessing whether the documents for which access has been refused fall into the categories outlined in the case law.[107]

[99] CJEU, 4 Mai 2012, *Sophie in't Veld* v *Council*, T-529/09, EU:T.2012:215, paragraph 20; CJEU, 6 December 2012, *Evropaïki Dynamiki* et al. v *Commission*, T-167/10.

[100] European Ombudsman: Case: 119/2015/PHP, 04 November 2015; Case: 3106/2007/(TS)FOR, 14 December 2011; Case: 98/2012/ER, 27 September 2013.

[101] Curtin and Leino-Sandberg (note 45), p. 6; U. Biskup and W. Rosch, 'Recent case-law of the Court of Justice of the European Union on Public Access to Documents: Regulation (EG) No 1049/2001 and Beyond', 2 *Revue Internationale de la Gouvernements Ouvert*, (2015), pp. 60–61.

[102] ECJ, 1 July 2008, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council*, paragraph 50.

[103] See CJEU, 29 June 2010, Case C-139/07 *Commission v Technische Glaswerke Ilmenau*.

[104] CJEU, 28 June 2012, Case C-404/10 P *Commission v Editions Odile Jacob and* CJEU, 28 June 2012, Case C-477/10 P *Commission v Agrofert Holding*.

[105] CJEU, 21 September 2010, Case C-514/07 P, *Kingdom of Sweden* v *Association de la presse internationale ASBL (API) and European Commission*.

[106] CJEU, 9 September 2011, Case T-29/08 *Liga para Protecçao de Natureza (LPN) v Commission*.

[107] European Ombudsman Case: 98/2012/ER 27 September 2013; Case: 2004/2013/PMC 05 November 2015; Case: 2781/2008/(TS)FOR 04 April 2013.

3.8.2 International Relations

The Courts and the European Ombudsman hold a similar opinion on this exception. The Court of Justice of the EU has said that the risk of jeopardizing international relations must be reasonably foreseeable and not purely hypothetical[108] and that the institution must show that the document requested specifically and actually undermines the interest protected by the exception.[109] Both courts and the European Ombudsman showed sensitivity to these claims, acknowledging the discretion of EU bodies in this area. However, the tendency was to find that the institutions had implemented the provision too broadly.[110] On the other hand, the case law and European Ombudsman's decisions show that international relations as a policy field should not be treated as a categorical exception. In other words, the exception on international relations does not apply simply because the subject matter of a document 'concerns' international relations. On the contrary, it is necessary to show that, based on the content of a document, its disclosure would undermine the public interest as regards international relations.[111]

3.8.3 Public Security

The Sison case[112] was the first case where the court had to examine the mandatory exception relating to public security and international relations. The case also made reference to sensitive documents as described in Article 9 of Regulation No 1049/2001 which should be subject to special treatment. In Sison the applicant had been refused access relating to three successive Council decisions implementing a Regulation on specific restricting measures directed against persons with a view to combating terrorism. The applicant's name had been included in all three Council decisions and his funds and financial assets were frozen. Mr. Sison challenged

[108] CJEU, 21 July 2011 Case C-506/08 P, *Sweden* v *MyTravel and Commission*.

[109] CJEU, 28 November 2013, Case C-576/12 P, *Ivan Jurasinovic* v *Council of the European Union*, paragraph 45.

[110] CJEU, 4 May 2012, Case T-529/09, *Sophie in 't Veld* v the *Council supported by the Commission (In 't Veld I)*; CJEU, 12 September 2013, Case T-331/11, *Leonard Besselink* v *the Council*. European Ombudsman Case: 119/2015/PHP 04 November 2015; Case: 2393/2011/RA 22 July 2013.

[111] European Ombudsman Case: 119/2015/PHP 04 November 2015; OI/10/2014/RA 06 January 2015; Case: 689/2014/JAS 02 September 2015.

[112] ECJ, 26 April 2005, Joined cases T-110/03, T-150/03 and T-405/03, *Jose Maria Sison* v *Council of the European Union*.

the legality of the Council's decision not to grant him access to the documents that had led the Council to adopt Decision 2002/848 as well as the Council's refusal to disclose the identity of the states which had provided the Council with certain documents in that connection. The applicant argued that the Council had never conducted a concrete and individual examination of the documents requested, and therefore the applicant was not able to determine and evaluate the reasons put forward by the Council. The Council in its turn argued that the existence of a specific procedure dealing with the request for sensitive documents shows that concrete examination had taken place.[113] The Court agreed with the Council and adopted a very conservative view: the power to review the legality of the institution's decision pursuant to Article 4(1)(a) is 'limited to verifying whether the procedural rules and the duty to state reason have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.[114]

Other more recent cases on this matter may show more light regarding this exception.[115] The *Evropaïki Dynamiki* ruling of 6 December 2012 shows how the Commission wrongfully applied this exception. In a tendering procedure giving rise to a request to provide commercial quotations, it claimed that producing these documents relating to a wide range of IT systems would be likely to reveal their 'functioning and weaknesses'. The General Court held the view that nothing could establish 'how access to the documents requested could specifically and actually undermine that objective in a way that is reasonably foreseeable and not purely hypothetical'.[116] The Order in the Steinberg[117] case is more informative. A refusal to grant access relating to the provision of grants in Palestine on the basis of a European program was opposed for fear that detailed information about the relevant projects featuring in the documents might be used to exert pressure on the relevant persons, even to make threats to their physical or moral integrity. Security might then be breached due to the 'high' risk hanging over the parties involved. The Order of the General Court endorsed this analysis.

[113] See M. Costa, *The Accountability Gap in the EU: Mind the Gap* (Routledge: 2016), p. 40.

[114] See (note 112), Para 47.

[115] Labayle (note 8) p. 16.

[116] CJEU, 6 December 2012, case T-167/10, *Evropaïki Dynamiki* et al. v *Commission*.

[117] CJEU, 27 November 2012, case T-17/10, *Steinberg* v *Commission*.

3.8.4 *Privacy and Integrity of the Individual*

As already discussed in a different section, the disclosure of documents on the basis of the right of access may raise a problem with the protection of personal data guaranteed by both the Charter and Regulation No 45/2001. The case law in this area is in fact about balancing and reconciling two different fundamental rights.

Starting with Bavarian Lager, but also in other cases,[118] the main approach of the courts was to consider that if personal data are part of the documents requested, then Regulation No 45/2001 should apply. It is important to note that the European Data Protection Supervisor took a different view, arguing that actual harm to privacy should always be a necessary threshold to justify refusal to documents containing personal data.[119] In more recent cases, such as *ClientEarth and PAN Europe v EFSA*, the CJEU acknowledged that the need to disclose the personal data had been sufficiently established by the claimants, and it insisted that for prejudicial effects to be found, there had to be a concrete evidence of a risk to the privacy and integrity of data subjects.[120] However, also in this case the entire argument put forth by the court is based entirely on the interpretation of the data protection rules.[121]

3.8.5 *Protection of Commercial Interest*

The first indent of Article 4(2) features one of the most traditional exceptions. It is the subject of numerous court cases,[122] mostly relating to mergers or

[118] CJEU, 9 November 2010, (Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen; CJEU, 15 July 2015, Case T-115/13 *Dennekamp* v *European Parliament* (Dennekamp II), para 63.

[119] European Data Protection Supervisor, 'Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager', press release (30 June 2010)
<www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11_ECJ_Bavarian_Lager_EN.pdf>, accessed on 30 September 2017.

[120] Pecsteen (note 43).

[121] Curtin and Leino-Sandberg (note 48), p. 19.

[122] CJEU, 19 January 2010, cases T-355/04 and T-446/04, *Co-Frutta Soc. coop.* v *European Commission*; CJEU, 7 July 2010, case T-111/07, *Agrofert Holding* v *European Commission*; CJEU, 24 May 2011, cases T-109/05 and T-444/05, *Navigazione Libera del Golfo Srl (NLG)* v *European Commission*; CJEU, 22 May 2012, T344/08, *EnBW Energie Baden-Württemberg AG* v *European Commission*; CJEU, 15 January 2013, case T-392/07, *Guido Strack* v *European Commission*; CJEU, 29 January 2013, cases T-339/10 and T-532/10, *Copesuri* v *European Food Safety Authority (EFSA)*.

tender proceedings.[123] General Court ensures systematically that the institution in question has definitely undergone an individual, specific examination to provide a judgment on a case-by-case basis.[124]

With regard to commercial interests, the European Ombudsman has found that such requests for information pose the following problems: not all information about a company is commercially sensitive, so a test should be performed each time to conclude whether the exception applies.[125] The goal is to determine whether the disclosure would undermine the commercial interest of the company. Although there are cases where the refusal was duly reasoned,[126] in many cases the European Ombudsman found insufficient reasoning of the refusal.[127] Also, opposition lodged by an economic operator regarding disclosure is not binding on the EU's institutions (which can 'overrule' a third party's objections).

3.8.6 Court Proceedings

Article 15 TFEU currently establishes that the Court of Justice is subject to the ordinary access to document provisions only when exercising its administrative tasks. After the entry into force of the Treaty of Lisbon, the Court has adopted a decision establishing rules concerning public access to documents held by it in exercise of its administrative functions.[128] This means that applicants cannot apply for Court pleadings directly through the court.

Applying for Court pleadings through the other EU institutions is subject to the rules set forth in the leading case in this area, namely, API.[129] In API, the court established one extra 'general presumption' that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings (para 94). However, the general presumption of confidentiality is counterbalanced by a time-related factor. The Court pointed out that once proceedings

[123] Labayle (note 8), p. 22.

[124] Ibidem.

[125] European Ombudsman Case: 1701/2011/ANA 24 June 2013; Case: 676/2008/RT 07 July 2010.

[126] European Ombudsman Case: 1922/2014/PL 30 August 2016.

[127] European Ombudsman Case: 676/2008/RT 07 July 2010; Case: 181/2013/AN 16 February 2015.

[128] Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).

[129] CJEU, 21 September 2010, Kingdom of Sweden and ASBL (API) v Commission, C-514/07 P, C-528/07 P and C532/07 P.

have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court and the general presumption thus no longer applies. The judgment also made reference to external/public pressure if disclosure would be granted at any time.

3.8.7 Inspections, Investigations, and Audits

With regard to ongoing investigations, the European Ombudsman has stressed the fact that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Furthermore, institutions need to prove, for each individual document, that disclosure would undermine the investigation[130] and provide clear reasoning on the motives for non-disclosure.[131] Upon conclusion of the investigation, the commission should be proactive in disclosing the documents and not wait for another request.[132] The European Ombudsman merely applied the case law of the CJEU on this matter. Thus, the Court of First Instance[133] was the first one to state in *Franchet and Byk v Commission* that 'the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect "the purpose of inspections, investigations and audits", applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits'.[134] Many requests regard infringement procedures, and in its case law the Court has recognized certain types of document as benefiting from a general presumption of confidentiality,[135] among them the documents concerning an infringement procedure under Article 258 TFEU during its pre-litigation stage.[136] The Ombudsman is of the opinion that this reasoning also applies, by analogy, to documents concerning investigations brought under Article 260 TFEU, since Article 260 also has as its purpose to ensure that the Member State concerned brings itself into compliance

[130] European Ombudsman Case: 3699/2006/ELB 06 April 2010; Case: 725/2014/FOR 01 October 2015; Case: 248/2016/PB 31 October 2016.

[131] European Ombudsman Case: 2004/2013/PMC 05 November 2015.

[132] European Ombudsman Case: 685/2014/MHZ 12 January 2015; Case: 349/2014/OV 17 March 2015.

[133] ECJ, 6 July 2006, Joined Cases: T-391/03 and T-70/04 *Franchet and Byk* v *Commission*.

[134] European Ombudsman Case: 1506/2014/JAS 17 September 2015.

[135] CJEU, 16 July 2015, Case C-612/13 P, *ClientEarth* v *Commission*, paragraph 57.

[136] CJEU, 14 November 2013, Joined Cases C-514/11 P and C-605/11 P LPN and Finland v Commission, paragraph 65.

with EU law.[137] A general recommendation of the European Ombudsman regarded the need for various agencies to clarify the rules in their rules of procedure on public access in the case of ongoing complaints.[138]

3.8.8 Documents/Information Pertaining to the Decision-Making Process

Article 4(3) refers to two separate situations: protection is afforded to the institutions' internal deliberations and workings to the same extent as to the decision-making process. Post Lisbon, the Court had the opportunity to interpret this exception, with reference to a situation where a decision has not yet been taken by the institution, in the legislative context. In the *Council* versus *Access Info Europe* case,[139] an NGO requested access to a legislative document including footnotes indicating the position of Member States. The Council opposed, claiming that the effectiveness of its decision-making process was disrupted by excessive weight given to transparency. The Court ruled that the general interest in obtaining access to Council documents took precedence a priori, with the identity of the Member States participating in the legislative process featuring as an aspect of democratic transparency. Access to legislative preparatory documents, especially if they relate to trialogues, continues to occupy the Court.[140]

Summarizing the European Ombudsman's findings in such cases, it could be said that although some refusals were justified,[141] in many cases EU bodies have offered insufficient reasoning for a refusal when it was grounded on the protection of the decision-making process—and this amounts to maladministration.[142] Also, access was often granted after intervention by the European Ombudsman. The European Ombudsman's main recommendation is proactive dissemination of such documents where there is an interest[143] and proactive disclosure once the decision-making process is over.[144]

[137] European Ombudsman Case: 1506/2014/JAS 17 Sep 2015.

[138] European Ombudsman Case: 755/2014/BEH 12 June 2014.

[139] CJEU, 17 October 2013, Case C-280/11 P, *Council of the European Union* v *Access Info Europe*.

[140] Case T-540/15, *De Capitani* v *European Parliament*.

[141] European Ombudsman Case: 292/2016/AMF 05 July 2017.

[142] European Ombudsman Case: 2781/2008/(TS)FOR 04 April 2013.

[143] European Ombudsman Case: 2914/2009/DK 14 March 2012.

[144] European Ombudsman Case: 2186/2012/FOR 16 June 2015; Case: OI/8/2015/JAS 12 July 2016.

3.8.9 Third-Party Consent (Including Documents Originating from a Member State)

Article 4(4) refers to another possible ground for refusal, namely, a lack of third-party consent when documents originating from a third party are held at the EU level. Oftentimes cases involving third-party consent lead to significant delays in responding to the applicant due to lengthy consultation with the third party.[145] In a recent decision[146] (further remarks), the European Ombudsman has summarized the view of the institution on how EU bodies should approach such a situation step-by-step: if a third party needs to be consulted, there needs to be a proper deadline established for that response; if the third party does not respond within the set deadline, the institution should proceed to an examination of the documents without any need to carry out new consultations; third-party reservations cannot by themselves provide the grounds for a disclosure refusal[147]; and the third party's request to find out the identity of the applicant has no bearing and may not delay the response of the third party.[148]

Third-party consent is a pressing issue in disclosing documents regarding TTIP. The European Ombudsman launched an own inquiry into the issue of making TTIP more transparent,[149] and one recommendation concerns third-party consent (USA in this case)—the USA should be informed of the importance of making common negotiating texts in particular available to the EU public before the TTIP agreement is finalized. The Commission should also inform the USA that it will need to justify, to the satisfaction of the Commission, any request to prevent the disclosure of a given document.

Very often applicants seek access to documents originating in a Member State. The exception set in Article 4(5) provides that Member States may request the institution not to disclose a document originating from that Member State without its prior agreement. This issue has been at the center of several disputes[150] since the leading case Kingdom of *Sweden v Commission*.[151] The Court held in all cases that the provision in Article 4(5) 'does not confer on the Member State a general and uncon-

[145] European Ombudsman Case: 2073/2010/AN 01 December 2011.
[146] European Ombudsman Case: 1743/2013/TN 20 May 2014.
[147] European Ombudsman Case: 369/2013/TN 28 July 2016.
[148] European Ombudsman Case: 2266/2013/JN 02 March 2015.
[149] European Ombudsman Case: OI/10/2014/RA 06 January 2015.
[150] CJEU, 21 June 2012, C-135/11 P, *IFAW* v *Commission*; CJEU, 14 February 2012, case T-59/09, *Federal Republic of Germany* v *Commission*.
[151] ECJ, 18 December 2007, case C-64/05 P, *Kingdom of Sweden* v *Commission*.

ditional right of veto, permitting it arbitrarily to oppose, and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State'.[152] Before issuing a refusal, EU institutions must ensure that such a reason exists and state it in the decisions they adopt at the end of the procedure, without embarking on a comprehensive assessment of the decision to object made by the Member States.[153]

3.8.10 Partial Disclosure

Significant progress was also made in the area of partial disclosure due to the European Ombudsman. The institution strengthened this approach by requiring institutions to assess whether they could grant the complainant partial access to internal documents pursuant to Article 4(6) of Regulation No 1049/2001 with failure to do so amounting to maladministration.[154]

3.8.11 The Exception to Exceptions: The Overriding Public Interest in Disclosure

Articles 4(2) and 4(3) of Regulation No 1049/2001 provide that an institution must not release a document to the public if one of the interests set out in those provisions applies, unless there is an overriding public interest in disclosure. The contribution of the case law on this matter is important. First, the interest has to be a public interest—defined in the case law as 'an interest that is objective and general in nature and not indistinguishable from individual or private interests that would outweigh for example the need to protect the interests of individual companies (…)'.[155] In other words, the interest being a public interest means that any request for access to the institutions' documents is likely to fail if the applicant seeks information for his/her own sake, for example, in order to prepare an action for damages.[156] Second, the institution in question needs to examine, of its own accord, whether such an overriding interest exists. As observed in the literature, 'it is difficult to identify a case where the Court would have been convinced about the existence of a public interest in disclosure that would have effectively reversed the outcome, even if

[152] IFAW (note 150), para 58.

[153] Labayle (note 8), p. 28.

[154] European Ombudsman Case: 1861/2009/(JF)AN 15 February 2011; Case: 1403/2012/CK 28 August 2013.

[155] CJEU, 20 March 2014, case T-181/10, *Reagens SpA* v *Commission*.

[156] CJEU, 25 September 2014, cases T-669/11 and T-306/12, *Spirlea* v *Commission*.

attempts have been made for example in relation to environmental matters (*LPN* case), the use of public funds (*Dennekamp*) the protection of public health (*Spirlea*) and constitutional issues (*Besselink*)'.[157]

The European Ombudsman's decisions on overriding public interest mirror the case law. The Ombudsman has made it rather clear that EU institutions must carry out a full analysis to determine whether an overriding public interest in disclosure exists.[158] It is certainly correct that an institution that has received a request for public access must weigh the arguments put forward by an applicant in relation to overriding public interest, but the institution concerned should also, ex officio, carry out its own examination as to whether there is an overriding public interest in disclosure.[159] To this effect, the European Ombudsman welcomes any internal guidelines or rules that the institutions may decide to implement in order to ensure that its services are aware of the obligation to carry out the said examination.[160] This recommendation—addressed to the EU institutions—is where the Ombudsman departs from case law.

3.8.12 Institutional Practices

In this sub-section we present statistical data regarding the type of exceptions used by the three core institutions to justify refusal at both the initial and confirmatory stages. The three institutions are rather different in nature, and therefore comparisons are not always meaningful. Detailed tables with data for the period 2011–2015 for each institution are included in Appendix 3.

First, we examined which are the first three exceptions invoked by institutions to refuse access to documents (in descending order). For Commission, in 2015, 29.4% of refusals were due to protection of privacy of individuals; 20.88% due to protection of purpose of audits, inspections, and investigations; and 17.69% due to protection of the decision-making process (decisions not taken yet). For Council, in 2015, 45% of refusals were due to the need to protect the decision-making process (both instances), in 27.80% of cases multiple reasons were invoked, and 18.7% of refusals were justified due to protection of international relations. For the Parliament, in 2015, 67% of refusals were due to protection of privacy, 17% due to protection of decision-making process (both instances), and 13% due to protection of commercial interests.

[157] Curtin *supra* n. 1, p. 6.

[158] European Ombudsman Case: 1039/2008/FOR 03 November 2010.

[159] European Ombudsman Case: 172/2010/ANA 23 November 2010; Case: 119/2015/PHP 04 November 2015; Case: OI/3/2014/FOR 08 June 2016.

[160] European Ombudsman Case: 3106/2007/(TS)FOR.

The second step was to try to identify general trends for the period 2011–2015 for each institution. For the Commission the following trends occurred: decrease of refusals in the area of international relations (from 12.02% in 2011 to 4.92% in 2015); increase of refusals due to protection of privacy (from 8.90% in 2011 to 29.40% in 2015); decrease of refusals with regard to protection of the decision-making process (decisions already taken) (from 8.58% in 2011 to 2.58% in 2015). For the Council it is more difficult to identify clear trends because the percentages for refusal under multiple reasons are high. However, one can observe a decrease in refusals due to protection of public security (from 8.9% in 2011 to 3.6% in 2015). Also, there is a relatively constant trend at approx. 40% refusal rate due to protection of the decision-making process (with the exception of 2014). For the European Parliament, there is a clear decrease of refusals due to protection of public security (from 25% in 2011 to 2% in 2015) and an increase in refusals due to protection of privacy (from 16% in 2011 to 67% in 2015).

Table 2.6 presents for 2015 a comparison among the three analyzed institutions. As mentioned earlier, precaution is advisable in interpreting differences and similarities.

Table 2.6 Breakdown of refusals by exception applied, 2015, comparative view Commission, Council, and Parliament (%)

	Commission	*Council*	*Parliament*
Article 4(1)—Absolute exceptions			
a) Public security	2.43	3.60	2.00
a) Defense and military matters	0.15	1.70	–
a) International relations	4.92	18.70	–
a) Financial and economic policy	0.71	2.20	
b) Privacy and the integrity of the individual	29.40	0.20	67.00
Article 4(2) (3) (5)—Relative exceptions			
(2) First indent: commercial interests	14.75	–	13.00
(2) Second indent: court proceedings	4.51	0.80	1.00
(2) Third indent: inspection, investigation activities	20.88	–	–
(3) First subparagraph: decision-making process, decision not yet made	17.69	45.00	17.00
(3) Second subparagraph: decision-making process, decision already made, opinions for internal use as part of deliberations and preliminary consultations	2.58		
(5) Refusal by Member State	1.98	–	–
Several reasons together (only Council)	–	27.80	–

3.9 Timeframes for Answering the Requests

Regulation No 1049/2001 provides that both initial and confirmatory applications should be handled promptly by the EU bodies. Such a prompt response is however needed because there are no sanctions in case the institutions do not respond. The time limits for response are 15 working days for both initial and confirmatory applications; they can be extended by 15 days provided that the applicant is notified in advance and that detailed reasons are given. Such an extension can be justified if the application is relating to a very long document or to a very large number of documents.

Only the Council provides statistical information with regard to the average number of working days needed to reply to a request for access to documents. Thus, in 2015, the average number of days for reply was 16 for an initial request and 29 for a confirmatory application. For the initial applications, approx. 25% had an extended deadline for response, while in the case of confirmatory applications, over 90% had an extended deadline. In the 2013 annual report on the implementation of Regulation No 1049/2001, it is mentioned that the Parliament generally responds to requests for access to documents within five working days, and in only six cases in 2013 did the institution request an extension of the 15-working-day deadline. No such data are available for the Commission.

From the numerous complaints lodged with the European Ombudsman, one can however infer that complying with the timeframes from the Regulation is a challenge for EU bodies, especially the Commission. The European Ombudsman has found in its investigations that there are excessive delays[161] in answering requests for information, especially by the Commission. The intervention of the Ombudsman often led to apologies offered for delays and the disclosure of the document.[162] This situation shows how important the moral authority of the Ombudsman can be and how effective this ADR mechanism is.

The European Ombudsman has started a series of own inquiries on this topic, some of them regarding EU agencies.[163] The Ombudsman stated the fact that such practice might become an instance of institutional mal-

[161] European Ombudsman 11 months, for instance, see Case: 2058/2011/(BEH)JN 23 July 2013 and Case: 119/2015/PHP 04 November 2015.

[162] European Ombudsman Case: 2351/2012/JAS 23 June 2016; Case: 1402/2014/DK 21 November 2016.

[163] European Ombudsman Case: OI/6/2013/KM 11 March 2015; Case: OI/10/2015/NF 21 December 2016.

administration if not addressed in a structured manner. The purpose of own inquiries was therefore to establish concrete steps that could help institutions reduce or eliminate the delays. Some of these recommendations simply concern better institutional management such as providing additional training to selection of board members on complaint handling and the practicalities of dealing with requests for review and giving greater responsibility to EPSO's permanent selection of board members in coordinating how selection of board decisions are recorded.[164]

In cases where the institution receives complex requests, the approach suggested by the European Ombudsman would be to enter into informal agreements between the EU institution and applicants for a fair solution. The requester needs, however, to agree with the proposed solution. Extensions should be well grounded.[165]

As a general good practice, the European Ombudsman has also specified that institutions should give the complainant an indication of how long it would take to deal with the application, and reasons for extending the deadline, when the case,[166] considering the fact that there is no sanction for not respecting the deadline for answering requests.[167]

3.10 Administrative and Judicial Remedies

According to Article 7(2) from Regulation No 1049/2001, upon the total or partial refusal by the EU institution, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position. As regards the deadlines for confirmatory application, the Ombudsman notes that, while an applicant is required to make a confirmatory application within 15 working days of any *express* refusal to grant public access under Article 7(2) and Article 7(3) of Regulation No 1049/2001, no such deadline applies as regards a failure by an institution to respond to an initial application. Consequently, the Ombudsman is of the opinion that an applicant that becomes entitled under Article 7(4) of Regulation No 1049/2001 to make a confirmatory application (because he/she has not received a reply within the prescribed time limit) can thus introduce a confirmatory application at any time.[168] The confirma-

[164] Ibidem.
[165] European Ombudsman Case: 1869/2013/AN 03 November 2014.
[166] European Ombudsman Case: 1199/2016/DR 16 June 2017.
[167] European Ombudsman Case: 339/2011/AN 19 January 2012.
[168] European Ombudsman Case: 465/2010/FOR, 30 November 2010.

tory application is mandatory in order to be able to lodge a complaint with the European Ombudsman or the courts.

It is interesting to examine for the Commission and the Council some statistical data regarding the number of confirmatory applications and their rate of success. The institutions do not report the data in the same format; therefore sometimes it is difficult to make meaningful comparisons. The Parliament, which has a rate of positive response at the initial stage of approx. 90%, doesn't even report on the number of confirmatory applications.

As a general trend, one can observe a sharp increase in the number of confirmatory applications with the Commission. In the case of the Council, the number of confirmatory applications, with the exception of 2014, has been relatively stable. What we can observe however is an increase in the number of documents considered at confirmatory stage. The rate of success at this stage is relatively similar with both the Commission (access denied ranging from 42.6% to 58.7% of requests) and the Council (from 30.6% to 65.4% of the total documents requested). What can be observed however is the willingness of institutions at the confirmatory stage to consider partial access to the documents requested; this willingness which works in favor of the applicants may be related to the very active role of the Ombudsman in this field (Tables 2.7 and 2.8).

In the event of a total or partial refusal at the stage of confirmatory application, the institution shall inform the applicant of the remedies open to him or her, namely, instituting court proceedings against the institution and/or making a complaint to the Ombudsman. Failure of the institution to respond to a confirmatory application within the prescribed time limit should be considered refusal to grant access.

It is interesting to examine some data regarding the volume of complaints lodged with the European Ombudsman and the courts in the area of access to information/documents. The data for both institutions show that review of decisions by EU institutions regarding denial or partial access to public documents accounts for a significant part of their activity. From 2010 to 2016, the largest number of inquiries addressed to the European Ombudsman had free access to information and documents as their subject. Based on the European Ombudsman's annual reports, in 2014 21.5% of decisions regarded access to information and documents, 22.5% in 2015, and 29.6% in 2016. In terms of the number of inquiries handled by the European Ombudsman per year, in 2014 there were 342 inquiries opened and 400 closed; in 2015, 261 opened, 277 closed; and in 2016, 245 opened, 291 closed. For the

Table 2.7 Commission: Statistical data on confirmatory applications

# of confirmatory applications	165	229	236	300	284
# of replies pursuant to Regulation No 1049/2001	144	160	189	272	230
Full access (%)	14.58	18.75	20.11	18.75	9.57
Access denied (%)	42.36	56.88	56.08	56.62	58.70
Partial access (%)	43.05	24.38	23.81	24.63	31.74

Table 2.8 Council: Statistical data on confirmatory applications

Number of confirmatory applications									
2011		**2012**		**2013**		**2014**		**2015**	
27		23		25		40		24	
Number of documents considered by confirmatory application									
2011		**2012**		**2013**		**2014**		**2015**	
59		78		77		255		127	
Documents released by the Council at the confirmatory stage									
2011		**2012**		**2013**		**2014**		**2015**	
41 (69.4%)		27 (34.6%)		33 (42%)		159 (62%)		61 (48%)	
Full	Partial	Full	Partial	Full	Partial	Full	Partial	Full	Partial
15	26	17	10	29	4	132	27	38	23

Court of Justice, it can be established that out of an overall of new cases registered for the period 2011–2014, the General Court had to deal with an average of about 20 cases regarding Regulation No 1049/2001 and related matters: in 2010 630 cases overall, therein access to documents 19; in 2011 722 cases overall, therein access to documents 21; in 2012 617 cases overall, therein access to documents 18; in 2013 790 cases overall, therein access to documents 20; in 2014 912 cases overall, therein access to documents 17.[169]

It is important to examine also the statistical data provided by each of the three core institutions on the number of complaint lodged against each institution with the Ombudsman and respectively with the courts. Examining the tables below, we can conclude: The Commission's decisions are by far the most challenged compare to those by the Council or the Parliament. The numbers of complaints addressed to the European Ombudsman and to the courts are relatively similar, with a slight preference for the Ombudsman in the case of the Commission (Tables 2.9, 2.10, 2.11, and 2.12).

[169] Biskup and Rosch (note 101), p. 53.

Table 2.9 Complaints to the European Ombudsman

	2011	*2012*	*2013*	*2014*	*2015*
Parliament	1	1	2	1	1
Council	0	4	0	2 (1 own inquiry)	4 (1 own inquiry)
Commission	10	20	22	30	11

Table 2.10 Decisions by the European Ombudsman

	2011	*2012*	*2013*	*2014*	*2015*
Parliament	0	1 1 with critical/ further remark	1	1 recommendation	0
Council	1	1	1 1 with critical/ further remark	3 1 with critical/ further remark	0
Commission	17 8 with critical/ further remark	18 10 with critical/ further remark	15 6 with critical/ further remark	20 8 with critical/ further remark	16 2 with critical remark

Table 2.11 Court actions lodged against the institution (initial complaint and appeals)

	2011	*2012*	*2013*	*2014*	*2015*
Parliament	0	0	0	0	3
Council	1	0	1	2	0
Commission	15	15	15	10	14

Table 2.12 Judgments handed down by courts (first instance and on appeals)

	2011	*2012*	*2013*	*2014*	*2015*
Parliament	2	1	0	0	1
Council	3	5	3	3	3
Commission	15	20	12	12	11

4 Discussions and Conclusions

More than 15 years since Regulation No 1049/2001 was first adopted, it is critical to inquire whether or not access to Community documents has contributed to greater transparency and openness. If one examines merely numbers and general trends such as the development of public registers by Community bodies, then the conclusion is mostly positive. Over the last 15 years, the number of documents made publicly available has grown continuously, and various policy areas had been opened up to the general public. However, in many cases, the mere existence of registers does not mean that citizens can successfully use them. For example, the Council's register is not user-friendly and searches are extremely difficult to perform without knowing a lot of details about the searched document. This is why, despite a positive outlook resulting from very condensed and quantitative annual reports by the three core institutions, a more in-depth analysis is needed.

A first remark regards the outdated character of Regulation No 1049/2001. Discussions on its reform have been pending since 2008. It is clear that there is an impasse in the legislature procedure. It is important to note that some of the proposed changes in 2008 and 2011 go somewhat against the spirit of the Treaty of Lisbon in the sense that they try to limit the citizens' right of access in quite significant ways.[170] Until a systematic reform of Regulation No 1049/2001 is achieved, the courts have the main important contribution, even if on a case-by-case basis. The European Ombudsman also plays a significant role, not just in individual decisions but rather through own inquiries which result in specific recommendations for EU bodies. For the most part, it can be argued that the 'judicature guarantees a broad approach when applying the scope of the right of access'; however this approach is moderated by the introduction of a 'set of "general presumptions" in some sectors which favor confidentiality'.[171] The European Ombudsman can be described as the absolute champion of the cause of broad access to EU documents, especially in the area of international relations and trialogues.

It is interesting to discuss what type of changes Regulation No 1049/2001 would need to undergo in the future. In one opinion,[172] these changes, though fundamental, are minimal. Thus, the new

[170] Curtin and Leino-Sandber (note 45) p. 22.
[171] Labayle (note 8), p. 38.
[172] Ibidem, p. 39.

Regulation will need to acknowledge the fundamental nature of the right of access as opposed to being presented as an institutional issue. Second, it should establish a legal presumption of disclosure, following the logic from Regulation No 1367/2001, based on the fundamental nature of the right.

Second, it is important to distinguish the challenges faced by the European Union, as supranational organization, from the ones faced by Member States in the process of opening up their decision-making processes.[173] At EU level, access refers not only to documents in the administrative realm but in the legislation one as well. This has been clear from the very beginning. The reason why it is quite confusing for a layman person to understand what documents are the subject of right of access is because the three core institutions have different degrees of administration and are involved in different stages of the legislative process. Furthermore, their roles are evolving over time, as it is the case with the European Parliament. Currently, there seems to be a presumption that legislative documents are more important than administrative ones.[174] This is worrisome, because administrative documents are equally important, especially in light of the Commission's non-legislative activity.

There are two areas which require special attention, namely, protection of privacy and international relations. As one remembers from the section on exceptions, the number of refusals due to protection of privacy has increased significantly. While it is important to balance these fundamental rights, it is clear that currently protection of privacy receives more footing. As numerous documents requested include personal data as well, it would be important to have a decision by the institutions based on whether or not privacy is actually harmed. Currently, all documents containing personal data are exempted for disclosure almost automatically. In the area of international relations, we have international agreements which are creating far-reaching rights and obligations for the EU citizens.[175] The activity of the European Ombudsman in this area, for example, with regard to the transparency of TTIP, is remarkable. In a future regulation on access however the exception based on the protection of international relations needs to be redefined.

[173] Curtin and Leino-Sandber (note 45) p. 22.
[174] Ibidem, p. 23.
[175] Ibidem, p. 24.

A final remark regards the beneficiaries of access to documents. It is clear that legal professionals and companies as well as parties in court proceedings account for a significant part of the requests filed. This was not the intention of the Regulation No 1049/2001 when first adopted. However, in our opinion it is wrong to argue that access should be restricted because other groups and not the citizens at large make use of its provisions.

Appendix 1: Profile of Applicants

Table A1.1 Commission: **b**reakdown of initial requests by the occupational profile of applicants (%)

	2011	*2012*	*2013*	*2014*	*2015*
Academic sector	23.24	22.70	22.08	19.80	22.33
Lawyers	10.69	13.58	14.46	18.30	13.06
Civil society (interest groups, industry, NGOs, etc.)	8.18	10.32	16.62	16.04	15.64
Public authorities (other than EU institutions)	13.56	7.12	8.24	8.23	6.38
Other EU institutions	8.32	7.64	8.76	12.80	12.56
Journalists	3.35	4.81	4.58	6.00	7.03
Not specified	32.68	33.83	25.26	18.83	22.99

Source: European Commission (2016b), Annex to the Report from the Commission on the Application in 2015 of Regulation (EC) No 1049/2001 regarding Public Access to European Parliament, Council, and Commission documents, p. 6, <http://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=CELEX:52016DC0533&from=EN> accessed on 30 September 2017

Table A1.2 Council: breakdown of initial requests by the occupational profile of applicants (%)

	2011	*2012*	*2013*	*2014*	*2015*
Academic sector	34.60	23.80	43.50	24.10	33.30
Lawyers	15.40	14.30	13.00	31.00	33.00
Civil society (interest groups, industry, NGOs, etc.)	19.3	28.5	21.8	27.7	16.6
Public authorities (other than EU institutions)	0.00	0.00	0.00	3.40	0.00
Other EU institutions	3.80	4.80	0.00	0.00	5.60
Journalists	11.5	9.5	0.00	3.5	5.6
Others	7.70	4.80	4.30	0.00	0.00
Not specified	7.70	14.30	17.40	10.30	5.60

Source**:** Authors' own compilation based on Council of the European Union (2016), 'Council Annual Report on Access to Documents – 2015', <http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-council-access-documents/> accessed on 30 September 2017

Table A1.3 European Parliament: breakdown of initial requests by the occupational profile of applicants (%)

	2011	*2012*	*2013*	*2014*	*2015*
Academic sector	45.00	33.00	43.00	39.00	30.00
Lawyers	10.00	11.00	9.00	9.00	9.00
Civil society (interest groups, industry, NGOs, etc.)	10.00	17.00	18.00	18.00	25.00
Public authorities (other than EU institutions)	1	6	7	*	6
MEP (MEP assistants)	2	0	1	*	1
Journalists	6.00	3.00	5.00	*	12.00
Others	26.00	30.00	17.00	*	18.00

Source: Authors' own compilation based on European Parliament Annual Reports on Access to Documents, 2011–2015, < http://www.europarl.europa.eu/RegistreWeb/home/annualReport.htm?language=EN > accessed on 30 September 2017

*Note: % impossible to decipher from the report

Appendix 2: Documents in the Public Registers

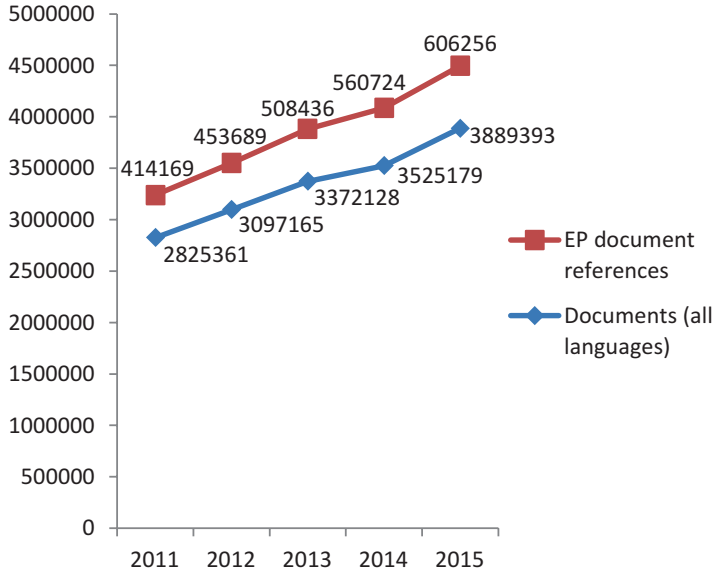

Fig. A2.1 Evolution of the public register of Parliament's documents

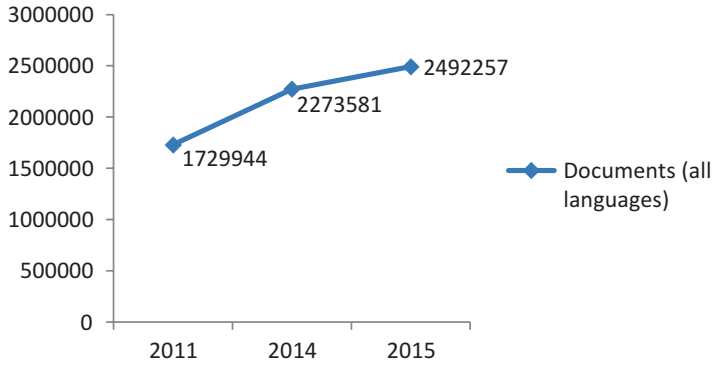

Fig. A2.2 Evolution of the public register of Council's documents

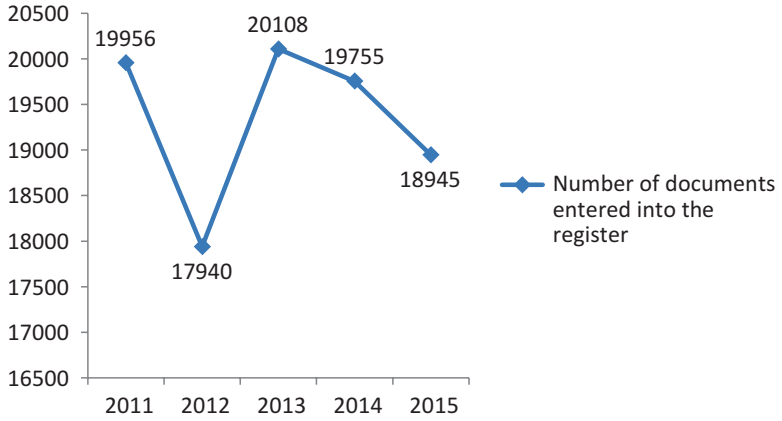

Fig. A2.3 Evolution of the public register of Council's documents (annual entries)

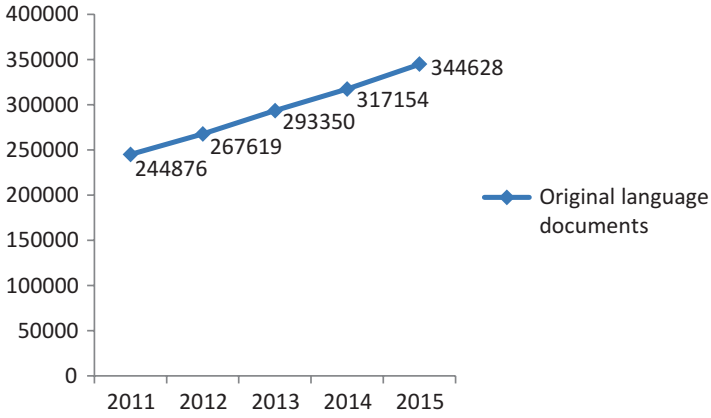

Fig. A2.4 Evolution of the public register of Commission's documents

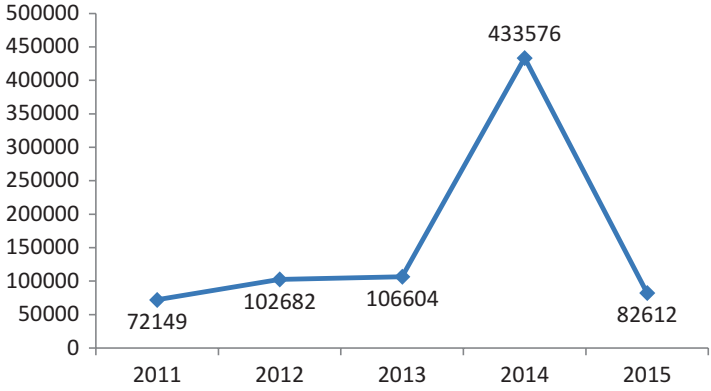

Fig. A2.5 Number of documents consulted for the European Parliament

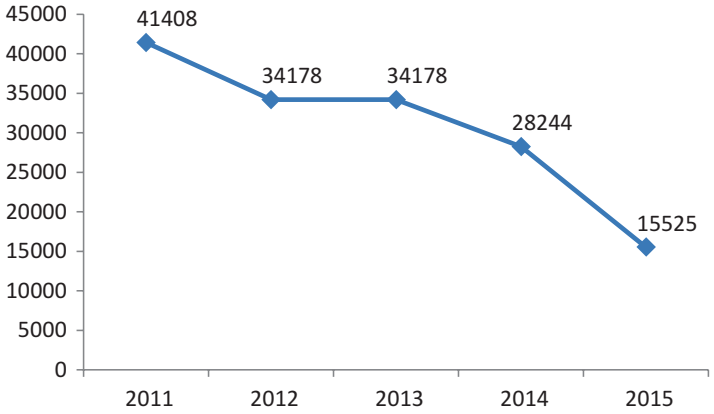

Fig. A2.6 Number of unique visitors for the Commission's general register

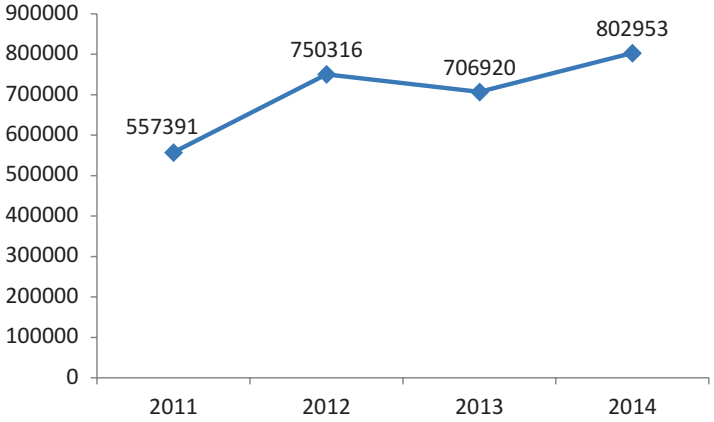

Fig. A2.7 Number of unique visitors for the Council's register

Appendix 3: Exceptions Used for Refusals by the Commission, Council, and European Parliament

Table A3.1 Commission: breakdown of refusals by exception applied (%)

	2011		*2012*		*2013*		*2014*		*2015*	
	Initial	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*
4.1.a. First indent—protection of public security	2.40	1.33	1.34	1.31	1.53	0.92	1.52	0.00	2.43	2.05
4.1.a. Second indent—protection of defense and military matters	0.39	2.00	0.11	0.65	0.26	0.00	0.00	0.71	0.15	0.00
4.1.a. Third indent—protection of international relations	12.02	4.67	3.58	7.19	6.19	7.37	7.27	4.61	4.92	7.38
4.1.a. Fourth indent—protection of the financial, monetary, or economic policy	1.88	3.34	1.40	0.00	1.66	3.69	1.57	2.84	0.71	2.87

(*continued*)

Table A3.1 (continued)

	2011		*2012*		*2013*		*2014*		*2015*	
	Initial	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*
4.1.b. Protection of privacy and the integrity of the individual	8.90	20.67	14.65	10.46	16.26	16.13	21.00	18.09	29.40	15.57
4.2. First indent—protection of commercial interests	16.83	14.66	16.94	11.76	16.14	11.98	14.92	15.96	14.75	13.11
4.2 Second indent—protection of court proceedings and legal advice	6.76	1.33	9.84	7.84	5.42	6.91	4.94	10.28	4.51	4.92
4.2 Third indent—protection of the purpose of inspections, investigations, and audits	21.90	32.68	25.32	45.10	23.60	36.87	25.01	32.98	20.88	37.70
4.3 Subparagraph 1—decision-making process, no decision yet taken	17.15	15.33	20.23	6.54	20.60	10.60	15.95	11.35	17.69	13.93

(*continued*)

Table A3.1 (continued)

	2011		*2012*		*2013*		*2014*		*2015*	
	Initial	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*
4.3. Subparagraph 2—decision-making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	8.58	4.00	4.92	9.15	6.51	5.53	6.19	3.19	2.58	2.46
4.5. Refusal by Member State/ third author[a]	3.18		1.67		1.85		1.63		1.98	

Source: Authors' own compilation based on European Commission (2016), Annex to the Report from the Commission on the Application in 2015 of Regulation (EC) No 1049/2001 regarding Public Access to European Parliament, Council, and Commission documents, pp. 2–9, <http://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=CELEX:52016DC0533&from=EN> accessed 30 September 2017

[a]This category is not used anymore, as it does not constitute an exception in the sense of Article 4 of Regulation No 1049/2001. It still appears as the raw data available did not in all cases enable categorization according to the exceptions included in Article 4

Table A3.2 Council: breakdown of refusals by exception applied (%)

	2011		*2012*		*2013*		*2014*		*2015*	
	Initial	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*
4.1.a. First indent—protection of public security	8.90	15.80	5.80	0.00	3.80	0.00	2.00	0.40	3.60	3.00
4.1.a. Second indent—protection of defense and military matters	1.40	0.00	1.60	0.00	0.60	0.00	0.20	0.00	1.70	0.00
4.1.a. Third indent—protection of international relations	21.20	78.90	20.50	3.90	24.70	69.00	25.80	14.60	18.70	34.90
4.1.a. Fourth indent—protection of the financial, monetary, or economic policy	1.10	0.00	0.00	0.00	0.30	0.00	0.00	0.00	2.20	0.00
4.1.b. Protection of privacy and the integrity of the individual	0.20	0.00	0.20	0.00	0.10	0.00	0.20	0.00	0.20	0.00

(*continued*)

Table A3.2 (continued)

	2011		*2012*		*2013*		*2014*		*2015*	
	Initial	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*	*Initial*	*Confirmatory*
4.2. First indent—protection of commercial interests	0.00	0.00	0.00	0.00	0.10	0.00	0.00	0.00	0.00	0.00
4.2 Second indent—protection of court proceedings and legal advice	1.00	0.00	0.60	2.00	0.50	0.00	0.70	1.20	0.80	0.00
4.2 Third indent—protection of the purpose of inspections, investigations, and audits	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
4.3 Subparagraphs 1 and 2—decision-making process	40.90	0.00	41.30	2.00	36.70	3.40	21.50	0.00	45.00	0.00
Other reasons/multiple reasons	25.30	5.30	30.00	92.10	33.20	27.60	49.40	83.80	27.80	62.00
Documents not held by the Council	0.00	0.00	0.00	0.00	0.00	0.00	0.20	0.00	0.00	0.00

Source: Authors' own compilation based on the Council of the European Union (2016), 'Council Annual Report on Access to Documents – 2015', <http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-council-access-documents/ accessed 30 September 2017

Table A3.3 European Parliament: breakdown of refusals by exception applied (%)

	2011	*2012*	*2013*	*2014*	*2015*
Par. 1(a) Security	25.00	16.00	00.00	6.00	2.00
Par. 1(b) Privacy	16.00	32.00	50.00	39.00	67.00
Par. 2 Commercial interests	4.00	11.00	00.00	17.00	13.00
Par. 2 Legal advice	15.00	11.00	00.00	6.00	1.00
Par. 2 Audits	5.00	11.00	00.00	6.00	00.00
Par. 3 Decision-making process	35.00	21.00	50.00	28.00	17.00

Source: Authors' own compilation based on European Parliament Annual Reports on Access to Documents, 2011–2015, < http://www.europarl.europa.eu/RegistreWeb/home/annualReport.htm?language=EN > accessed 30 September 2017

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PART II

The National FOIAs

CHAPTER 3

Freedom of Information in France: Law and Practice

Yseult Marique and Emmanuel Slautsky

1 Introduction[1]

Transparency is in increasing demand in France. It applies with special force to politicians, as the 2017 presidential and legislative elections showed.[2] Yet, transparency is a double-edged sword as President Hollande's

[1] We are grateful to Professor Bénédicte Delaunay for her comments and suggestions on an earlier draft of this chapter. All errors remain ours.

[2] For instance: http://www.lemonde.fr/election-presidentielle-2017/article/2017/05/05/la-france-a-quitte-le-monde-de-l-opacite-de-la-connivence-et-de-la-complaisance_5123121_4854003.html; https://transparency-france.org/actu/interpelle-les-candidats-presidentielle-2017/ All links were last accessed on 27 July 2017.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_3

discussions with journalists[3] have made crystal clear: French power also needs a layer of symbolic prestige and aura, some sacralisation or distanciation away from the mob. A similar tension is found in the discussions around administrative transparency: the administrative machinery should be transparent to connect executive power with citizens and to increase accountability, but, at the same time, administrative secrecy can be necessary to protect private and/or public interests.

Administrative transparency requires three main elements: (1) knowledge of the activities of public bodies, (2) understanding of the decisions taken by public bodies, and (3) the possibility for citizens to be involved in the administrative decision-making process.[4] Access to administrative documents is a tool for achieving administrative transparency. With a relatively early package of administrative reforms revolving around administrative transparency in the 1970s, France has always sought to be pioneering in this matter at the level of principles. Although administrative transparency has only been enshrined in a constitutional provision for environmental matters,[5] access to administrative documents has been understood as a fundamental guarantee granted to citizens in the exercise of civil liberty since 2002.[6] In the same vein public bodies have been baptised with reference to 'transparency'.[7] At the international level, France is a member of the Open Government Partnership.[8] Lastly, France adopted its Digital

[3] Davet and Lhomme (2016).

[4] Garin (2017), pp. 38–39. See also Debbasch in Debbasch (ed.) (1990), p. 12.

[5] Art. 7 Charter for the Environment 2004. Art. 15 French *Déclaration des droits de l'Homme et du Citoyen* provides that 'Society has the right to ask a public official for an accounting of his administration' (*Transparence administrative*, p. 46 (F. Moderne)). All legislative and executive acts mentioned in this chapter can be found on the official website of the French official journal: https://www.legifrance.gouv.fr/.

[6] CE, 29 April 2002, no 228830. The *Conseil d'État* has two databases: http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/ArianeWeb (database comprising its case law) and http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/ConsiliaWeb (database comprising its opinions).

[7] For example: *Haute Autorité pour la transparence de la vie publique* (see Acts nos 2013-906 and 2013-907 of 11 October 2013); *Haut Comité pour la transparence et l'information sur la sécurité nucléaire* (Act no 2006-686 of 13 June 2006 (art. 23-27, today codified in art. L125-24- L125-40 environmental code)).

[8] The Open Government Partnership is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance (https://www.opengovpartnership.org/about/about-ogp).

Republic Act in 2016,[9] which strongly emphasises open data and its potential contribution to the democratic accountability of the administration as well as to its efficiency.[10] Hence, transparency has confirmed its quasi-mythical status in France.[11]

However, this general commitment to administrative transparency needs to be confronted with the actual transformation of administrative culture and the ways in which access to documents delivers its promises of enduring public participation in decision-making and of increasing accountability in the French administration. This chapter seeks to provide such an assessment thanks to interviews with senior practitioners in this matter such as legislators, judges, and information commissioners.[12] These interviews supplement traditional legal research based on statutes, case law, *Commission d'accès aux documents administratifs*' (CADA) annual reports, and CADA's opinions and advice.[13] Three main issues emerge from this research: firstly, administrative inertia is still very strong nearly 40 years after the first FOIA was adopted. Secondly, the exceptions to the principle of access to administrative documents have grown over time, reducing the actual scope of freedom of information (FOI). Thirdly, fragmentation of the special regimes may lead to more confusion than transparency.

After an overview of the historical background of FOI in France (Sect. 2), this chapter is organised around the central role played by the CADA in regulating access to administrative documents. Section 3 thus details the institutional framework and the CADA. Section 4 explains how the FOIA and the work of the CADA organise the principle of access to administrative documents. Section 5 goes on to detail the modalities of access to administrative documents. Section 6 outlines the extent to which the FOIA and the CADA accept limits to the principle of access to administrative

[9] Act no 2016-1321 of 7 October 2016 (called hereafter French Digital Republic Act or FDRA).

[10] FDRA, *Legislative proposal*, p. 14.

[11] See for early assessment of this dimension: Chevallier (1988).

[12] We thank our interviewees who generously gave us their time to answer our questions: Mrs C. Bouchoux, Senate member (2011–2017) and CADA member (interview with Yseult Marique); Mr M. Dandelot, CADA Chair; Mrs C. Guichard, CADA Secretary General; Mrs C. Drèze, CADA Communication Officer; Mrs M. Perrière, CADA General Rapporteur; Mr P. Lemoine, CADA member (interviews with Emmanuel Slautsky).

[13] Available at http://www.cada.fr/ (official website—comprises CADA annual reports) and http://cada.data.gouv.fr/ (database comprising all CADA's opinions and advices).

documents. Section 7 casts light on special regimes of access to documents, especially in the field of environment and media. Section 8 concludes with an assessment of FOI in France. In taking the perspective of the CADA and its strong contribution to fleshing out the FOIA through its activities, this chapter hopes to highlight the gap between the black letter of the FOIA (the 'law') and its actual implementation in the day-to-day life of the administration ('the practice').

2 A Short History

Until the 1970s administrative secrecy was a key feature in France. Legal rules of different natures—criminal, professional, and so on—protected the confidentiality of administrative information.[14] Some elements of administrative openness existed nonetheless. For example, obligations to make administrative decisions known, by way of display or publication, have existed in France since the *Ancien Régime* and, from the nineteenth century, public inquiries have had to be organised in some circumstances (e.g. expropriations), and citizens have been allowed to access decisions and financial documents from their local authorities.[15]

However, in the 1970s, this fragmented and limited transparency was no longer sufficient. Debates on administrative transparency were lively both at the supranational level—notably within the Council of Europe[16]—and abroad, with the adoption of the 1966 American Freedom of Information Act. This increased the perception that the French situation was inadequate. Administrative secrecy was also challenged as a result of the broader crisis of authority that followed the events of May 1968. As bureaucracies expanded their activities, the—better educated—general public became increasingly unwilling to accept administrative decisions without understanding their reasons and having been associated with their

[14] *Transparence administrative*, pp. 21–28 (Moderne); Lallet (2014), at 3–5.

[15] Lasserre et al. (1987), pp. 13–53; *Transparence administrative*, pp. 29–32 (Moderne); Lallet (2014), at 8–17.

[16] The debates within the Council of Europe led to the adoption, in 1981, of the Rec No R (81) 19 of the Committee of Ministers to member states on the access to information held by public authorities. In 2009, the Council of Europe Convention on Access to Official Documents was adopted. It will enter into force when ten states have expressed their consent to be bound by the Convention (this is not the case yet). France has not signed or ratified it. It is the first binding international treaty that contains a general right to access administrative documents (Garin (2017), p. 27).

adoption. Parallelly, public bodies also realised that they were likely to benefit from greater transparency as this would notably improve their image and help them gain citizen support for their projects.[17]

In this context the following three major legislations were adopted at the end of the 1970s in the wake of a large administrative reform movement.[18]

- Act no. 78-17 of 6 January 1978. This Act aimed to regulate the processing of personal data by public authorities and to protect the privacy of citizens. An independent authority—the *Commission Nationale de l'Informatique et des Libertés* (CNIL)—was also established to monitor its application.
- Act no. 78-753 of 17 July 1978 (the French FOIA). This Act granted every person the right to obtain communication of documents held by a public body within the framework of its public service mission, regardless of form or medium.[19] The Act also set up an independent authority—the CADA—to monitor its application and to receive complaints from the general public regarding requests to access administrative documents.
- Act no. 79-587 of 11 July 1979. This Act imposed a general duty on public bodies to give reasons for 'unfavourable' decisions.

These three acts have been modified several times since their adoption. As far as the FOIA is concerned, reforms in 2000 and 2005 can, among others, be mentioned.[20] The 2000 reform redrafted many provisions of the 1978 Act. This led to modifications in the scope of the right to access, in the procedure, in the list of exceptions and in the combination of the provisions of this Act with specific regimes dealing with access to administrative documents in particular areas.[21] Following the 2005 reform, a right to reuse public information was notably established in implementation of European

[17] Chevallier (1988), pp. 243–246.

[18] Chevallier (1988), p. 246.

[19] A few months before, a Decree no 77-127 of 11 February 1977 had paved the way for the adoption of the FOIA, but its scope remained limited: notably, it did not establish as a default rule the possibility of gaining access to administrative documents (CADA, *Annual report 1979–1980*, pp. 5–6). See also, a few months after the Act of 17 January 1978, Act no 79-18 of 3 January 1979 on archives.

[20] Act no 2000-321 of 12 April 2000; Ordinance no 2005-650 of 6 June 2005.

[21] Lallet (2014), at 24.

law requirements,[22] the powers of the CADA were reinforced, and many public bodies have been obliged to appoint a person responsible for access to documents and reuse.[23] In 2015 the provisions of Act no. 78-753 of 17 July 1978 were codified in book III of the French Code on Relations between the Public and the Administration (CRPA). The provisions of the Code concerning freedom of information were, again, modified in 2016 with the adoption of the FDRA.

3 Institutional Framework

Three main institutional actors play a role in implementing the FOIA: the staff in charge of requests for access to administrative documents within public bodies (PRADAs) (Sect. 3.1), the CADA (Sect. 3.2), and the administrative courts (including the *Conseil d'État*) (Sect. 3.3).

3.1 PRADAs

Firstly, since 2005, most large public bodies have had to appoint PRADAs.[24] PRADAs make sure that FOI requests made to their respective authorities are processed and handle potential complaints. PRADAs are the link between their respective authorities and the CADA and operate as internal referents for issues of administrative transparency. PRADAs may also draft annual reports on administrative transparency.[25] PRADAs are often based in the legal or general services of their respective institutions.[26] The CADA relies heavily on the PRADAs to improve the effectiveness of the FOIA in practice. The CADA coordinates a network of PRADAs and regularly organises courses and training for them.[27] Many public bodies have,

[22] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information. See also Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the reuse of public sector information. European law is only concerned with the reuse of public information, not access to administrative documents (see art. 1 Directive 2003/98/EC).

[23] Art. 10 Ordinance no 2005-650 of 6 June 2005.

[24] Art. L330-1 CRPA.

[25] Art. R330-4 CRPA.

[26] CADA, *Annual report 2009*, p. 80.

[27] See, for example, CADA, *Guide des personnes responsables de l'accès aux documents administratifs et de la réutilisation des informations publiques*, 2007, available on http://www.cada.fr/IMG/pdf/Guide_PRADA_.pdf and CADA, *Annual report 2016*, p. 66.

however, not designated their PRADA; furthermore, many PRADAs have been tasked with this function on top of their ordinary workload.[28]

3.2 CADA

The second central actor operationalising administrative transparency, the CADA, is an independent and advisory administrative authority responsible for monitoring the FOIA. When created in 1978, the CADA was one of the first independent administrative authorities set up in France, supposed to be at arm's length from the administration so as not to be influenced by political considerations in its decision-making.[29] However, it is actually an entity that administratively and financially depends on the services of the prime minister[30] and with close connections to a series of French entities, such as the French *Conseil d'État*, the French Parliament, and the CNIL. Following article L341-1 CRPA, the Commission is composed of 11 members: one each from the *Conseil d'État*, the *Cour de Cassation*, the Court of Audit, the French National Assembly, and the French Senate. There is also an elected member of a local authority, a university professor, a person qualified in the management of archives, the president of the CNIL or its representative, a person with knowledge of competition and prices, and someone with knowledge of the public dissemination of information. CADA members are appointed by the prime minister. Men and women must be equally represented while civil society is not represented as such.[31] A government delegate appointed by the prime minister also attends the meetings and the *Défenseur des droits* (ombudsman) is also a (non-voting) member of the CADA.

CADA members are assisted by both an administrative staff of 14 people under the authority of a secretary-general and a team of rapporteurs. The rapporteurs work under the authority of a rapporteur-general

[28] Interview with M. Perrière. See Senate report, volume 1, p. 149. There were 1642 PRADAs in 2016 (CADA, *Annual report 2016*, p. 66). The CADA considers that more than 5000 PRADAs should be appointed if the obligations under the FOIA are to be respected (CADA, *Annual report 2013*, p. 107).

[29] Although it is only in 2005 that the CADA was explicitly classified as an independent administrative authority (art. 10 Ordinance no 2005-650 of 6 June 2005). Currently, the CADA also falls within the scope of a 2017 Act which regulates independent administrative authorities (Act no 2017-55 of 20 January 2017).

[30] Lallet (2014), at 379.

[31] Interviews with M. Dandelot et al. and M. Perrière.

and of two adjunct rapporteurs-general.[32] The rapporteur-general is a full-time member of an administrative court and her activities at the CADA come on top of her normal activities. The latter situation is similar for the rapporteurs.[33] The CADA has in fact always been a small authority with limited financial and human resources.[34] These limits prevent the CADA from exercising its powers to their fullest (e.g. to carry out investigations *in situ*, to develop technological know-how in-house, or to develop the PRADAs network).[35]

The CADA plays a role in promoting FOI among public authorities and citizens. First, the CADA informally responds to many requests for information from citizens or public authorities. The CADA also regularly formally advises public bodies on interpreting the FOIA. It may also be consulted by the government or propose amendments to legislative or regulatory texts in order to promote transparency.[36] Through its website and paper publications,[37] the CADA informs the public on its right to access to (and reuse of) administrative documents. Quantitatively, the most important role of the CADA, however, is its advisory role in disputes between public bodies[38] and people requesting access to administrative documents. Before any judicial action can be brought against a public body that refuses to grant access to administrative documents, a request for advice must be sent to the CADA, normally within two

[32] See organigram: http://www.cada.fr/IMG/pdf/organigramme_janvier_2017.pdf.

[33] Interview with M. Perrière. See also, for example, CADA, *Annual report 2012*, p. 59.

[34] Interviews with M. Dandelot et al. and M. Perrière. See also Delaunay (1993), pp. 557–558. The limited means of the CADA are also regularly highlighted in its annual reports (e.g. CADA, *Annual report 2008*, p. 52). The CADA is not the only French authority acting as a guardian of administrative transparency with very limited means. Another example is the *Commission consultative du secret de la défense nationale* (see *Rapport de la Commission consultative du secret de la défense nationale 2013–2015*, Paris, La Documentation française, 2016, p. 95). On this commission, see Sect. 6.3.4.

[35] Interviews with M. Dandelot et al. and M. Perrière. For example, CADA, *Annual report 2001*, p. 2; *Annual report 2007*, p. 55.

[36] Art. L342-4, art. R342-4-1, and art. R342-5 CRPA.

[37] For example, CADA, *Documents administratifs. Droit d'accès et réutilisation*, Paris, La Documentation française, 2008.

[38] The FOIA also applies to some private entities and does not apply to all public bodies. The details of its scope of application will be discussed below. For reasons of convenience, we use the expressions 'public bodies' or 'public authorities' to refer to the entities bound by the FOIA and only specify the nature of those entities when necessary for a correct understanding of the situation.

months of the refusal. This is a condition of admissibility of any judicial action.[39] When its opinion is requested, the CADA issues either a favourable or unfavourable opinion on the total or partial disclosure of the document. It does not itself send the requested administrative documents to the applicant. The CADA must normally issue its opinion on the lawfulness of a public body's refusal to grant access to administrative documents within a month of the registration of the request for advice.[40] This deadline is regularly exceeded.[41]

After the authority is informed of the CADA's opinion, it must inform the CADA (but not the applicant) of its decision on the request for access within a month.[42] The CADA's opinions show that a large majority of the cases in which public bodies refuse to disclose administrative documents are unlawful.[43] If no explicit decision by the authority has been taken two months after a request for advice has been lodged, the refusal to grant access is implicitly confirmed. This is the case even in the absence of an opinion by the CADA within the required one-month deadline (Table 3.1).[44]

Table 3.1 Opinions of the CADA

	1990	*1995*	*2005*	*2010*	*2015*
Appeals to the CADA	1992	2903	4433	4666	5591
Opinions favourable to access	52.7%	52.3%	41.6%	46%	55.1%
Moot appeals	25.1%	26.9%	39.5%	33.4%	25%
Documents already communicated and withdrawals of the request for advice	*14.9%*	*16.2%*	*27%*	*22.3%*	*na*
Non-existent or no longer existing documents	*10.2%*	*10.7%*	*12.5%*	*11.1%*	*na*
Unfavourable opinions (on substance, admissibility, or jurisdictional grounds)	22.2%	20.8%	18.9%	23.4%	20%

Source of data: CADA annual reports

[39] Art. L342-1 CRPA, art. R343-1 CRPA. See also CE, 19 February 1982, no 24215; CE, 20 February 1985, no 55194.

[40] Art. R343-3 CRPA.

[41] In 2016, for example, the CADA took on average 69 days to issue its opinions (CADA, *Annual Report 2016*, p. 67). Over the years, the numbers have evolved as follows: 39.9 days (2011), 39.1 days (2012), 40.3 days (2013), 50.1 days (2014), and 58 days (2015).

[42] Art. R343-3 CRPA.

[43] Lallet (2014), at 391. See also Table 3.1.

[44] Art. R343-4 and art. R343-5 CRPA.

The CADA is an advisory authority: its opinions are not binding on public bodies. Nevertheless, in most cases, public bodies follow CADA's positions: according to the CADA's president, depending on the year, 80–85% of favourable CADA opinions are followed by disclosure of the requested documents.[45] However, in a substantial proportion of cases, public bodies do not inform the CADA of their final decisions following a positive CADA opinion.[46] Moreover, there are also cases of late or partial compliance which are not necessarily accounted for by the CADA.[47]

3.3 Administrative Courts

If the CADA procedure does not settle an FOI dispute between an authority and an applicant, a judicial challenge of a decision confirming (after the opinion of the CADA) a refusal to disclose documents can be brought before the administrative court of first instance that is geographically competent.[48] More precisely, the authority's decision taken in view of the CADA's opinion can be referred by the applicant to the court, not the CADA's opinion itself.[49] Such appeals only concern a small minority of the cases handled by the CADA.[50] Moreover, it happens that the requested documents are communicated by the authority immediately after such an appeal has been lodged.[51] The administrative court reviews the legality of the refusal decision. The court has extensive powers of investigation. It

[45] Interview with M. Dandelot et al. The numbers have been high since the start (e.g. CADA, *Annual report 1986–1987*, p. 16; *Annual report 1988–1989*, pp. 24–27). Add CADA, *Annual report 2013*, pp. 7–15 (in-depth analysis of 120 refusals by the authority to follow the opinion of the CADA).

[46] No response in 57.2% of cases in 2015, 36.85% in 2014, 52.85% in 2013 (CADA, *Annual Report 2015*, p. 70). The *2016 Annual report* mentions that the CADA tends to receive increasingly less information about the ways in which public bodies follow its opinions. It identifies gaining more information on this area as one key area for future work (p. 65).

[47] *Transparence administrative*, p. 96 (Chevallier).

[48] Art. L211-1 Code of administrative justice. See also *Tribunal des conflits*, 2 July 1984, nos 02324 and 02325 and CE, 13 November 2002, no 225908.

[49] CE, 27 April 1983, no 46476.

[50] Between 1990 and 2002, refusals to grant access to administrative documents were submitted for advice to the CADA 42,000 times but were challenged only 1000 times before the judge (Puybasset (2003), p. 1308). Add, for example, CADA, *Annual report 2004*, p. 22; *Annual report 2005*, p. 69; *Annual report 2010*, p. 49 and p. 81; *Annual report 2012*, p. 80.

[51] CADA, *Annual report 2010*, p. 50.

may 'require the competent authorities to present all necessary documents' to settle the dispute, including 'the documents whose refusal of disclosure is the very subject of the dispute'.[52] In such a case, however, the document is not disclosed to the applicant.[53] These powers allow the court to assess whether the public body was justified in refusing to disclose, entirely or partially, the documents.[54] The court may also impose that the public body adopts the necessary measures to implement its decisions.[55] This may include communicating the requested documents after a refusal to grant access has been annulled.[56] FOI decisions by the administrative court of first instance must be directly appealed before the *Conseil d'État* on matters of law.[57]

Furthermore, when the urgency of the situation warrants it, it is also possible to request access to administrative documents by directly referring the matter to the court in summary proceedings.[58] In such a case prior reference to the CADA is not required.[59] In practice, however, conditions to start summary proceedings are rarely met in FOI cases.[60]

Finally, it is also possible for an applicant to claim damages before the administrative court in the event of a loss caused by an unlawful refusal to disclose administrative documents or, conversely, in case of an illegal disclosure of such document.[61] Liability actions are, however, also uncommon in FOI cases.[62]

4 Principle of Access

The range of FOIA beneficiaries is broad as there is no standing requirement (Sect. 4.1). Furthermore, most public bodies and some private entities are subject to the FOIA (Sect. 4.2).

[52] CE, 23 December 1988, no 95310.
[53] CE, 14 March 2003, no 231661.
[54] Lallet (2014), at 427–429.
[55] Art. L911-1 Code of Administrative Justice.
[56] CE, 12 July 1995, no 161803; CE, 5 May 2008, no 294645; CE, 6 October 2008, no 289389.
[57] Art. R811-1 Code of Administrative Justice.
[58] See book V Code of Administrative Justice.
[59] CE, 29 April 2002, no 239466.
[60] Lallet (2014), at 441–444.
[61] CE, 25 July 2008, no 296505.
[62] Report (2015), 16.

4.1 Beneficiaries of Access to Documents

Every person, without distinction of nationality or proof of standing, has the right to request the disclosure of administrative documents under the conditions set out by the CRPA.[63] As explained below, however, 'personal' documents can only be accessed by the person concerned.[64] The text initially voted on by the National Assembly in 1978 limited the benefit of the FOIA to French citizens. Foreigners and legal persons were therefore excluded. However, the French Senate amended the bill to extend the right to access to all persons falling under the authority of the French administration (*administrés*).[65] Act no 79-587 of 11 July 1979 further clarified the scope of beneficiaries by using the words 'any person' instead of the word *administrés*: civil servants were, as a result, unequivocally included in the scope of the beneficiaries.[66] Finally, since the adoption of the FDRA in 2016, public bodies have also been entitled to request the disclosure of administrative documents in the exercise of their public service missions.[67]

According to the CADA the number of FOI requests has substantially increased over time.[68] In any event, the number of cases handled by the CADA has done so.[69] For instance, 5214 requests for CADA advice were introduced in 2016,[70] while they numbered less than a thousand in the first half of the 1980s.[71]

In the years following the adoption of the FOIA, natural persons represented a large majority of applicants before the CADA[72] and they still constitute the majority. A large percentage of these applications by individuals are made in the context of a dispute with an authority, for example,

[63] Art. L300-1 CRPA.
[64] Art. L311-6 CRPA. See Sect. 6.4.1.
[65] *Transparence administrative*, p. 43 (Moderne).
[66] Art. 8. See also Lasserre et al. (1987), p. 106.
[67] Art. 1 FDRA.
[68] CADA, *Annual report 2015*, p. 65.
[69] There are no centralised statistics on the number or identity of people requesting access to administrative documents. The only statistics available concern applicants to the CADA.
[70] CADA, *Annual report 2016*, p. 13.
[71] See CADA, *Annual report 2001*, p. 3 (contains the statistics for all years between 1979 and 2001).
[72] CADA, *Annual report 1982–1983*, p. 8; CADA, *Annual report 1986–1987*, p. 9.

regarding labour, fiscal, residency, or building matters.[73] More generally, the FOIA is often used by citizens for 'private' purposes.[74] This is sometimes taken to show a lack of interest in public affairs among French citizens.[75] Yet, requests for documents of broader administrative or political interest, notably at local level, are also regularly made, as shown, for example, by the 2013 statistics, even if they are not the majority.[76]

The number of legal persons requesting advice from the CADA has increased over time and now represents, on average, a third of requests.[77] Legal persons that have requested the CADA's intervention in recent years can be divided into three categories. The first category includes companies requesting access to administrative documents related to public procurement or, to a lesser extent, to tax or social security matters. The second category includes associations interested in environmental, building and planning, and tax issues, especially at local level. The third category includes public sector unions.[78]

4.2 Entities Bound by the Law

The FOIA applies, firstly, to documents held by public bodies acting in an 'administrative' capacity. The document may have been produced or received by the public body that holds it.[79] Documents in possession of the courts which are related to their judicial function, documents that are directly linked to judicial proceedings or that cannot be isolated from such proceedings, judicial documents related to civil status, and the documents of parliamentary assemblies cannot be obtained on the basis of the FOIA.[80]

[73] This has been the case from early on: see, for example, CADA, *Annual report 1982–1983*, pp. 12–14; *Annual report 1984–1985*, p. 6.

[74] *Transparence administrative*, p. 14 (Denoix de Saint Marc), p. 104 (Delaunay).

[75] *Transparence administrative*, p. 14 (Denoix de Saint Marc), pp. 49–50 (Moderne).

[76] CADA, *Annual report 2013*, p. 86.

[77] See, for example, CADA, *Annual report 2000*, p. 57 (numbers for 1999 and 2000); *Annual report 2005*, p. 19 (numbers for 2001, 2002, 2003, 2004, and 2005); *Annual report 2009*, p. 60 (numbers for 2006, 2007, 2008, and 2009); *Annual report 2013*, p. 85 (numbers for 2010, 2011, 2012, and 2013. In 2013, however, the requests were equally split between natural and legal persons).

[78] CADA, *Annual report 2012*, p. 68; *Annual report 2013*, p. 87.

[79] Art. L300-2 CRPA.

[80] The exclusion of judicial documents is a result of the case law (Lallet (2014), at 78). See, for example, CE, 7 May 2010, no 303168. On judicial documents related to civil status, see Lallet (2014), at 88–90. For parliamentary documents, see art. L300-2 CRPA.

Furthermore, the right to access administrative documents only applies to documents held by public bodies in the course of their public service mission.[81] The requested documents must, in other words, have a link with the competences of the public body.[82] This requirement entailed, for example, that until 2016 and the adoption of the FDRA, documents related to the private estates of public bodies (*domaine privé*) could not normally be disclosed on the basis of the FOIA.[83]

In addition to public bodies, the FOIA applies, secondly, to documents held by private entities in charge of a public service mission.[84] However, the FOIA only applies when there is a direct link between the requested document and the public service mission of the private entity.[85]

There are no centralised statistics that show which French administrations receive the largest share of requests for access to administrative documents. Only limited studies exist.[86] CADA's annual reports also provide some insights, even though the CADA only has jurisdiction for cases in which requests for access have been denied. Currently, cases arriving before the CADA are divided as given in Table 3.2.[87]

Table 3.2 Entities bound by the FOIA before the CADA (in %)

	2011	*2012*	*2013*	*2014*	*2015*
Local government	31.5	32.5	32.6	33.1	31.8
State—independent administrative authorities	32.5	32.8	30.3	31.4	28.6
Local public bodies	17.3	16	18	12.4	17
Private bodies in charge of a public service mission	7.3	7.4	7.5	9.7	9.5
State public bodies	6.9	5.8	6.6	6.4	6.5
Departments	3.4	4.3	41	5.7	4.5
Regions	0.7	0.8	0.6	1.1	1.6
Other entities	0.1	0.8	0.2	0.3	0.5

Source of data: CADA annual reports

[81] Art. L300-2 CRPA.

[82] CADA, *Le lien avec la mission de service public*, available on http://www.cada.fr/le-lien-avec-la-mission-de-service-public,6096.html.

[83] CE, 26 July 1985, no 35067; see art. 10 FDRA.

[84] Art. L300-2 CRPA. See Lallet (2014), at 50–60.

[85] CE, 17 April 2013, no 342372; CE, 24 April 2013, no 338649.

[86] For example, in 1988, the CADA estimated that a municipality of 30,000 inhabitants would receive 20–50 requests per week for access to documents on average (CADA, *Annual report 1986–1987*, p. 10). See also *Transparence administrative*, pp. 99–110 (Delaunay).

[87] *Annual report 2015*, p. 67 (our translation).

These statistics show that almost half of requests before the CADA concern local authorities (municipalities and local public bodies). The numbers were quite stable in 2011–2015. In its annual reports, the CADA also publishes a list of the public bodies whose decisions are most often challenged before the CADA. In recent years the state public finances department has been at the top of the CADA's list, followed, at a distance, by the Home Office (two state departments).[88]

5 Modalities of Access

The FOIA regulates the procedure for requesting access to administrative documents (Sect. 5.1), the form and content of responses to these requests (Sect. 5.2), and their timeframe (Sect. 5.3). As a rule the right to access only applies to documents and not to information (Sect. 5.4). Some administrative documents and data must be made publicly available *ex officio* by public bodies (Sect. 5.5). Regulated fees may be charged by public bodies when they copy a document that has been requested or when they allow the reuse of public data (Sect. 5.6).

5.1 Request for Access

An FOI request must correctly identify the requested documents: it must be clear and precise and addressed to the public body that holds the document.[89] However, public bodies must, as a rule, redirect to the relevant authority requests for access to documents that they are not in possession of and notify the applicant.[90] The requirement to identify the requested document precisely means that, in many cases, only insiders—people who know that an administrative document exists and are able to identify it—can make fruitful use of their right to request access to administrative documents.[91] This is a significant limit of the FOIA.[92] Article L322-6 CRPA, however, obliges public bodies to make publicly available, if possible

[88] *Annual report 2013*, p. 89; *Annual report 2014*, p. 59; *Annual report 2015*, p. 68.

[89] Lallet (2014), at 235.

[90] Art. L311-2 CRPA. This duty applies to both public and private bodies subjected to the CRPA. See CE, 15 October 2014, nos 365058 and 365063. A 2003 study in one French region showed that in a majority of the cases this duty was not respected (*Transparence administrative*, pp. 105–106) (Delaunay).

[91] Interview with M. Perrière.

[92] Delaunay (1993), p. 550.

through the internet, and update a register containing a list of the main documents in which public information can be found. This register must contain the title, the object, the date, and the conditions for reuse of the listed documents and a description of potential updates.[93] These registers improve the practicability of the FOIA. Many authorities have not created such a register yet,[94] however, probably because of the cost that is entailed.[95] No sanction applies when public bodies do not respect this duty.[96]

Although there is no standing requirement to make an FOI request, public bodies are not required to respond to requests that are abusive, for example, because of their numbers or their repetitive or systematic character.[97] It is not uncommon for public bodies to refuse access to their documents because they believe that requests are abusive.[98] According to the CADA, an FOI request is abusive when its manifest purpose is to disrupt the functioning of the administration.[99] A variety of elements determine whether a request is abusive. These elements are linked to the request for access itself, not to the person making the request. The abusive character of a request must be evaluated *in concreto*.[100] The number and volume of requested documents, and the systematic and repetitive character of requests, are the first criterion.[101] If the aim of the access request is to hurt the authority or to materially prevent it from processing the request, this will also be taken into account.[102] Similarly, request denial is more likely to be justified if the person requesting access has other ways of obtaining the documents, is already in possession of copies of the documents, or had access to the documents in the recent past.

[93] Art. R322-7 CRPA. For an example of a register, see http://www.bayonne.fr/la-mairie/repertoire-des-donnees-publiques/902-donnees-publiques.html (Bayonne municipality).

[94] Lallet (2014), at 461.

[95] See Delaunay (1993), p. 554.

[96] CADA, 8 June 2006, opinion no 20062173.

[97] Art. L311-2 CRPA.

[98] Between 2009 and 2013, 7% (2009), 11.3% (2010), 3.2% (2011), 5.3% (2012), and 1.94% (2013) of the unfavourable opinions issued by the CADA were justified by the abusive character of the requests (the numbers are not available in more recent years) (CADA, *Annual report 2013*, p. 98).

[99] CADA, *Les demandes abusives*, available on http://www.cada.fr/les-demandes-abusives,6147.html

[100] See, for example, CE, 25 July 2013, no 348669.

[101] See, for example, CE, 28 November 2014, no 373127.

[102] See, for example, CADA, 23 December 2008, opinion no 20084654.

Finally, the (contentious) context of the request or past refusals to pay the required fees by the person requesting access may also be taken into account to deny the request.[103]

5.2 Response/Answer

The authority normally has one month to respond to an FOI request. The absence of a response in this timeframe is assimilated to a decision to refuse disclosure.[104] This implicit decision can be challenged before the CADA and in court.[105] Furthermore, reasons must be given for administrative decisions that refuse disclosure, and the possibility of challenging the decision must be indicated.[106] If the possibility of legal challenge is not indicated, the two-month time limit to request advice from the CADA does not start to run.[107] In the case of implicit decisions, the absence of reasons does not, as such, affect the lawfulness of the decision. The reasons for the implicit decision may, however, be requested.[108]

5.3 Timeframes for Answering Requests

Public bodies normally have one month to respond to an FOI request and the absence of a response in this timeframe is assimilated to a decision to refuse disclosure. In practice, administrative inertia is frequent.[109] Even when there is no legal doubt about whether a document should be communicated, administrative authorities often wait for an appeal before the CADA before communicating the requested document. Handling FOI requests is often perceived as an administrative burden that comes on top of the normal activities of the administration, and the one-month deadline for responding to requests is considered to be short.[110] Furthermore,

[103] See, for example, CADA, 6 December 2007, opinion no 20074652.

[104] Art. R311-12 and R311-13 CRPA.

[105] See Sects. 3.2 and 3.3.

[106] Art. L311-14 CRPA.

[107] CE, 15 November 2006, no 264636 (per analogy).

[108] Art. L232-4 CRPA.

[109] See, for example, CADA, *Annual report 1999–2000*, p. 7; *Annual report 2002*, p. 18; *Annual report 2003*, p. 2; *Annual report 2005*, p. 26; *Annual report 2013*, p. 83. See also *Transparence administrative*, p. 87 (Chevallier).

[110] Interview with M. Dandelot et al. See also, for example, CADA, *Annual report 2012*, p. 62.

public bodies may also be wary of disclosing too hastily documents that should have been kept secret. This concern could even have become more pregnant because of the obligation to make administrative documents that have been disclosed publicly available on the internet.[111] In addition, some public bodies, such as small local governments, may not always have the material resources to handle requests for access to voluminous documents speedily.[112] This widespread inertia finds an echo in the fact that public bodies frequently communicate the requested documents as soon as a request for advice is lodged with the CADA, without waiting for the position of the CADA.[113] Thus, in such cases, a mere request for advice before the CADA is enough for the claimant to obtain access to the requested document. Nevertheless, such behaviours weaken the effectiveness of the FOIA.[114]

In many ways the fact that administrative documents may be requested is not factored in by authorities when drafting them. It is only at the end of the process and if a document is requested that the administration looks at the document from the perspective of disclosing it.[115] The non-factoring in of transparency requirements in the organisation and functioning of the administration has been highlighted for decades.[116] Overall, this shows that transparency is not really embedded in French administrative culture.

5.4 Relationship between Documents and Information

Article L300-2 CRPA gives a broad definition of administrative documents that may be requested: the definition covers all documents produced or received in the exercise of their public service mission by public bodies or private bodies in charge of such a mission. Files, reports, studies, statistics, decisions, and so on are included in this definition. Administrative documents are covered whatever their date, their form, their format, or where they are held.[117]

[111] Interview with M. Dandelot et al. See art. L312-1-1 CRPA.

[112] Interview with M. Dandelot et al.

[113] Interview with M. Dandelot et al. See Table 3.1.

[114] Roux in Debbasch (ed.) (1990), p. 91.

[115] Interview with C. Bouchoux.

[116] Lasserre et al. (1987), p. 199; Roux in Debbasch (ed.) (1990), pp. 91–92; Delaunay (1993), pp. 575–576; Puybasset (2003), p. 1308; *Transparence administrative* (2003), p. 107 (Delaunay). See also, for example, CADA, *Annual report 2003*, p. 2.

[117] Lallet (2014), at 63.

Public bodies are not obliged to respond to requests for information.[118] The aim of the law is not to oblige the authority to undertake research to provide the applicant with documentation on a given topic.[119] There is, accordingly, no right to obtain information from the administration.[120] As an exception to this rule, however, people have the right to know the information contained in administrative documents when the conclusions of the document are the basis of a decision taken against them.[121]

In 2016 the FDRA introduced a duty for administrative authorities to communicate the details of algorithmic processes that lead to the adoption of individual decisions if they are requested to do so.[122] An example of such a decision is the allocation of students to different higher education tracks ('Post-Bac' admission system). These decisions are based on algorithmic processes. The objective of the 2016 legislative change is to allow, for example, the students to understand and challenge the working of the algorithm that leads to the allocation decision.[123] Through this change citizens are granted access not to a document as such but rather to a tool shaping the administrative decision-making process.

5.5 *Methods of Providing Public Information* Ex Officio, *Including Open Data Policy*

France has developed an active policy of open data within the public sector, notably with the adoption of the FDRA in 2016. Open data is seen as a tool for fostering innovation and economic activity and also for increasing the democratic accountability of the administration as well as its efficiency.[124] Open data within the public sector is probably the most significant development regarding administrative transparency and FOI in France in recent years.[125] It signals a transition from a logic of demand to

[118] CE, 16 January 1985, no 46591; CE, 30 September 1987, no 66573.

[119] CE, 9 March 1983, no 43438; CE, 27 September 1985, no 56543; CE, 30 September 1987, no 66573.

[120] Lallet (2014), at 65. As explained in Sect. 7.2, the situation differs in environmental matters.

[121] Art. L311-3 CRPA.

[122] Art. L311-3-1 CRPA. The algorithms may also themselves qualify as administrative documents in the sense of the FOIA (CADA, *Annual report 2016*, p. 18).

[123] FDRA, *Legislative proposal*, p. 11.

[124] FDRA, *Legislative proposal*, p. 14.

[125] Interview with M. Perrière; interview with C. Bouchoux.

a logic of offering public information by French authorities, as well as a transition from a logic of access to administrative documents to a logic of access to public data.[126] This open data policy may mitigate the effects of the administrative inertia that has plagued the effectiveness of the FOIA since the beginning.[127]

The French policy on open data translates into different obligations resting on public bodies to make documents and data publicly available. For example, data that is commonly used and frequently reused and that must be entirely reliable, such as national registers of associations and undertakings, must be made publicly available in order to facilitate their reuse.[128] An administrative unit—Etalab—coordinates and promotes open data initiatives at national level and runs an official centralised open data platform (www.data.gouv.fr). In 2017 more than 25,000 sets of data were available on this platform.[129]

The French policy on open data raises a number of questions. For instance, as mentioned, this policy seeks to improve the democratic accountability of French authorities. It is not, however, clear that empirical research has been conducted into the ability and willingness of citizens to engage with the publicly available information and data to call public bodies to account. On the contrary, open data initiatives have not originated in French civil society.[130] Furthermore, the risks of exacerbating the digital divide, with a very few who not only have access to the internet but are also in a position to critically engage and develop the technical tools to extract, analyse, and contextualise data for the sake of the public debate, on the one hand, and the ones left with no clue how to develop the required skills, on the other hand, have been left unchartered. Finally, the obligation to respect the exceptions to the public character of the information contained in administrative documents means that, in many cases, databases held by public bodies cannot be made publicly available as such: public bodies need to distinguish between information that they possess which can be made public and information that cannot. This may

[126] Interview with P. Lemoine. See also CADA, *Annual report 2016*, p. 19.

[127] Interview with P. Lemoine.

[128] Art. L321-4 and R321-5 CRPA. The conditions for reusing public information are examined in Sect. 5.6. See also art. L312-1 CRPA, art. L312-1-1 CRPA, art. L312-1-3 CRPA, and art. L312-2 CRPA (these provisions list documents and data that must be made publicly available).

[129] http://www.data.gouv.fr/fr/datasets/.

[130] Interview with P. Lemoine.

entail very substantial work. The CADA seems to consider that, in the future at least, the open data obligations resting on public bodies should be factored into the creation and updates of administrative databases.[131] One must wait to know whether that will really happen.

5.6 Fees and Costs, Including the Reuse of Information

Access to administrative documents is granted either through on-site consultation of the document, the communication of a copy of the requested document, via email if the document exists in electronic version or through publication online. The person who makes the request chooses how she/he wishes to access the document[132] within the limits of the technical possibilities of the administration[133] and the need to ensure the physical integrity of the document. When a copy of the requested document is delivered, a fee covering the cost of reproduction and postal services can be charged,[134] under the control of the CADA and the judge.[135] The fee cannot include the personnel costs involved in researching, copying, and sending but may include the costs of the material, the copy (material depreciation and functioning costs), and the postal fees.[136] Maximum costs for the copying of the documents have been set by a decree from the prime minister and the budget minister.[137] In 2017 the costs that can be recovered are as follows: maximum 0.18 € per page, 1.83 € per floppy disk, and 2.75 € per CD-ROM.[138] The copying costs for other material may only cover the price of the copy.[139] Payment of the fees can be required beforehand.[140]

Before 2005 the reuse for commercial purposes of documents disclosed under the FOIA was restricted.[141] Since 2005 and the implementation of Directive 2003/98/EC, a right to reuse public information contained in administrative documents for purposes other than those for which the

[131] CADA, *Annual report 2016*, pp. 20–21.
[132] CE, 15 May 2006, no 278544.
[133] See, for example, CADA, 3 May 2007, advice no 20071782.
[134] Art. L311-9 CRPA.
[135] See, for example, CE, 4 August 2006, no 263299.
[136] Art. R311-11 CRPA.
[137] Decree of 1 October 2001. It should be updated to take into account new technological developments (Lallet (2014), at 249), but this has not been the case yet.
[138] Art. 2 Decree of 1 October 2001.
[139] CADA, 25 January 2007, opinion no 20070331.
[140] CADA, 19 January 2006, opinion no 20060472.
[141] Art. 10 Act no 78-753 of 17 July 1978 as originally enacted.

documents were initially prepared or received by the authority has been established under the conditions currently set out in book III of the CRPA.[142] This right to reuse is made more effective by the fact that, whenever public information is electronically disclosed, it must be disclosed in an open standard that can easily be reused and automatically processed.[143] This is important as inadequate standards significantly limit the possibilities for reusing administrative documents.[144] Information contained in documents that have not been made publicly available and for which there is no right to access and documents subjected to intellectual property rights are excluded from the right to reuse.[145] Besides, privacy requirements must be respected when public information is reused,[146] and the integrity of the information must also be respected.[147] The reuse of public information is normally free of charge. This principle is one of the main measures adopted in recent years in France to encourage the reuse of public information as part of the French policy of open data within the public sector.[148] Public bodies are therefore compelled to allow economic operators to reuse valuable data generated in the public sector freely. Notably, however, if a public body must cover a substantial proportion of its costs through its own resources, it may require the payment of a fee. In such a case the fee cannot exceed the costs incurred in gathering, generating, making publicly available, or spreading the information.[149] When the payment of a fee is required, the right to reuse is subjected to a licence that defines the conditions for reuse.[150] Infringements of the licence requirements or of other legal requirements regulating the reuse of public information can be sanctioned by the CADA, notably by way of fines.[151] Finally, an exclusive right to reuse public information can be granted only when this is necessary for the purposes of a public service mission and for ten years maximum; it must also be reevaluated at least every three years.[152]

[142] Title II of book III CRPA.
[143] Art. L300-4 CRPA.
[144] Senate report, volume 2, pp. 69–72.
[145] Art. L321-2 CRPA.
[146] Art. L322-2 CRPA.
[147] Art. L322-1 CRPA.
[148] Lallet (2014), at 446 ff.; Cluzel-Métayer (2017), p. 343.
[149] Art. L324-1 CRPA. See also art. L324-2 CRPA (digitalisation of cultural collections).
[150] Art. L323-1 and art. L323-2 CRPA. A licence for reuse can be imposed in other cases as well.
[151] Art. L326-1 and art. L342-3 CRPA.
[152] Art. L325-1 and art. L325-2 CRPA.

6 Exceptions

The FOIA provides for a range of exceptions that can be invoked by public bodies to refuse disclosure of administrative documents. No statistics are available about the ways in which public bodies use these exceptions. However, as seen above,[153] their primary tool for resisting FOI requests is more silence and inertia than delving into the technicalities of the exceptions that the FOIA provides. As such, public bodies are afraid to disclose administrative documents that should have been kept secret. The actual working of the exemptions is thus better investigated through the CADA's practice and administrative courts' case law.

After a brief overview of the scope of the exceptions (Sect. 6.1), this section maps the documents that are exempted from the FOIA for reasons pertaining to good administration (Sect. 6.2), exceptions based on the protection of public interests (Sect. 6.3) and exceptions based on the protection of private interests (Sect. 6.4). In short, transparency cannot imperil either the pursuit of public activities or citizens' trust.[154] Finally, nuances and limitations to the disclosure process (partial disclosure) (Sect. 6.5), the absence of a public interest test (Sect. 6.6), and the case of non-existent documents (Sect. 6.7) are briefly discussed so that the full scope of exceptions under the FOIA appears.

6.1 Scope of the Exceptions

The FOIA distinguishes three different kinds of exceptions to the right of access to administrative documents: good administration reasons, exceptions on grounds of public interests (including secrecy of deliberation by government, international relations, defence, state security, economy of the state, ongoing proceedings, investigation into tax offences, secrecies protected by law), and exceptions on grounds of private interests (privacy, industrial and commercial secrecy). These exceptions were gradually listed in articles 6 (good administration and public interest exceptions) and 6*bis* (private interest exceptions) FOIA, now L311-5 CRPA. Article 6 remained unchanged between 1978 and 2000, whilst article 6*bis* was introduced promptly, in 1979. After 2000 the pressure to recognise more exceptions

[153] Section 5.3.
[154] Lallet (2014), at 140.

increased, and articles 6 and 6*bis* were modified at least seven times. This illustrates how difficult it is for transparency to become truly embedded in administrative culture.

The CADA gives unfavourable opinions (on the merits) in less than 10%[155] of the appeals lodged to it, meaning that it believes that administrative documents should not be disclosed only in a small minority of cases. Although there may be slight variations over time in the exceptions that the CADA accepts, the overwhelming majority of the refusals to disclose administrative documents relies on the protection of privacy (approx. 55%), followed by three grounds accepted in about 10% of cases each (commercial and industrial secrecy, preparatory documents, and incomplete documents). This means that access to preparatory and incomplete documents represents about 20% of the cases in which the CADA finds that refusals to disclose are justified. Finally, grounds are also accepted in a range of rather heteroclite cases: legally protected secrecies, abusive requests, documents pertaining to judicial procedures, public safety grounds, and so on. This trend whereby the majority of the exceptions pertains to privacy has been extremely constant over time. The CADA noted it in its 1984–1985 annual report and explained it as a lack of curiosity among citizens about major public issues. So there are actually very few requests for administrative documents in relation to national defence, international relations, public safety and currency, and so on.[156]

The following two figures account for the detailed statistics in 2013 and the overall trend since 1988. Abusive requests peak in 2003 because this ground was formally introduced in the FOIA in 2000 (Figs. 3.1 and 3.2).[157]

6.2 Good Administration as an Exception to Access

The first kind of exceptions to FOI can be justified broadly speaking in terms of exceptions that are needed to ensure that the proper running of the administration is not disturbed by FOI requests.

Among these exceptions some documents are excluded from disclosure on the ground that they are already public (e.g. in official journals or on the internet),[158] unfinished/incomplete or preparatory,[159] an exception

[155] 6.5% (1990), 7.5% (1995), 4.1% (2005), 9.2% (2010), 9.8% (2015).

[156] CADA, *Annual report 1984–1985*, p. 7.

[157] See Sect. 5.1.

[158] Art. L311-2 CRPA. See Sect. 5.5. Add to these exclusions abusive requests.

[159] To be contrasted with the special regime applicable for environmental information (see Sect. 7.2).

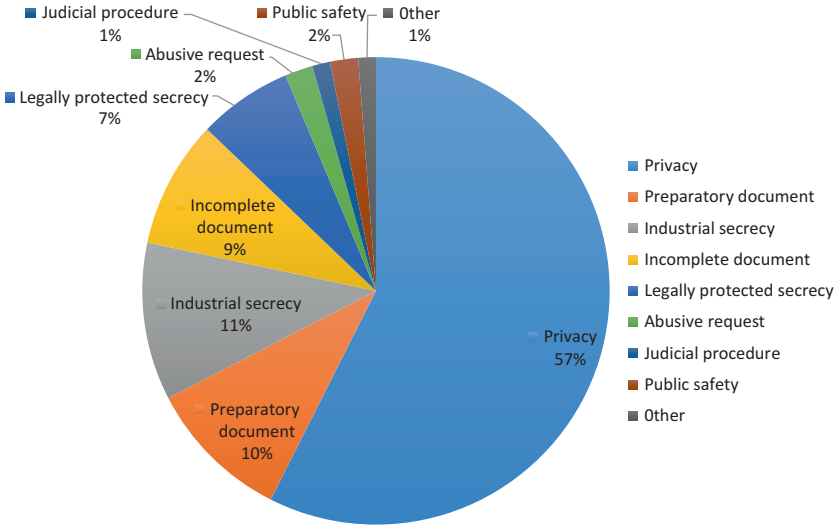

Fig. 3.1 Repartition of exceptions—2013 (2013 is the last year for which a complete set of statistics is available at the time of writing; Source of data: CADA annual reports)

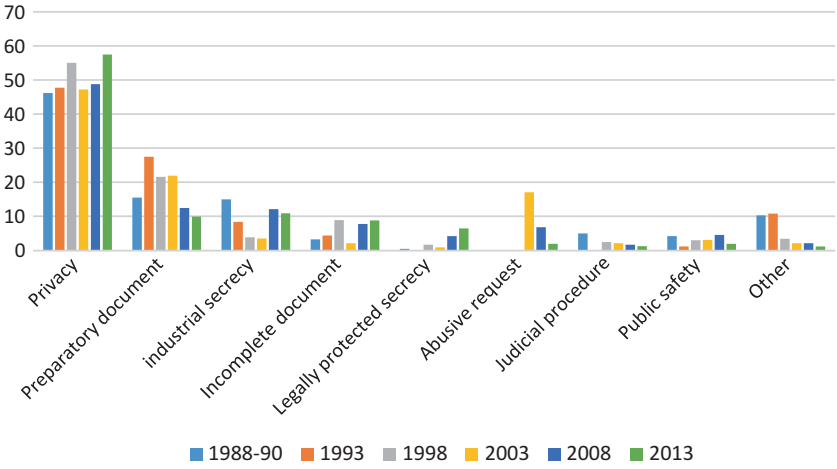

Fig. 3.2 Consistency over time in the main grounds for exceptions (Source of data: CADA annual reports)

introduced in 2000 confirming the previous practice of the CADA.[160] Interestingly, these exceptions represented a larger proportion of exceptions before their formal introduction in the FOIA than after.[161] A preparatory document is a document that is one step in a longer procedure. An incomplete document is a document that is still in a draft form. However, the distinction between 'incomplete' documents and 'preparatory' documents is rather arcane in practice.[162] As this could lead to a situation where citizens face a kind of administrative black box with no way to know the position of public bodies before a decision is taken, a change was introduced in 2014: preliminary opinions that public bodies collect whilst they are investigating individual files are made disclosable when applicants request them and when the administrative decision makes individual rights arise to the benefit of individual applicants.[163] However, when these preliminary opinions include comparisons of individual merits, they remain outside the scope of the FOIA until the administrative decision is taken.[164]

The labelling of this type of exclusion as exclusion on the ground of good administration is not a legal one but one made in the scholarship.[165] The underlying idea is clear: these are cases where the way in which public bodies are organised, make their decisions, and process FOI requests should not be overburdened. However, it is striking to use the concept of good administration as a tool for restricting access to administrative documents. In international and European instruments, the concept of good administration usually seeks to make the administration more open.[166]

6.3 Exceptions Based on the Need to Protect Public Interests

The second kind of exceptions that can be used to refuse the disclosure of administrative documents relates to public interests that need to be protected in the absolute. The main grounds that were identified in 1978 include the protection of governmental deliberation, international

[160] CADA, *Annual report 1999–2000*, pp. 19–20.

[161] For example: peak for preparatory documents of 39.8% in 1992 (CADA, *Annual report 1992*, p. 33) while now the statistics average 10% (CADA, *Annual report 2013*, p. 98).

[162] Lallet (2014), at 110–122.

[163] Ordinance no 2014-1328 of 6 November 2014 (now Art. L311-2 al 2 CRPA).

[164] Art. L311-2 al 3 CRPA.

[165] Lallet (2014), pp. 109–139.

[166] For example, art. 15 TFEU.

relations/foreign policy, defence/national security, state security, and the economy of the state. On top of these exceptions, article 6 FOIA especially mentioned a range of documents that were automatically excluded from the system by the very sensitive nature of their content as a rule. In short, all matters pertaining to the very core of public power and activities (*activités régaliennes*). Until 2000 the FOIA provided that a list of these documents needed to be adopted by ministerial departments. This was, however, omitted when article 6 was redrafted following the 2000 reform.[167]

6.3.1 Automatic Exclusion: Nature of the Document

The FOIA lists documents that are automatically excluded from access due to their nature. This creates a range of documents to which the principle of access to documents does not apply.[168] However, it makes the decision-making process of public bodies, the CADA, and administrative judges easier and more straightforward. No specific ground for denying access needs to be looked at. In addition, the list tends to grow over time, which is indicative of the resistance that transparency meets with.

At the outset only the opinions of the *Conseil d'État* and administrative judges were included in this list. However, the opinions can be voluntarily disclosed with the agreement of the public body that has requested the *Conseil d'État*'s opinion. These opinions are now made available on a publicly accessible database,[169] a rare and symbolic step towards more voluntary transparency starting from one of the key actors of the FOIA and announced by the French president himself.[170]

To the list of excluded documents were added reports and documents relating to health bodies.[171] In 2009 parliamentary proceedings were added to the list[172] and in 2011[173] documents drafted or held by the Competition Authority. Finally, documents held by the *Haute Autorité pour la transparence de la vie publique* have also been excluded from the FOIA since 2013.[174]

[167] Art. 7 Act no 2000-321 of 12 April 2000.
[168] Art. L311-5, 1° CRPA.
[169] http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/ConsiliaWeb.
[170] http://www.vie-publique.fr/actualite/alaune/gouvernement-rend-publics-avis-du-conseil-etat-20150319.html.
[171] Art. 40 Act no 2000-1257 of 23 December 2000.
[172] See Sect. 4.2 and Art. 2, 2° Ordinance no 2009–483 of 29 April 2009.
[173] Art. 50 Act no 2011-525 of 17 May 2011.
[174] Art. 20 Act no 2013-907 of 11 October 2013.

6.3.2 *Secrecy of Deliberation by Government and Executive Bodies*[175]

The CADA uses three criteria to apply this exception: (1) the nature of the deliberating body, (2) the content and subject matter of the document, and (3) the scope of the decision-making power.

This secrecy applies when the highest authorities of the state are considered no longer acting in their administrative capacity but as political organs. In this case the head of state, the prime minister, and ministers are covered by this exception. Government minutes (*Conseil des ministres*), opinions to interministerial committees and meetings, and any documents requested by the French president, the prime minister, or ministers to decide on government policy are covered by this exception. Independent administrative authorities are not covered by the exception, even when a representative of the minister attends their deliberations. Nor are covered reports drafted by the Court of Audit or local government deliberations.

This exception is extensively understood in two ways. Firstly, the CADA decided that this ground covered all the documents that contributed to the drafting of a decree taken in *Conseil des ministres*.[176] Secondly, even in relation to environmental information (where more extensive access to information applies), the *Conseil d'État* decided that the prime minister is the authority which needs to decide, on a case-by-case basis, whether the secrecy of governmental deliberation would be imperilled by releasing the requested information.[177]

No detailed statistics exist on the number of cases in which this exception is relied on as it falls within the 'other' category for 2009–2013, presumably because in previous years the number had been extremely small: 0.6% (2005), 0% (2006), 0.8% (2007), 0.2% (2008).[178]

6.3.3 *International Relations/Foreign Policy*

This exception covers all documents that are directly related to the diplomatic relationships between French public bodies and foreign bodies (e.g. diplomatic mail, inquiries into prisoners at a high level, relationships with

[175] CADA, *Délibérations du Gouvernement*, available on http://www.cada.fr/le-secret-des-deliberations-du-gouvernement-et,6099.html.

[176] CADA, 7 June 2007, n° 20072239.

[177] CE, 30 March 2016, no 383546.

[178] CADA, *Annual report 2008*, p. 67. Similar results in CADA, *Annual report 1999–2000*, p. 71 (1995–2000) and CADA, *Annual report 2004*, p. 16 (2001–2004). The situation was, however, different earlier on: for example, in 1993, 3.6%, and in 1994, 2.7% (CADA, *Annual report 1993–1994*, p. 76).

the European Commission). In some cases this exception can extend to matters more indirectly connected to such diplomatic relationships (e.g. general guidelines sent to consulates relating to the processing of visa requests, statistics relating to visas), but it does not extend to, for example, individual requests regarding visas.[179]

No detailed statistics exist on the number of cases in which this exception is relied on as it falls within the 'other' category for 2009–2013, presumably because in previous years the number had been extremely small: 0.4% (2005), 0% (2006), 0.6% (2007), and 0.6% (2008),[180] up from 0% of cases between 2001 and 2004.[181]

6.3.4 Defence/National Security[182]

Defence secrecy covers all documents that have been classified and are stamped appropriately. A specific law regulates the classification procedure.[183] These classified documents can be communicated after 50 or 100 years (if their communication would jeopardise the security of named persons or easily identifiable people).[184] CADA's statistics show that it was relied on in 0.2% (2005), 0.5% (2006), 0.6% (2007), and 0.2% (2008) of cases,[185] up from 0% between 2001 and 2004, however.[186] No recent statistics are available.

At first no specific procedure was organised to identify defence secrecy, which led to discussions between the Department of Defence and the CADA on how best to accommodate the necessary balance between transparency and the need to protect defence secrecy.[187] In due course this led to organising a specific procedure when it comes to using these classified documents in a judicial procedure: a specific commission (the so-called *Commission consultative du secret de la défense nationale* or the *Consultative Commission on national defence secrets*) was set up to decide whether defence secrecy was justified when invoked in judicial proceedings. This commission, composed of five members, including three senior judges, is

[179] Lallet (2014), at 164–165.
[180] CADA, *Annual report 2008*, p. 67.
[181] CADA, *Annual report 2004*, p. 16.
[182] Guillaume (1998), 1223.
[183] Act no 98-567 of 8 July 1998, now Art. L2312-1 ff. Defense Code.
[184] Respectively, Art. L231-2, I, 3° and 5° Defense Code.
[185] CADA, *Annual report 2008*, p. 67.
[186] CADA, *Annual report 2004*, p. 16.
[187] CADA, *Annual report 1982–83*, pp. 15–16.

an independent administrative authority which provides an opinion regarding the declassification of classified information upon the request of a judge or the minister of defence. It issued 205 opinions between 1997 and 2015, peaking at 26 opinions in 2006 and 2013.[188] In recent years the numbers have declined to 11 (2014) and 16 (2015).[189]

As elsewhere, the natural leaning towards secrecy in French administrative culture returned. In 2009 a legal provision extended the role of the *Commission consultative du secret de la défense nationale*[190]: the Commission was made competent to attend premises searches in locations where documents and information relating to national defence were present. In the context of the criminal investigation into the 2002 attack in Karachi,[191] the *Cour de Cassation* (French highest civil and criminal court) asked the Constitutional Council whether this new provision was constitutional.[192] The Constitutional Council decided that this provision was unconstitutional as it conflicted with the duty to organise a fair trial and the principle of power separation.[193]

6.3.5 State Security, Public Security, and Security of Individuals[194]

The state security exception covers all the acts and procedures aiming to protect the continuity of institutions' workings. Mostly, these acts and

[188] *Cinquième rapport de la Commission consultative du secret de la défense nationale*, Paris, La Documentation française, 2010, p. 8 (for 2005, 2006, and 2007, average of 20 opinions a year). Despite variations across the years, the overall trend is confirmed in the following years (*Rapport de la Commission consultative du secret de la défense nationale 2013–2015*, 2016, p. 85).

[189] *Rapport de la Commission consultative du secret de la défense nationale 2013–2015*, 2016, p. 85.

[190] Art. 11 Act no 2009-928 of 29 July 2009. Legislative elaboration: https://www.senat.fr/dossier-legislatif/pjl97-297.html; opinion from the commission, https://www.legifrance.gouv.fr/affichSarde.do?reprise=true&page=1&idSarde=SARDOBJT000007104682&ordre=null&nature=null&g=ls; more information on this commission is available in the *Projet de loi relatif à la programmation militaire pour les années 2009 à 2014 et portant diverses dispositions concernant la défense*.

[191] On the events see https://www.theguardian.com/world/2002/may/09/pakistan.rorymccarthy.

[192] Crim., 31 August 2011, no 11-90.065.

[193] CC, 10 November 2011, no 2011-192 QPC (official translation on the website of the CC).

[194] CADA's statistics only refer to public security and give the following figures: 4.9% (2009), 1.5% (2010), 2% (2011), – (sic–2012), 1.94% (2013) (CADA, *Annual report 2013*, p. 98).

procedures are classified and fall within the scope of the previous exception of defence secrecy.

The public security and security of individual exceptions often overlap. The security of individuals[195] is, however, more related to a specific risk of retaliation against an individual without a risk to public safety as such. These exceptions cover a range of information pertaining to authorisations to own a weapon or to the safety infrastructure of the railways. They are, however, never assumed and need to be assessed within the particular context of the FOI request.[196]

In 2016, an exception protecting the 'security of the information systems of administrations' has been added by the FDRA.[197]

6.3.6 Economy of the State, Monetary and Financial Issues of the State

This exception aims to prevent speculation or acts that would weaken France's monetary policy. This exception is extremely rarely accepted by the CADA,[198] even more so as monetary policy is mostly decided at European level. The statistics confirm this as the category is not named for the periods 2001–2004,[199] 2005–2008,[200] or 2009–2013.[201]

6.3.7 Protection of Ongoing Proceedings and Investigations

This exception needs to be distinguished from the judicial documents that are excluded from the scope of the FOIA.[202] Here this exception pertains to administrative (and not judicial) documents. However, their disclosure is forbidden as it would interfere with pending judicial proceedings.

In practice, this exception seems rarely accepted.[203] It does not, for instance, apply when communicating the document would be related in some loose way to pending proceedings. The CADA requires, indeed, that communication would impede or complicate the judge's decision-making

[195] Exception added by Act no 2000-321 of 12 April 2000, art 7-V.
[196] Lallet (2014), at 167–171.
[197] Art. 2, II, 1° FDRA.
[198] Lallet (2014), at 174.
[199] CADA, *Annual report 2004*, p. 16.
[200] CADA, *Annual report 2008*, p. 67.
[201] CADA, *Annual report 2013*, p. 98.
[202] See Sect. 4.2.
[203] 1.2% (2009), 0.9% (2010), 2.4% (2011), 3.8% (2012) and 1.23% (2013) (*Annual report 2013*, p. 98).

or would delay the decision.[204] The *Conseil d'État*, for instance, decided that an internal opinion of the Home Office directed to police forces could not be disclosed as it had been drafted within the context of a litigation relating to a public procurement. The disclosure of that document would have indicated to the judge who had to decide on the dispute how one of the parties itself assessed the legality of the procurement. Therefore, this disclosure would have breached the principle of a fair process.[205]

In any case, a document may be communicated to the applicant if the public body or judge believes that communication would not trigger difficulties regarding pending judicial proceedings.[206]

6.3.8 Protection of Investigations into Offences

At the outset, this exception covered documents that explained the methods used by the customs and tax authorities to uncover and fight fraud. It did not, however, cover documents relating to cooperation with foreign authorities, which can be disclosed as long as sensitive data is hidden. Furthermore, documents pertaining to criminal offences were not covered as they are more likely to fall within the scope of the state security or public safety exceptions.[207]

The statistics showed that this exception was rarely used. It was not explicitly mentioned for the period 2009–2013,[208] and it was used in about 1% of the cases where exceptions to FOI requests were accepted by the CADA for the period 2005–2008.[209] However, the FDRA extended this exception to the investigation and prevention of 'offences of any kind' by the competent authorities.[210]

6.3.9 Secrecies Protected by the Law

The FOIA ends its list by referring to 'secrecies that are protected by the law'. In the context of access to environmental information, the Court of Justice of the European Union (CJEU) found that this reference was too general to allow certainty about the secrecies that were so covered, so that France was in breach of its obligations under the Directive

[204] Lallet (2014), at 177–178.
[205] CE, 28 September 2016, no 390760.
[206] Lallet (2014), at 179.
[207] Lallet (2014), at 180–183.
[208] CADA, *Annual report 2013*, p. 98.
[209] CADA, *Annual report 2008*, p. 67.
[210] Art. 2, II, 2° FDRA.

n°90/313/CEE of 7 June 1990 on freedom of access to information on the environment.[211]

In practice this catch-up expression refers to a wide range of statutes protecting documents held by professionals that should not be disclosed to the public. Illustrations of such statutes include relationships between a barrister and his clients, data relating to gamete donors, the professional secrecy of labour inspectorates, the professional secrecy of tax officers acting in tax procedures, and so on.[212]

As the list of these secrecies tends to grow over time, the number of times they are relied on as exceptions to FOI requests also increases, from 0.9% in 2003[213] to 3.1% in 2005[214] to 6% in 2010 and 7.6% in 2012.[215]

6.4 Exceptions Based on the Need to Protect Private Interests

The third kind of exceptions that the CADA can use to reject FOI requests relates to documents that can only be communicated to the persons named in them.[216] These relative exceptions were introduced in 1979[217] as they were not included in the original FOIA. Article L311-6 CPRA currently lists the following documents: (1) documents whose communication would jeopardise privacy, medical secrecy,[218] and industrial and commercial secrecy, (2) documents containing an assessment or value judgement on a natural person identified by name or easily identifiable, and (3) documents which bring to light the behaviour of a person when this might bring her harm. We first consider privacy, including an assessment or a value judgement and information on the behaviour of a person (Sect. 6.4.1), and then commercial confidentiality (Sect. 6.4.2).

[211] On this directive see Sect. 7.2.

[212] CADA, *Autres secrets protégés par la loi*, available on http://www.cada.fr/autres-secrets-proteges-par-la-loi,6229.html.

[213] When it had dipped from slightly higher levels the previous years (CADA, *Annual report 2004*, p. 16).

[214] CADA, *Annual report 2008*, p. 67.

[215] CADA, *Annual report 2013*, p. 98.

[216] Art. L311-6 CRPA.

[217] Art. 9 Act no 79-587 of 11 July 1979.

[218] It is mentioned in art. L311-6 CRPA but refers to a special regime detailed elsewhere (art. L111-7 public health code). Medical information is disclosed to the person concerned directly or through a doctor, according to her wish (art. L311-6 last alinea CRPA). CADA, *Informations à caractère médical*, available on http://www.cada.fr/informations-a-caractere-medical,6092.html.

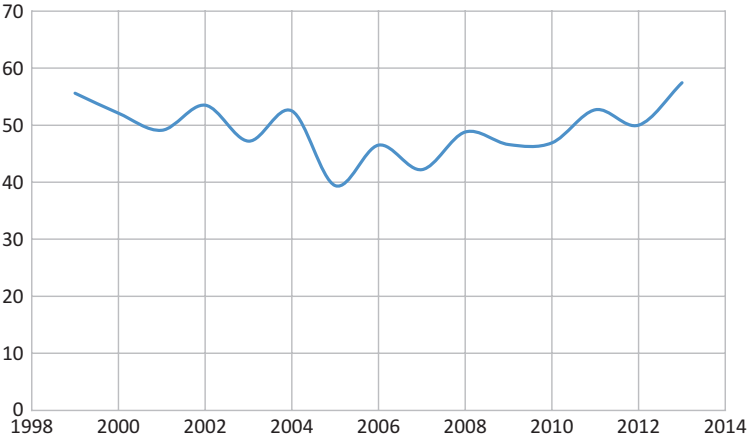

Fig. 3.3 Privacy as exception (1998–2014) (in percentage of all exceptions) (Source of data: CADA annual reports)

6.4.1 Privacy and Protection of Individuals[219]

The protection of privacy is the most frequently relied-upon exception for the CADA to issue an unfavourable opinion on FOI requests. With some variations between 1998 and 2014, it generally represents between 40% and 55% of the cases for rejecting such requests. It is systematically the first cause for rejection (other than in 1992, when the exception of preparatory documents came first at 39.8% of the cases) (Fig. 3.3).

These statistics mean that a voluminous practice flows from this exception. Firstly, both natural and legal persons benefit from the privacy exception. This means, for instance, that documents including information relating to trade unions and their representativity cannot be disclosed because such disclosure would reveal the trade union orientations of corporations.[220] Secondly, only the person to whom the information relates in the document or the person who legally represents him/her can request access to the administrative documents. Family members do not have the right to access these documents.[221] Thirdly, the privacy exception does not cover the first and last names of a person. It only concerns the link between

[219] Lallet (2014), at 191–212.
[220] CE, 17 April 2013, no 344924.
[221] CE, 8 June 2016, no 386525.

these data and data relating to privacy that require anonymisation or the occultation of data throughout the document. In the case law and CADA practice, the following data have been found to pertain to privacy: the date of birth and private address of a person, to the exclusion of the local government area where the person lives and their family situation, emotional relationships, health state (including pregnancy), patrimonial data, income and taxes, *curriculum vitae*, and political and religious opinions.[222]

The privacy exception also applies in two specific circumstances which find their origin in the exclusion of disclosure for documents that are 'nominative', as the FOIA originally provided. As this expression was not clear, the practice distinguished two distinct cases in which documents were 'nominative': (1) when they contained an assessment or value judgement on a natural person identified by name or easily identifiable and (2) when they brought to light the behaviour of an individual and this might bring her harm. These two aspects were then included in the FOIA in 2000.[223]

An assessment or value judgement on a natural person is a positive or negative assessment on the personality, dealings, qualities, or faults of a person who can be identified. This includes, for instance, expert advice on a scientific or artistic work that needs to be submitted to a public body. There is necessarily a subjective element to this assessment or value judgement. Mere objective facts and elements are not included. However, a mark that a person receives for an administrative competition[224] or the modulable part of an income (reflecting performance)[225] falls within this exception.

Documents that reveal the behaviour of an individual relate to purely objective, factual statements on an individual's dealings. The determining factor for whether these documents fall within the exception to the FOI is that these documents may harm, in the specific circumstances of the case, this individual. Therefore, contextual elements, such as tensions in the work environment between employees or between citizens, need to be taken into account. These documents include complaints, witness statements, and so on that may be used by public bodies when they are taking (often unfavourable) decisions in relation to individuals.[226]

[222] http://www.cada.fr/protection-de-la-vie-privee,6111.html.

[223] Art. 7, 7° Act no 2000-321 of 12 April 2000. For details, CADA, *Appréciation, jugement de valeur et comportement*, available on http://www.cada.fr/appreciation-jugement-de-valeur-et-comportement,6113.html.

[224] CE, 20 January 1988, no 68506.

[225] CE, 10 March 2010, no 303814.

[226] Lallet (2014), at 206.

The CADA included statistics for the use of this exception for the first (and only) time in 2013. It used the 'behaviour' criterion in 12.82% of the cases and the 'assessment' criterion in 5.82% of the cases in which it gave an unfavourable opinion.[227]

6.4.2 Industrial and Commercial Secrecy

This exception has been elaborated upon in the CRPA, which now specifies that industrial and commercial secrecy 'includes the secrecy of processes, secrecy of economic and financial information, of commercial or industrial strategies and is assessed by taking into account, if needed, the fact that the public service mission of the public body [to which the right of access to documents applies] is subject to competition'.[228] This statutory explanation of industrial and commercial secrecy consolidates the previous practice of the CADA based on the old article 6 FOIA.[229] The determining factor for the CADA to rely on this exception is an analysis of the consequences that disclosure of the document may have on the competitive environment. So, for instance, statements by a social security body are not protected as this activity is not undertaken in a competitive environment.[230]

The CADA and the administrative courts interpret this exception in an extensive way. First, industrial and commercial secrecy applies to any legal person, whatever its legal form, if this person undertakes its activity, fully or in part, in a commercial environment. This means that it also applies to not-for-profit organisations. Secondly, even if a legal person is in a position of monopoly—thus in an environment from which competition is actually absent—this exception can be relied on.[231] Information on the commercial strategies of former state monopolies such as EDF and SNCF has also been confirmed to be protected.[232]

This exception has been relied on in about 10–15% of the cases of rejections of FOI requests since 2005.[233] However, the importance of this exception lies not so much in the volume of rejections than in the sensitive nature

[227] CADA, *Annual report 2013*, p. 98.

[228] Art. L311-6, al.1, 1° CRPA (our translation) as inserted by the FDRA, art. 6, 1°.

[229] CADA, *Annual Report 2016*, p. 29. For the detail of what each aspect includes, CADA, *Les documents couverts par le secret en matière commerciale et industrielle*, available on http://www.cada.fr/les-documents-couverts-par-le-secret-en-matiere,6069.html.

[230] CADA, 22 September 2016, advice no 20163396.

[231] CE, 21 April 2017, no 394606.

[232] CADA, *Annual report 2016*, pp. 31–32.

[233] CADA, *Annual report 2008,* p. 67; *Annual report 2013*, p. 98. Before 2006, the statistics had always been below the 10% threshold.

of the documents that are so protected. This sensitive character is best illustrated with the example of a request by environmental groups to access documents that the Nuclear Safety Authority had drafted in its auditing mission pertaining to construction defects in the tanks produced by AREVA.[234] These documents were found to pertain to secret processes. The information contained in these documents is related to the ways in which AREVA sought to conform its quality management system to regulatory norms in this field.[235]

6.5 Partial Disclosure

When only part of a document pertains to one of the exceptions provided in the FOIA, the public body cannot refuse disclosure of the administrative documents in full. At first the practice was developed in that direction, and then it was enshrined formally in the FOIA,[236] now in article L311-7 CRPA. However, if partial occultation of information would not be satisfactory or would change the understandability of the document, refusal to disclose the full document is accepted.[237]

6.6 Public Interest Test: Absence

The FOIA does not provide for public bodies to undertake a public interest test, which would allow administrative documents to be made accessible despite links to protected private interests such as privacy or commercial confidentiality. While this test normally results in extending the scope of the FOIA on an *ad hoc* basis, no similar safety valve is available in France.

6.7 Non-existence of Requested Documents

Public authorities do not have to prepare documents that do not exist to respond to FOI requests,[238] except in some cases where the documents can easily be extracted from a database.[239] They do not have to reconstitute

[234] For an account of the facts in English: https://www.theguardian.com/environment/2017/mar/24/areva-creusot-nuclear-forge-france-hinkley-point; https://www.economist.com/news/business/21711087-electricit-de-france-has-had-shut-down-18-its-58-nuclear-reactors-frances-nuclear-energy.

[235] CADA, 6 October 2016, opinion no 20163114.

[236] Ordinance no 2005-650 of 6 June 2005, introducing a III in art. 6 FOIA.

[237] Lallet (2014), at 232.

[238] CE, 22 May 1995, no 152393.

[239] CADA, 25 May 2000, opinion no 20001636.

documents that have disappeared either.[240] Furthermore, when the amount of information that cannot be disclosed from an administrative document is important and can only be occulted through substantial administrative efforts, disclosure of the requested document would amount to the disclosure of a new document that did not previously exist and can therefore be refused.[241] Finally, there is no formal ground for public authorities to confirm or deny the existence of a document if this mere confirmation would jeopardise the secrecy of the information requested.

In practice statistics show that the non-existence of a document as a ground to deny access is relied upon by the CADA in about 10% of its opinions that conclude to the rejection of an FOI request.[242] Usually, the CADA relies on the good faith of the authority as far as the existence of the document is concerned.[243]

7 Fragmentation of Special Regimes

7.1 Overview

Special regimes have proliferated over the years,[244] leading to fears that the FOIA is losing its internal consistency.[245] CADA's website lists 46 exceptions under a special regime.[246] According to the CADA, different special regimes can be distinguished: archives, derogatory regimes, and competing regimes.

Archives have their own special regime, directly articulated alongside the FOIA.[247] When documents are communicated under the FOIA, they need to be immediately released. However, for other documents (such as documents which would reveal deliberation secrets or be related to external policy), time limits bar them from being immediately communicated to citizens.[248]

[240] CE, 7 November 1990, no 95084; CE, 11 December 2006, no 279113.
[241] Lallet (2014), at 64.
[242] See Table 3.1.
[243] Lallet (2014), at 393; interview with M. Dandelot et al.
[244] For the first systematic discussion of the articulation between the FOIA and special regimes, see CADA, *Annual report 1995*, chapter 1.
[245] See interview with M. Dandelot et al.
[246] http://www.cada.fr/les-dispositions-legislatives-nationales,6145.html.
[247] Act no 2008-696 of 15 July 2008 (now art. L211-1 ff *Code du patrimoine*).
[248] For an overview of the time limits, see Senate report, volume I, p. 39.

Numerous derogatory regimes are regulated by specific legal provisions (e.g. electoral lists,[249] local government accounts and budgets, tax rolls, driving licences, environmental data, medical data). The FOIA itself lists more than 20 specific communication regimes.[250] In all these cases the CADA acts as the administrative review body for FOI requests rejected by the public body.

Competing regimes are regimes where the FOIA is set aside totally and trumped by a different regime. For instance, in case of criminal records, access can only be granted under certain conditions in order to protect individual rights and for no other reasons than the ones listed in the criminal procedure legislation. In these regimes the CADA has no role to play (e.g. access to documents relating to CCTV surveillance is solely regulated by a specific legal regime; providing that access needs to be requested from the person in charge of the CCTV system)[251] or only a very limited role (e.g. access to personal data by a ward of the state—access to data on biological parents needs to be asked of a specific body).[252]

The administrative judge seeks to articulate the different regimes in using the legal principle *lex specialis derogat generalibus*.[253] In cases of silence in a special regime or a field where a special regime could apply, the administrative judge tends to decide that the FOIA applies as a default regime. This has, for instance, been confirmed in the case of electoral financing, where article 6 French Constitution provides that a special law (a so-called *loi organique*, which sits above ordinary laws but below the constitution in the French norm hierarchy) needs to regulate this topic. However, the special law was silent regarding access to administrative documents. The *Conseil d'État* applied the FOIA,[254] hence filling a gap in a logic and consistent manner.[255]

[249] Requests in relation to electoral lists are increasing. The CADA ensures that access to electoral lists is limited to a specific use, namely, ensuring that the electoral lists are correctly established. Purely commercial uses (art. R16 last alinea electoral code) are not allowed (CADA, *Annual report 2016*, pp. 35–36). CE, 2 December 2016, no 388979 (concl. Rapporteur public A. Bretonneau) took a stricter approach: the mere serious risk that the person requesting access to electoral lists might use them at least partly for commercial purposes was enough to justify the mayor rejecting the request.

[250] Article L342-2 CRPA.

[251] Art. 10-V Act no 95-73 of 21 January 1995.

[252] Art. L147-1 ff Code of social action and families.

[253] Saison (2016). 556. Add. CADA, *Annual report 2007*, p. 41: *Combinaison de la loi du 17 juillet 1978 avec des régimes spéciaux.*

[254] CE, 27 March 2015, no 382083. For the available objections to this solution, see Lessi and Dutheillet de Lamothe (2015), p. 981.

[255] Rambaud (2015), p. 598.

One special regime, however, deserves more attention: access to environmental information (Sect. 7.2). The lack of a special regime for mass media also deserves some further comments (Sect. 7.3).

7.2 Access to Environmental Information

From the beginning of the FOIA, environmental associations seized the opportunities that it offered to gain access to administrative documents.[256] However, international instruments and EU legislation have slowly developed a more sophisticated regime for environmental information.[257] France has progressively followed track and developed a special regime for guaranteeing access to environmental information[258] that supplements the FOIA.[259] The FOIA only applies in so far as the environmental code does not derogate from it. The CADA relies on the environmental code each time its provisions are more favourable to the applicants, even if the environmental code is not invoked by the applicants.[260] The regime of access to environmental information features noteworthy differences in comparison to the general regime of access to administration documents.

Firstly, a dedicated provision with constitutional rank, article 7 Charter for the Environment,[261] was introduced in 2004 to consecrate the right to access to environmental information. This provision entails that the legislator and not the executive has to regulate this right (e.g. listing the information that can remain confidential).[262]

[256] CADA, *Annual report 1982–83*, pp. 8–9 noted the different strategies used by environmental associations. Some targeted specific issues (e.g. access to documents pertaining to emissions in the environment) while others focused on gaining access to local projects (e.g. urban projects or road building). For an overview of the situation before a special regime was developed, see CADA, *Annual report 1988*, second part.

[257] See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, 1998), as well as the EU legislation, especially the Directive 2003/4/EC on Public Access to Environmental Information.

[258] Act no 95-101 of 2 February 1995 (Prieur 1988).

[259] France was found in breach of first European Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (CJEU, 26 June 2003, C-233/00).

[260] Senate report, volume I, 42.

[261] 'Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment' (translation from the Constitutional Council).

[262] CC, 19 June 2008, no 008-564 DC; confirmed in CC, 13 July 2012, no 2012-262 QPC ; CC, 27 July 2012, no 2012-270 QPC; and CE, 3 October 2008, no 297931.

Secondly, the environmental code confirms that the FOIA applies but provides for more extensive access to the benefit of applicants.[263] This regime relates to access to information and not only to documents. There is thus no requirement that the information should be formalised or be included in an existing document for it to be communicated. The information needs to be available, however. If so, then the administration may have to draft a document with the relevant information. The environmental code lists environmental information in an extensive way. This includes the state of environmental components (i.e. air, atmosphere, water, soil, grounds, landscapes, natural sites, costal or maritime zones, biological diversity) and the interactions between the different components of this state, activities, and factors likely to impact on these components, human health, security, the life conditions of individuals, buildings, and natural heritage in so far as they can be affected by these components, activities, and factors. In short, any information pertaining to the past, present, or future of the environment falls within the scope of this wide access to information.[264]

Thirdly, access to environmental information is limited in various ways: there is no right to access for abusive requests or in the case of incomplete documents.[265] Questions of definition arise here. Indeed, this special regime aims to provide information to citizens before the public body has taken a decision related to the environment so that citizens can express their opinions and thus influence the public decision-making process. So a 'provisional' document[266] or a document that is contained in an incomplete file[267] cannot per se be labelled as 'incomplete'. Furthermore, the preparatory nature of information cannot justify a refusal to grant access to environmental information.[268]

Finally, some thorny issues have arisen in relation to GMOs. Indeed, an administrative judge decided that information related to the locations where GMOs were released could not fall within the exceptions of FOIA.[269] It referred a preliminary ruling to the CJEU to identify whether the locations where the GMOs were released could be kept

[263] Art. L124-1 environmental code.
[264] Lallet (2014), at 328.
[265] Art. 124-4-II-1° environmental code.
[266] CADA, 27 November 2008, no 20084434.
[267] CADA, 26 September 2013, no 20133131.
[268] CE, 24 April 2013, no 337982.
[269] CE, 21 November 2007, no 280969.

secret. The CJEU answered negatively.[270] This means that the problems that communicating such information may trigger for maintaining public order (e.g. if anti-GMOs campaigners were going to destroy the crops) could not be a ground for not implementing a European directive in the national order. Following this decision the administrative judge decided that the administration needed to communicate all documents that it had detained in relation to tests of GMO releases.[271]

7.3 Mass Media and Information of Public Interest

There is no specific FOI regime to the benefit of mass media. The FOIA provisions apply in all their principles and exceptions in the same way as they do for citizens or members of the civil society. Very early on the CADA noted that journalists did not make extensive use of the FOIA, maybe because it was not suited to their needs and ways of workings.[272] That the FOIA is applicable to journalists without any specific regime leads to a range of technical issues as mass media have a quick turnover and need information at short notice to feed into their outlets. The general inertia of public bodies in answering requests by journalists may put them off and make the currency of the information gone by the time the public body delivers the requested document, maybe after an administrative review by the CADA. The length of the judicial proceedings required to challenge an administrative refusal to grant access to administrative documents weakens the effectiveness of the FOIA.[273] Senate hearings held in 2014 give a clear account of this problem.[274] The Senate's report, however, did not recommend a specific regime for journalists.

The principle that the FOIA applies to journalists has been confirmed by the *Conseil d'État* regarding a politically loaded issue.[275] In this case a journalist asked the Electoral Commission (the *Commission de contrôle des dépenses électorales*) for access to the accounts of the 2007 presidential campaign of President Sarkozy and the mail exchanges between the Electoral Commission and President Sarkozy's campaign representative

[270] CJEU, 17 February 2009, C-552/07.

[271] CE, 9 December 2009, no 280969.

[272] CADA, *Annual report 1982–83,* pp. 11–12.

[273] Delaunay (1993), 570.

[274] See hearings of various journalists: Senate report, volume II, pp. 63 ff, 69 ff, 73 ff, and 79 ff.

[275] CE, 27 March 2015, no 382083.

(including lists of donors, employment contracts, tenancy contracts, and contracts pertaining to the electoral financing). The Commission rejected the request for access, arguing that the accounts were not administrative decisions. The journalist asked for an administrative review, at which the CADA issued a favourable opinion. However, the Electoral Commission still rejected the request, so the journalist appealed to the administrative judge (in the first instance). The first instance judge agreed with the CADA, instructing the Electoral Commission to disclose the information. The Electoral Commission went to the *Conseil d'État* to challenge this decision. The *Conseil d'État* again confirmed that the FOIA was fully applicable and that the electoral accounts and the documents exchanged between the candidate and the Electoral Commission were administrative documents.[276] This decision may open the doors to more systematic use of the FOIA by journalists.[277] However, practical constraints (financial and time-related) may remain. For instance, the final decision taken by the *Conseil d'État* in the case discussed above is dated 27 March 2015 while the requested documents pertained to the 2007 electoral campaign and the first CADA opinion is dated 7 June 2012. After nearly three years of proceedings, the documents had not yet been released.

8 Overall Assessment

The French FOIA was one of the first statutory frameworks developed to open up the French administration. In 1978 it heralded a period of administrative reforms in France and was seen as a potential spur to structural changes in administrative culture. The old principle of secrecy was to be replaced by transparency, which would strengthen accountability, public involvement, and public trust in political affairs. The main institutional engine for this reform was the CADA, an independent administrative authority in charge of monitoring the implementation of the FOIA. Forty years later assessing how far these objectives have been reached requires us to distinguish three different levels in the daily practice of the FOIA: an institutional dimension, the level of principles behind the FOIA, and the use of the FOIA by civil society and citizens.

[276] These administrative documents do not have to be communicated immediately. The different appeal possibilities that are available during the validation process of the electoral accounts need to have been exhausted or time to introduce them needs to have lapsed.

[277] Robitaille-Froidure (2015).

At the institutional level, the results are mixed. The CADA is definitively a gate-keeper contributing very substantially to work as an interface between citizens, administration, and administrative justice, being mindful of the competing needs of these actors. However, there is a never-ending deep-seated resistance in public bodies. Indeed, administrative inertia is still very often flagged up by the CADA as the main ground for access to administrative documents not being granted. A range of useful statistics (e.g. on the beneficiaries of the FOIA) are not available. PRADAs are under-staffed and freedom of information is rarely at the top of their job description. FOIA commissions are not provided with adequate budgets and financial resources.

At the level of overall principles behind the FOIA, an even more mixed assessment can be made. There is definitely an increasing demand to design systems and techniques that would improve transparency in public affairs, especially in French political affairs. There is a rising awareness among NGOs of the need and legal means to call public officials to account and a stronger nervosity over corruption and conflicts of interests. New statutory and regulatory frameworks are being developed to address these issues that undermine public trust. However, there is an equally strong pull to preserve secrecy in a range of sensitive matters. The list of documents excluded from the scope of the FOIA and the available grounds for rejecting a request to access administrative documents and special regimes have only grown over the years. This leads to more confusion and uncertainty for citizens, who can end up being unsure about their rights. It also puts administrative bodies in a difficult position when they do not receive either clear legal guidances or extended practical training regarding which main principles apply when it comes to dealing with requests for access to administrative documents. This leads one to wonder how embedded transparency really is in the administrative culture of France.

At the level of use of the FOIA by civil society and citizens, an even more mixed picture needs to be drawn. In theory legislative and institutional frameworks can only go so far. Their success and development also depend on the use that the supposed beneficiaries (i.e. media, civil society, and citizens) make of them and how they seek to influence the progress in this field. Carrying out systematic assessment of this aspect would deserve a piece of research on its own, based on different methods from that offered by the law. However, this research may help flag up some useful points. The FOIA has failed to trigger a revolution in how citizens request access to administrative

documents. There are a fair number of requests. Sometimes these requests touch highly sensitive political matters (e.g. access to financial information related to President Sarkozy's electoral campaign, AREVA's security failure). However, all in all, the FOIA seems to be used only in marginal cases. The FDRA sought to bring a deep shake-up here. It sought to develop a stronger market logic[278] with a clear demand side and a clear offer side to FOI. The pioneering idea that France seeks to put forward is that administrative information is economically valuable and that putting this information on the web will spur actors to use it, analyse it, dig into databases, and eventually make valuable use of this newly acquired knowledge (i.e. because of economic uses or thanks to calling public bodies into account). However, this approach eschews the debate about information and the quality of the public debate/the participation of civil society when it comes to decisions relating to the public good/general interest. The risks of strengthening the digital divide (not merely between those who have access to the internet and those who do not have it but also between those who are able to mobilise the technical skills to analyse large databases and those who are not) are clearly growing and are likely to become the next step in the development of FOI in France. In this context, although France does not seem to interact very strongly with other systems in Europe on FOI matters, the current experimentation that it is undertaking might become a very important source of inspiration and lesson learning for other European legal systems in the near future.

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CHAPTER 4

Access to Information in Belgium

Stef Keunen and Steven Van Garsse

1 Introduction

Prior to the Second World War, freedom of expression[1] and freedom of the press[2] were mainly seen from the view point of being an active right of the press to provide information without interference from the government. Since then the situation has evolved to a point where freedom of information is also seen from the perspective of the recipient as a passive right to be

[1] Art. 19 Coordinated version of the Belgian Constitution of 17 February 1994, *Belgian Official Gazette* (hereafter referred to as BS) 17 February 1994.
[2] Art. 25 Belgian Constitution.

Special thanks to Karen Deckers who helped preparing an earlier version of this text and to David Haljan for his useful input.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_4

informed. At the same time, there has been an evolution resulting in an active obligation for the government to create policy and infrastructure that allow the freedom of expression to become a fundamental social right.[3]

Following the Global Right to Information Rating, Belgium is not exactly an exemplary student regarding the right of access to information. Last year Belgium was awarded 59 out of 150 points regarding the following seven criteria: right of access (2 out of 6), scope (17 out of 30), application procedures (14 out of 30), exceptions (15 out of 30), appeals (11 out of 30), sanctions (0 out of 8) and promotional measures (0 out of 16). Belgium is, with this score, ranked at place 101 out of the 111 states which were investigated.[4] This chapter summarises the national and regional legislation for access to documents and information in Belgium and discusses some of the implications in practice. It also points to some challenges that lie ahead.

In Belgium the 1990s were of major importance for the development of the right of access to information. Transparency was more and more considered to be a prerequisite of good governance. Transparency and access to information are indispensable furthermore for increasing citizens' understanding of government decision-making and for enhancing public confidence in the administration and fostering open decision-making. In 1991, the first legislation concerning access to information within Belgium was introduced by the federated parliament of Flanders.[5] Subsequently, a

[3] Explanatory note accompanying the legislative proposal of the government to implement an article 24*ter* in the Constitution concerning access to information, *Parl. St.* Kamer 1992–93, no. 839/1, 1–2.

[4] The Global Right to Information Rating (2017) http://www.rti-rating.org/country_rating.php.

The Global Right to Information Rating is a programme which comparatively assesses the strength of legal frameworks for the right to information from around the world. At the heart of the methodology for applying the RTI Rating are 61 Indicators. For each Indicator, countries earn points within a set range of scores (in most cases 0–2), depending on how well the legal framework delivers the Indicator, for a possible total of 150 points. The Indicators are divided into seven different categories, namely: Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections, and Promotional Measures (http://www.rti-rating.org/methodology/).

[5] Flemish Decree of 23 October 1991 concerning access to administrative documents within the institutions of the Flemish government, *BS* 27 November 1991. Currently the matter is regulated in the Flemish Decree of 26 March 2004.

federal Charter on Good Governance followed.[6] Until 1993 there was no constitutional right of access to administrative documents. In that year, the Belgian Constitutional Legislator implemented an article concerning access to information.[7] Article 32 of the Belgian Constitution states: 'Everyone has the right to consult any administrative document and to obtain a copy, except in the cases and conditions stipulated by the laws, federate laws or rules referred to in Article 134'. It is important to stress that this Article not only enshrines the principle of freedom of access to information but also contains a rule of division of power between the federal state and the federated entities.[8] As a result of the federal structure and this particular provision, the different legislatures adopted their own legislation concerning the right of access to information.[9] Prior to this, a bureaucratic attitude focused on secrecy was the rule within the administration. Documents were often rejected arbitrarily.[10] Nowadays the right to access administrative documents cannot be seen as merely a general principle of public administration. It must, following jurisprudence of the Constitutional Court and the Council of State, be regarded as a genuine fundamental and constitutional right.[11]

The law in practice is not unimportant. As one of its beneficial effects, the right of access to information allows persons who are considering bringing legal proceedings to examine their file prior starting their action. As result, citizens will make an informed decision, one which could not be achieved if the citizens only got to view their file in the registry once their proceedings had started.[12]

[6] Handvest 4 december 1992 van de gebruiker van de openbare diensten, *BS* 22 January 1993.

[7] Constitutional reform of 8 June 1993, *BS* 29 July 1993, 15.584 (Article 24ter), consolidated version in *BS* of 17 February 1994 (in the consolidated version, Article 24ter turned Article 32).

[8] See also Bamps (1996), pp. 23; Schram (2008), pp. 40; Ornelis (1998) pp. 13; Brems (1995), pp. 620.

[9] Lewalle et al. (2008), pp. 57.

[10] Schram (2010), pp. 10–11; Vande Lanotte and Goedertier (2010), pp. 657.

[11] Constitutional Court 25 March 1998, no. 17/97; Constitutional Court 15 September 2004, no. 150/2004; Council of State 2 October 1997, no. 68.610, Delwart; Council of State 12 December 2003, no. 126.340, Vanderzande & Hallumiez; Council of State 3 October 2011, no. 215.506, Baumwald.

[12] Council of State, 7 November 2003, nr. 125,226, Goormachtigh a.o.

In what follows, we will discuss the federal statute[13] and the legislation of the Flemish Region as an example of how the federated entities legislated.[14] The Acts only contain the minimum guarantees for access to administrative documents. When special laws require a greater access, these laws should be applied.

2 Beneficiaries of Access to Information in Belgium

The Federal Act of 11 April 1994 states that passive transparency implies that everyone has a right of access to administrative documents, under the conditions set out by the law.[15] The notion 'everyone' led to a debate whether or not this notion comprises legal entities. Later on it became clear that the term 'everyone' comprises natural persons, non-profit associations, organisations, unincorporated associations, as well as (private or public) corporations.[16] The Belgian Council of State stipulated the following:

> *The terms 'person' and 'every' in the Constitution and the Federal Act concerning access to information indicate that the right of access to administrative documents applies to all, both the natural and legal persons. Nothing in this law refutes this interpretation […]. There is no reason to limit the scope of the Federal Act concerning access to information only to natural persons.*[17]

[13] Wet 11 april 1994 betreffende de openbaarheid van bestuur, *BS* 30 juni 1994 (ed. 2). Hereafter referred to as the Federal Act of 11 April 1994 concerning access to administrative documents (Federal Act of 11 April 1994).

[14] Vlaams Decreet van 26 maart 2004 betreffende de openbaarheid van bestuur, *BS* 26 maart 2004, 53,371. Hereafter referred to as the Flemish Decree of 26 March 2004 concerning access to administrative documents/Flemish Decree of 26 March 2004.

[15] Article 4 Federal Act of 11 April 1994.

[16] Judgments of the Council of State: Council of State 14 October 1996, no. 62.547, nv Electrification du Rail (the use of the extensive terms 'everyone' and 'each' in the Constitution and in the Federal Act of 11 April 1994 indicates that the right of access to information applies to all; this means natural persons and legal corporations); Council of State 21 October 2013, no. 225.162; Council of State 12 May 2015, no. 231.194, gemeente Schaarbeek (neither the Constitution nor the Federal Act explicitly excludes public corporations; therefore there is no justification that only public corporations cannot benefit from the right of access to information. Public corporations however can only rely on the right of access to information in relation to their competences).

[17] Council of State 14 October 1996, no. 62.547, NV Electrification du rail.

A similar provision is included in the Flemish Decree concerning access to administrative documents.[18] This Decree clearly states that all natural persons, legal persons or groups thereof have a right of access to administrative documents.

The content of the right of access to information is the same in the Decree as in the Federal Act. The right of access to administrative documents consists of the right for everyone to consult a document onsite, to receive explanations about the document and to receive a copy.[19] The possibility to receive explanations about a document was considered to be necessary in the light of having a meaningful right of access to information. The specific language used in administrative documents or the technicality of documents would make mere consultation ineffective.[20]

This obligation, on the other hand, does not extend to giving 'a clear overview of all the documents contained in the file' or to providing an inventory of a 'file'.[21] The Council of State ruled in a similar sense that the right to access does not extend beyond providing information that is recorded on a carrier. So far as the difference in points at the applicant's concerns is not explained in a document, the applicant asks for non-existent data (see below).[22]

The administrative authority can condition the right to receive a copy to the payment of a fee. At the federal level, the amount of the fee is determined by a Royal Decree.[23] The Flemish Decree also provides for the possibility

[18] Article 7 Flemish Decree of 26 March 2004.

[19] Article 4 Federal Act of 11 April 1994; article 7 Flemish Decree of 26 March 2004.

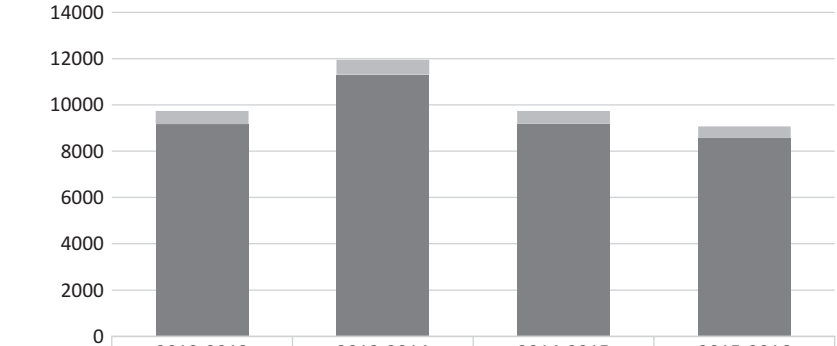
[20] Explanatory note accompanying the Federal Act of 11 April 1994 concerning access to administrative documents, *Parl. St.* Kamer 1992–93, no. 1112/1, 14 (hereafter referred to as: Explanatory Note Federal Act of 11 April 1994); Explanatory note accompanying the Flemish Decree of 26 March 2004 concerning access to administrative documents, *Parl. St.* Vl. Parl. 2002-03, no. 1732/1, 21 (hereafter referred to as: Explanatory Note Flemish Decree of 26 March 2004).

[21] Council of State, 24 June 2014, no. 227.809, Verrycken.

[22] Council of State 31 January 2012, no. 217.626, XXX.

[23] Article 12 Federal Act of 11 April 1994; Royal Decree 17 August 2007 to determine the amount of the fee due for receiving a copy of an administrative document or an environmental document, *BS* 14 September 2007.

The Court of Justice judged that the term 'reasonable amount' must be interpreted as follows: 'Consequently, any interpretation of what constitutes "a reasonable cost" for the purposes of Article 5 of the directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. The term "reasonable" for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search'. (European Court of Justice 9 September 1999, C-217/97, ECLI:EU:C:1999:395, Commission v. Germany, para. 47–48).



	2012-2013	2013-2014	2014-2015	2015-2016
Rejected	575	643	561	494
Granted	9169	11308	9185	8573

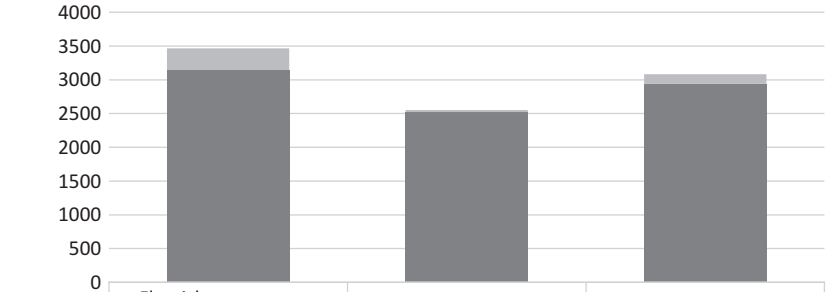
Fig. 4.1 Number of applications to get access to documents in Flanders

of levying a charge based on a reasonable cost for a requested copy. In practice however, most entities do not charge a fee. This can be partly explained by the fact that no payment can be asked for because the Flemish government (still) has not made any executive order setting a tariff for copies.

Article 5 of the Federal Act and Article 17 of the Flemish Decree require that the administrative authorities register all the applications to get access to administrative documents. Such a register undoubtedly provides the ability to deliver statistics concerning requests. However, on the federal level, there is no general register of all requests, while in Flanders such a general registration exists. In the yearly reports of the Flemish Appellate Body on the Openness of Government, the number of applications is registered. The following figure gives an overview of the years 2012–2013 until 2015–2016 (Fig. 4.1).[24]

[24] The counting of applications starts on the first day of July and ends on the last day of the month of June.

The numbers include the applications made to the following administrative authorities: a selection of 15 Flemish municipalities (3 municipalities per province), the 5 Flemish provinces, the departments of the 12 policy areas of the Flemish administration (Public Governance and the Chancellery; Finance and Budget; Flemish Foreign Affairs; Economy, Science and Innovation; Education and Training; Welfare, Public Health and Family;



	Flemish government authorities	Flemish provinces	14 cities within Flanders
Rejected	321	33	140
Granted	3144	2521	2941

Fig. 4.2 Number of applications at the different levels of government within Flanders (2015–2016)

By analysing concrete applications to the different institutions, the following tendency can be observed. An application will be made faster if the administrative body possessing the information is located closer to the citizen (e.g. municipalities, provinces). This can be explained by the fact that a citizen is more aware of the relevant decisions of authorities closer to him or her. The following figure describes the number of applications within the different spheres of government. This figure clearly shows that only 14 cities (of the 308 municipalities in Flanders) contribute an almost equal number of requests as those filed with Flemish government authorities (Fig. 4.2).

Unfortunately, the yearly reports do not gather information about who made the request: individual citizens, NGOs, non-profit organisations, and so on.

Culture, Youth, Sport and Media; Work and Social Economy; Agriculture and Fisheries; Environment, Nature and Energy; Mobility and Public Works; Spatial Planning, Housing Policy and Immovable Heritage), the Flemish Parliament, the Flemish Ombudsman, the Flemish Peace Institute, Flemish Office of the Children's Rights Commissioner and the cabinets.

The data are based on the different year reports of the Flemish Appellate Body on the Openness of Government (online available at http://openbaarheid.vlaanderen.be/nlapps/docs/default.asp?id=28&order=).

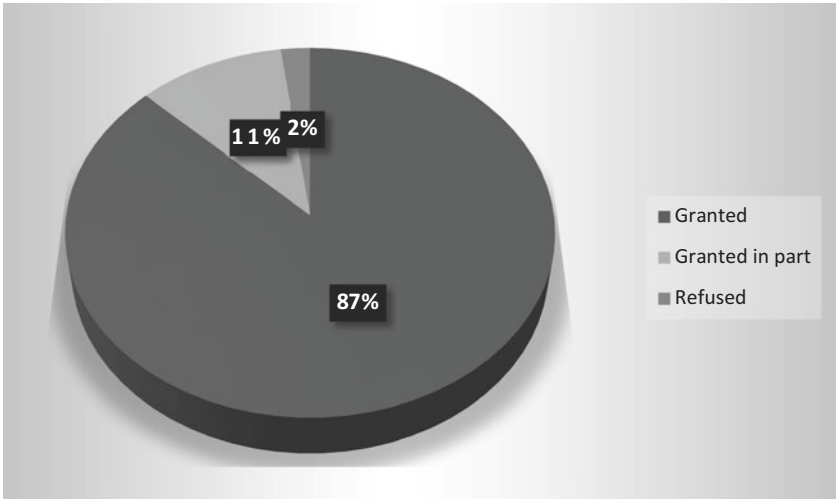


Fig. 4.3 Applications granted, granted in part or refused (2011)

One last remarkable fact, after analysing the year reports, is the relatively low number of rejections. From all the applications from July 2015 until the end of June 2016, only 5.3 % were rejected. However, we have to be critical regarding this percentage because the annual report does not contain all applications for access to administrative documents in Flanders (*see note no. 24*).

From a broader survey in 2011,[25] the following figure can be derived (Fig. 4.3).

The survey also contains information about the ways of submitting public requests: by letter (46%), by e-mail (35%), through personal delivery (12%) and by fax (2%), thereby highlighting a clear trend towards more requests by e-mail. The matters which concern the requests include: urban zoning and planning (over 50%), public procurement (tenders and selection of tenders) (22%) and environmental records (13%).

[25] http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/EvaluatieOpenbaarheidBestuur_LR.pdf accessed on 1 March 2017.

3 Scope of the Legislation on Transparency

3.1 Scope Ratione Personae*: Entities Which Are Bound by the Law*

As a matter of course, the Federal Act and the Flemish Decree on access to administrative documents have a different scope *ratione personae*. However, this does not imply that they have no relevance to one another in terms of the scope *ratione personae*. In order to determine the scope of the Federal Act, a distinction must be made between the procedure and the grounds for exceptions on the right of access to administrative documents. The Federal Act has to be applied in its entirety by all federal administrative authorities.[26] Additionally, all other administrative authorities (e.g. Flemish authorities, municipalities, provinces, etc.) have to apply the Federal Act with regard to the limitations on the right of access to administrative documents concerning federal competences.[27] In other words, the non-federal administrative authorities are only bound by the limitations set out in the Federal Act. A similar provision exists in the Flemish Decree.[28]

In the Federal Act, the term 'administrative authority' is used to determine the scope of the Act. The federal legislator defined the term 'administrative authority' as follows[29]: 'An administrative authority as referred to in article 14 of the Coordinated Laws on the Council of State'. Article 14 of the Coordinated Laws on the Council of State does not give a concrete definition either, but there is comprehensive case law from the Council of State, the Constitutional Court and the Supreme Court ('Hof van Cassatie') about the interpretation of the notion 'administrative authority' in this Article. On this point, the Supreme Court has stated that 'institutions established or recognised by the federal government, the government of the communities and the regions, the provinces or the municipalities, who are entrusted with a public service and do not belong to the judiciary or the legislative power, are in principal administrative authorities, in so far as their functioning is determined and controlled by the government and in so far as they can take decisions which bind third parties'.[30] This last

[26] Article 1, par. 1, a) Federal Act of 11 April 1994.
[27] Article 1, par. 1, b) Federal Act of 11 April 1994.
[28] See art. 4, §2 Flemish Decree of 26 March 2004.
[29] Article 1, par. 2, 1° Federal Act of 11 April 1994.
[30] Cass. 14 February 1997, *RW* 1996–97, 1438.

element of taking decisions which bind third parties is a decisive criterion, especially for private persons exercising public powers. Some institutions could be considered as an administrative authority in certain circumstances, but are not in others.[31]

Furthermore, as a consequence of the case law of the Constitutional Court, Article 14 of the Coordinated Laws on the Council of State was revised and now also includes the legislative assemblies or organs thereof, the Auditor General, the Constitutional Court, the Council of State, administrative courts, other bodies of the judiciary, and of the High Council of Justice, when they take decisions regarding public procurement and members of their staff.[32] The Attorney-General, the public prosecutor or an investigating magistrate cannot be considered 'administrative authorities' when they initiate and manage a criminal file. In other words, no information from a judicial file which is still *sub judice* can be obtained under the Federal Act on the right of access to administrative documents.[33]

Whereas the notion of 'administrative authority' was already well-established in Belgian legislation and jurisprudence, this was not the case for the notion of 'federal administrative authority'. In preliminary advice, the Council of State gave a description of the latter notion.[34] In general the notion includes federal administrative bodies, public institutions and similar public services dependent on federal administrative authorities, as well as private persons who are assigned with the execution of a federal public service.[35] More specifically, the following persons or institutions

[31] For example: on the one hand, the University of Leuven is not acting as an administrative authority by granting the construction of a university building to company X; on the other side, the University of Leuven is acting as an administrative authority when taking examination decisions (Council of State 31 July 2009, no. 195.486, nv Aannemingsmaatschappij CFE; Council of State 16 October 1981, no. 21.467, Van Noten (1981–1982), pp. 491–493; see also Verstegen (2002), pp. 801–814).

[32] Art. 14 of the Coordinated Laws on the Council of State as reformed by article 2 of the Federal Act of 25 May 1999. See the case law of the Constitutional Court: Constitutional Court 15 May 1996, no. 31/96, and Constitutional Court 29 January 2004, no. 2004/17 (online available at http://www.const-court.be/). In the latter case, the Court ruled that by referring to 'administrative authorities as referred to in article 14 of the Coordinated Laws on the Council of State' the legislator wanted to adept to scope of the law to the evolution in the case law.

[33] Council of State 8 February 2000, no. 85.177, Ghysels.

[34] Cf. also Explanatory memorandum preceding the Federal Act of 11 April 1994 concerning access to administrative documents, *Parl. St.* Kamer 1992–93, no. 1112/1, 9–10.

[35] See for an interesting example Federal Commission on Access to and Reuse of Administrative Documents 7 June 2016, no. 2016–50: the legislation is applicable to a gov-

are considered as federal administrative authorities: administrative institutions of the federal state, such as the King (in the circumstances where a minister is accountable) and federal ministers, as well as civil servants when they are entrusted to make decisions by delegated authority. Members of the cabinet are not considered as administrative authorities because they are the personal staff of a minister and they cannot make decisions for which the minister is competent. Non-federal authorities, on the other hand, are authorities dependent on other government levels, namely the Communities and the Regions, the provinces and the municipalities.[36] Currently, a proposal is pending to amend the Federal Act by replacing 'administrative authority' with the concept 'public authority'.[37]

The personal scope of the Flemish Decree is defined in a similar way as the Federal Act. However, it was a conscious choice by the Flemish legislator not to use the term 'administrative authority', but rather 'public authority'.[38] In general terms, the Flemish Decree applies to all instances within the Flemish Community and the Flemish Region.[39] Compared to the Federal Act, the Flemish Decree provides a specific list of those whom the Decree covers.[40] Additionally, the Decree applies to other instances insofar as it limits or prohibits access to administrative documents on grounds that fall within the scope of their competences.[41] This last provision is similar to the above-described provision of the Federal Act.

ernment commissioner; see for another interesting example Federal Commission on Access to and Reuse of Administrative Documents 29 February 2016, no. 2016–25: the legislation is applicable to the Ombudsstelle für Energie/Ombudsdienst voor energie.

[36] Explanatory memorandum preceding the Federal Act of 11 April 1994 concerning access to administrative documents, *Parl. St.* Kamer 1992–93, no. 1112/1, 9–10.

[37] Legislative proposal to amend the Federal Act of 11 April 1994 concerning access to administrative document, *Parl. St.* Kamer 2014, no. 0061/001, 4–5.

[38] Explanatory Note Flemish Decree of 26 March 2004, 10; Council of State 6 December 2012, no. 221.641, Arteveldhogeschool.

[39] The decree provides an enumeration of instances that fall within the scope of the decree, such as the Flemish parliament and the instances linked to it, the municipalities, the provinces, the public instances for public welfare and others. The enumeration ends with the 'all other instances within the Flemish Community and the Flemish region' which indicates clearly that the enumeration is by no meaning exhaustive (art. 4, §1 Flemish Decree of 26 March 2004).

[40] Art. 4, §1 Flemish Decree of 26 March 2004.

[41] Art. 4, §2 Flemish Decree of 26 March 2004.

An 'instance' can be either an executive body or an environmental one.[42] In contrast to the Federal Act which gives no concrete definition of 'administrative authority', the Flemish Decree provides such a definition for the notion 'executive instance'[43]:

(a) *a legal person who is founded by or by virtue of the Constitution, a law, a decree or an ordonnance;*
(b) *a natural person, a group of natural persons, a legal person or a group of legal persons who are determined and controlled in their functioning by an instance in the meaning of a);*
(c) *a natural person, a group of natural persons, a legal person or a group of legal persons, in so far they are entrusted with the execution of a task of public interest by an instance in the meaning of a) or in so far they look after a task of public interest and take decisions that are binding on third parties.*

The judiciary does not fall under the scope of this definition, except when it acts in a capacity other than judicial. Parliamentary assemblies and the institutions linked there to are excluded from this definition, except in matters regarding public procurement and matters regarding staff. The executive is excluded from this definition insofar as it acts in a judicial capacity.[44]

The interpretation *ratione personae* of the Flemish Decree generated some interesting case law, for example, in the field of education institutions.[45] There has been a certain evolution in the interpretation of the scope of education institutions. At first the Flemish Appellate Body on the Openness of Government considered that free education institutions, in accordance with article 3, 1°, first paragraph (c) of the Flemish Decree, only fell under its coverage inso far as they conducted tasks of general interest and took decisions that bound third parties. The Flemish Appellate Body on the Openness of Government ruled that free education institutions in their relations with their staff were not governed by unilateral and binding

[42] Art. 3, 3° Flemish Decree of 26 March 2004.

[43] The Flemish Decree also provides a definition for the notion of 'environmental instance' (art. 3, 2° Flemish Decree of 26 March 2004) which is broader than the notion of 'executive instance'. The specific legislation for access to environmental information and the notion 'environmental instance' will be discussed further.

[44] Art. 3, 1° Flemish Decree of 26 March 2004.

[45] See, for example, Council of State 27 March 2012, no. 218.680, Veys.

decisions and that they were in that capacity not to be considered as governing bodies within the meaning of the Flemish Decree. Later, the Flemish Appellate Body on the Openness of Government held in compliance with Belgian legal doctrine that free education institutions indeed fell under Article 3, 1°, first paragraph (b) of the Flemish Decree. The operation of those educational institutions was sufficiently determined at the discretion of the authority and was under the control of the Flemish government. However, this interpretation proved too broad.

It was in fact decided later by the Belgian Council of State that accredited private schools are to be considered as 'executive instances' under 'c' above. This means in practice that they are characterised as an executive instance in relation to the award of a degree as this qualifies as a decision that binds third parties, but not in matters relating to their staffing or in matters related to public procurement. As to public schools, the situation is quite different: they qualify as executive instances under 'a' or 'c'. Legislation on access to administrative documents is therefore relevant in all matters and for all documents.

Yet this is not to say that the scope of the Flemish Decree would be interpreted restrictively. On the contrary, with regard to external autonomous public institutions and government (owned) companies who provide public services, it is (still) quite generally accepted that they are covered under the scope of the Decree.

3.2 *Scope* Ratione Materiae

The material scope of the Federal Act is defined by the notion 'administrative document'. The Federal Act gives an extensive interpretation to the notion 'administrative document'. It is defined as 'all information, in whatsoever form, which is in the possession of an administrative authority'.[46] According to *the travaux préparatoires* in the federal Parliament, the following forms of documents are included in the notion of 'administrative document': written documents, sound and visual recordings, magnetic tapes, floppy disks and other carriers of manually or automatically

[46] Art. 1, par. 2, 2° Federal Act of 11 April 1994.

See, for example, Council of State 21 May 2001, no. 95.677, Antoun in which the Council of State judged that a software program concerning the electronic voting is an administrative document.

processed data.[47] By way of illustration, the *travaux* state that reports, studies, even non-official advisory commissions, some minutes and official records, statistics, administrative guidelines, circulars, contracts and permits, registers of public inquiries, reports of examinations, motion pictures, photographs and so on are all considered as administrative documents.[48]

The Flemish Decree uses the notion 'executive document' to define the material scope of the right of access to information. An executive document is defined as 'the carrier, in whatsoever form, of data in the possession of an (executive) authority'.[49] The term 'administrative document' has a very broad interpretation.[50] This term also includes electronic information. In principle all information which can be found, even an e-mail or the attachments within that e-mail, are subject to the principle of transparency. Although the notion is different than the one used in the Federal Act ('administrative document'), both statutes have nonetheless the same material scope.[51]

An executive document in the possession of a staff member of a government body ('instance') is considered to be a document in the possession of the instance insofar as it relates to the functions of that instance.[52] By explicitly stating that a document in the possession of a staff member is deemed to be in the possession of the instance, the Flemish legislator wanted to prevent the possibility that documents could be excluded from disclosure merely on the ground that certain data were the private property of a staff member or were located at their home. Thus it is important—also for reasons of protection of privacy—to make a clear distinction between documents that relate to the execution of the functions of the instance and documents regarding the private relationship of the staff member with the government and other persons. Naturally only the former are subject to the right of access to information.[53]

[47] Explanatory memorandum preceding the Federal Act of 11 April 1994 concerning access to administrative documents, *Parl. St.* Kamer 1992–93, no. 1112/1, 11 and Report on behalf of the commission of internal affairs, general affairs and the civil service, *Parl. St.* Kamer 1992–93, no. 1112/13, 9.

[48] Explanatory memorandum preceding the Federal Act of 11 April 1994 concerning access to administrative documents, *Parl. St.* Kamer 1992–93, no. 1112/1, 11–12. See also the advices of the (federal) Commission for access to information: http://www.ibz.rrn.fgov.be/nl/commissies/openbaarheid-van-bestuur/adviezen/.

[49] Art. 3, 4° Flemish Decree of 26 March 2004.

[50] See also Tijs (2011), pp. 81–82.

[51] See Schram (2011), pp. 681.

[52] Art. 8 Flemish Decree of 26 March 2004.

[53] Explanatory Note Flemish Decree of 26 March 2004, 21–22.

4 The Procedure for Access to Administrative Documents

4.1 The Application Procedure

The procedure for requesting access to administrative documents is very similar in the Federal Act and in the Flemish Decree. There are a number of requirements concerning the request. While the Federal Act deals with the application procedure in one Article,[54] the Flemish Decree contains a separate section for the application procedure.[55] We will discuss the procedure within the Federal Act first.

Access to information is granted upon request. There are a couple of requirements concerning the request. First of all a request must be in writing.[56] The term 'written request' is interpreted broadly nowadays but typically covers letters, e-mails, faxes and web forms.[57] Practical reasons are the basis for the requirement of a written request. Administrative authorities are free to give effect to a request made by phone, but in this case a right of appeal is not guaranteed.[58] Secondly, the request must clearly mention the matter at issue and, where possible, the relevant administrative documents. Finally, the request has to be addressed to the competent federal administrative authority. If, however, the request is addressed to a federal administrative authority who does not have the document in its possession, the authority has an obligation to refer the applicant to the relevant authority.[59] Specifically for administrative documents of a personal nature, it is further required that the applicant proves that he has the relevant personal interest. For all other documents, the applicant can make a simple request without having to show such an interest.[60]

As in the Federal Act, the Flemish Decree requires that a request has to be in writing. This means that the request can be filed by letter, by fax or by e-mail. Moreover, the request can also be made orally on site. In this case, the applicant has to fill in a form. If necessary, a staff

[54] Art. 5 Federal Act of 11 April 1994.

[55] Section IV. The request procedure (art. 17–21) Flemish Decree of 26 March 2004.

[56] Art. 5 Federal Act of 11 April 1994.

[57] See Schram (2011), pp. 689.

[58] Explanatory Note Federal Act of 11 April 1994, 14.

[59] Art. 5 Federal Act of 11 April 1994.

[60] Art. 4 Federal Act of 11 April 1994; Explanatory Note Federal Act of 11 April 1994, 13–14; Council of State 7 May 2007, no. 170.871, Rummens; Constitutional Court 25 March 1997, no. 17/97.

member will assist the applicant to do so. An oral request (by phone) on the other hand is not possible.[61] Regarding the content of the request, the request must clearly state the issue concerned and, if possible, the relevant executive documents, as well as the name and the correspondence address of the applicant. The latter requirement is only necessary to allow the instance to give an answer to the applicant. For this purpose an e-mail address is sufficient.[62] This has been criticised in practice because it gives no guarantee of the identity of the author of the request. The applicant should also mention the preferred carrier in which the information is provided.[63] However this is a non-mandatory requirement.[64]

The applicant has to prove his identity and, where applicable, the fact that he received the consent of the person from whom the information derives, if the request concerns private life, confidential commercial or industrial information or information voluntarily provided by a third party without being obliged to do so and which is explicitly labelled confidential by the third party.[65] Only in the case of information of a personal nature must the applicant show the necessary personal interest.[66]

Finally, the request has to be addressed to the public instance which possesses the document. If, however, the instance receiving a request does not have the documents concerned, the instance must forward the request as soon as possible to the instance which likely possesses those documents. The instance must also inform the applicant thereof.[67] This is a difference with the Federal Act which only obligates the administrative authority to refer the applicant to the authority who is in likely possession of the documents but without actively forwarding the request to that authority.

[61] Art. 17, §1, first paragraph Flemish Decree of 26 March 2004; Explanatory Note Flemish Decree of 26 March 2004, 34.

[62] Ibid; see also Flemish Appellate Body on the Openness of Government 30 September 2015, no. 170/2015 and Flemish Appellate Body on the Openness of Government 14 December 2015, no. 207/2015.

[63] Art. 17, §1, second paragraph Flemish Decree of 26 March 2004.

[64] The Explanatory note clearly states that 'the applicant can indicate the preferred form'. This means that the applicant has an option to choose the preferred form of the carrier (written, electronic) and the format of the electronic carrier. Explanatory Note Flemish Decree of 26 March 2004, 35.

See also Schram (2013), pp. 83.

[65] Art. 17, §1, third paragraph Flemish Decree of 26 March 2004.

[66] Art. 17, §2 Flemish Decree of 26 March 2004.

[67] Art. 17, §3 Flemish Decree of 26 March 2004.

If the request is manifestly unreasonable[68] or formulated in too general a manner, the authority must ask the applicant to complete the application anew or to reformulate it in a more specific manner as soon as possible. The authority will inform the applicant why the application is manifestly unreasonable or formulated too generally (see below when we discuss the various exceptions). To the extent possible, it should also be indicated what is required concerning the information requested in order to be able to comply with the application.[69]

4.2 The Response or Answer of the Administrative Authority

The administrative authorities must take a decision to grant or reject access to documents within a certain period. The Federal Act contains a provision which explicitly states that the authority should answer the request within a period of 30 days after receiving the request, which may be extended by a maximum of 15 days.[70] The decision to grant or to reject access has to be reasoned. If no decision has been taken within this specified period, the request shall be deemed rejected.[71]

The Flemish Decree contains a stricter timing: 'The application must be responded to as soon as possible and at the latest within 15 calendar days, either in writing, by fax or by e-mail'.[72] If the application is manifestly unreasonable or formulated in too general a manner, a new 15-day term begins from the time when the applicant has resubmitted it or (re)formulated his application more specifically.[73] If the information requested is too difficult to collect in a timely fashion or if the verification of the application for making public as regards the exceptions is difficult to complete in time, then the authority must inform the applicant that the term is extended to

[68] When the request involves too many documents and aims solely to harass the authorities.

[69] Art. 18 Flemish Decree of 26 March 2004.

[70] The period can be extended, for example, when the document is located elsewhere in an archive (Explanatory note accompanying the legislative proposal of the government to implement an article 24*ter* in the Constitution concerning access to administrative documents, *Parl. St.* Kamer 1992–1993, no. 839/1, 18).

[71] Art. 5 Federal Act of 11 April 1994.

[72] Art. 20, §2 Flemish Decree of 26 March 2004.

[73] The terms of the decisions and execution begin on the day after the date of registration of the application and, in the event of no such registration having taken place, on the day after the date of receipt of the application (art. 6 Flemish Decree of 26 March 2004).

30 calendar days.[74] If no formal decision is taken by the authority, the request shall be deemed rejected.[75] But if the authority grants access to the applicant, this decision will be effected as soon as possible and at the latest within 30 calendar days.[76]

In an amendment pending before the federal House of Representatives, a number of changes are proposed to the Federal Act on transparency. Those proposing the Bill want to introduce more strict terms within which the administrative authorities must answer a request. The terms would be made uniform with the existing terms under the Flemish Decree.[77]

5 Excepted Information

Not all applications to get access to administrative documents can be granted by the authorities. In some cases the right of access can be denied. In general there are three kinds of exceptions: (i) relative mandatory exceptions, (ii) absolute mandatory exceptions and (iii) optional exceptions by which the authority can choose whether or not to apply the exception.[78] Common to all these exceptions is that partial disclosure takes precedence over an overall refusal to provide access to an administrative document.[79] With mandatory exceptions though, the authority is obliged to reject access if the exception is applicable. All three groups of exceptions have to be interpreted restrictively.[80]

5.1 Exceptions Within the Federal Framework

Article 6 of the Federal Act contains the exceptions on granting access to administrative documents. Although both the first and the second group of exceptions are mandatory, there is a difference in treatment of the

[74] Art. 20, §2 Flemish Decree of 26 March 2004.

[75] See *infra* administrative and judicial remedies for the importance of taking a decision by the authority.

[76] Art. 20, §3 Flemish Decree of 26 March 2004.

[77] Legislative proposal to amend the Federal Act of 11 April 1994 on access to administrative documents, *Parl. St.* Kamer 2014, no. 0061/001, 5.

[78] Heremans (2011), pp. 18–50.

[79] Art. 6, §4 Federal Act of 11 April 1994; art. 9 Flemish Decree of 26 March 2004.

[80] Explanatory Note Federal Act of 11 April 1994, 16. For an example see Council of State 14 April 2009, no. 192.371, Nationale Instelling voor radioactief afval en de verrijkte splijtstoffen; Constitutional Court 25 March 1997, no. 17/97, B.2.1. and B.2.2.; Constitutional Court 15 September 2004, no. 150/2004, B.3.2.

exceptions. The first group of exceptions are relative, whereas the second group of exceptions are absolute. Absolute exceptions lead to a refusal of the request if the protected interest is affected even to the slightest degree, whereas relative exceptions only lead to a refusal if the protected interest prevails over the interest of disclosure. Thus in the case of relative exceptions, the administrative authority has a margin of discretion in determining which interest prevails.[81]

However, the administrative authority always has to examine whether there is a real risk for the protected interest (in the case of absolute exceptions) or whether the protected interest prevails over the interest of disclosure (in the case of relative exceptions).[82] This means that an exception cannot be applied automatically. The administrative authority must investigate the applicability of exceptions for each request and give concrete reasons why access cannot be given.[83] The federal Commission on Access to and Reuse of Administrative Documents states that three conditions have to be fulfilled to invoke these relative exceptions: (i) a particular interest is mentioned which is considered worthy of protection by the law; (ii) disclosure would harm the protected interest, and (iii) the importance of disclosure does not outweigh the damage caused to the protected interest.[84]

In that first category, the administrative authority, federal or others, will reject a request for access to an administrative document if the interest of disclosure does not prevail over one of the following general interests[85]: public safety, fundamental rights and freedoms of the citizens[86], the federal international relations of Belgium, public order, the security or defence of the country, investigation or prosecution of crimes, a federal economic or financial interest, the currency or the public credit rating[87], the confidential nature of company data or manufacturing data

[81] See Mast et al. (2014), pp. 911; see also Schram (2011), pp. 691.

[82] Council of State 8 January 2004, no. 126.934, Barbé.

[83] Explanatory Note Federal Act of 11 April 1994, 15–16. See, for example, Council of State 15 May 2014, no. 227.394, cvba Belgische Verbruikersunie Test-Aankoop; see Mast et al. (2014), pp. 912; see also Schram (2011), pp. 691.

[84] Andersen (1999), pp. 38.

[85] Art. 6, §1 Federal Act of 11 April 1994.

[86] An example where the request does not prevail over the fundamental rights and freedoms of the citizens is in the case of the protection of the rights of patients (Council of State 10 January 2013, no. 221.961, cvba Belgische Vebruikersunie Test Aankoop).

[87] Council of State 18 June 1997, no. 66.860, Matagne.

communicated to the authorities and, finally, the secrecy of the identity of a person who has entrusted to an administrative authority a document or information concerning a criminal act or a deemed criminal act.[88]

According to the second group of exceptions, the administrative authority, federal or others, will reject a request for access to an administrative document if the interest of disclosure endangers one of the following specific interests[89]: private life[90], secrecy established by law[91], the secrecy of federal government deliberations and of collegial authorities that depend on the federal executive power or which involve a federal authority, and the interests mentioned in Article 3 of the Law of 11 December 1998 concerning classification, security authorisations, security certificates and security opinions.

Some case law can clarify the distinction made between relative mandatory and absolute mandatory exceptions. In 2000 the federal government rejected a request from Filip Dewinter, a right-wing Belgian politician, to gain access to his personal file with the national Security Services. The federal government invoked two mandatory exceptions to justify this refusal: a relative one (public order, the safety or defence of the country) and an absolute one (private life). Consultation of the file would disclose, according to the authority, the *modus operandi* of the Security Services and constitute an infringement of the privacy of third parties (staff members, informants, addresses of headquarters, etc.). But the Belgian Council of State reiterated that transparency was the rule and that exceptions must be interpreted restrictively. Firstly, the federal government did not show in its balancing of interests why public order or safety of the country must prevail above access to public documents. Secondly, concerning the absolute exception of private life and privacy, the Council of State noted that information on the *modus operandi* of the Security Services and third parties be made unreadable (partial disclosure).[92]

The third group of exceptions allows the administrative authority to reject a request for access to an administrative document for mainly

[88] For example, the identity of an informant in fiscal or criminal cases: Council of State 27 June 2001, no. 97.056, Tassin.

[89] Art. 6, §2 Federal Act of 11 April 1994.

[90] The exception with regard to the protection of private life is not applicable in the case that consent is given by the person involved.

[91] For example, the professional secrecy of a lawyer: Council of State 29 January 2009, no. 189.864, Gemeente Lochristi.

[92] Council of State 11 December 2000, no. 69.056, Dewinter.

practical administrative reasons. A federal administrative authority may reject a request insofar as the request[93] concerns an unfinished or incomplete administrative document whose disclosure may lead to misunderstanding, which concerns advice or an opinion communicated to the authority on a voluntarily and confidential basis[94], or is clearly unreasonable or is too vague on its face. A federal administrative authority may reject a request if the request is deemed unreasonable. This discretionary exception is intended to guarantee the normal functioning of the public service.[95] In a case from 2014, the Federal Agency for the Safety of the Food Chain invoked this exception to reject access to a checklist for the inspection of pita restaurants and to a database to consult information. The reason for the rejection was the excessive workload required to grant access to these documents. The Council of State held that the right to access documents establishes a positive obligation on public authorities with which they must comply. They must organise themselves in such a way that requests for access can be granted. In cases where they reject access, the authority must provide specific reasons for rejection.

The following rationale of the Federal Agency for the Safety of the Food Chain was, according to the Council of State, therefore inadequate: 'Given the fact that we need all our people to perform our core business, which is to ensure food safety, we maintain our view to reject the application because of its unreasonable character'. This is a purely stylised formula consisting of generic terms without substantive content and which is insufficiently individualised and not specifically focused on the organisation for the Federal Agency.[96] In other words, invocation of the discretionary exceptions must be justified with specific relation to the authority relying on the exception. In another case, an application for access to a study about a military hospital was rejected. The Department of Defence invoked the exception that it concerned advice or an opinion which is communicated to an authority on a voluntarily and confidential basis—a discretionary exception.[97] After receiving the advice of the Commission, the Department confirmed its earlier decision not to disclose the study. The Council of

[93] Art. 6, §3 Federal Act of 11 April 1994.

[94] Council of State 7 June 2004, no. 132.072, Lybaert.

[95] Explanatory Note Federal Act of 11 April 1994, 19.

[96] Council of State 15 May 2014, no. 227.394, CVBA Belgische Verbruikersunie Test-aankoop.

[97] Art. 6, §3 Federal Act of 11 April 1994.

State held that the study was not communicated on a voluntarily basis, since the director of the military hospital had specifically commissioned the study. An examination of the particular facts is always necessary in reviewing the decision to the reject.[98]

When a citizen requests the consultation of thousands of objections to a master development plan of a government and also copies of these, the request for copies can be considered as being unreasonable. Consultation is possible, but the request for copies is unreasonable.

Last but not least—and not explicitly regulated—an authority can reject a request if the requested document does not exist.

5.2 Exceptions Within the Flemish Framework

Just like in the case of the Federal Act, the Flemish Decree comprises three kinds of exceptions: optional exceptions, relative mandatory exceptions and absolute mandatory exceptions. Besides the exceptions provided for in the Decree, there can also be exceptions set out in specific statutes, decrees or ordonnances.[99] Furthermore an instance can also reject a request concerning a document that does not (yet) exist.

The absolute mandatory exceptions stipulate that the instances may decline a request if the disclosure infringes an obligation of secrecy established in a matter for which the Community or the Region is competent; if the disclosure infringes the protection of private life, except if consent is given by the person concerned[100]; if the disclosure infringes the secrecy of deliberations of the Flemish government and of collegial authorities, the secrecy of deliberations of bodies of the Flemish Parliament as well as secrecy established by law or Decree of those bodies of instances mentioned in Article 4, §1, 3–10; if the request concerns executive documents that were solely set up for the purpose of a criminal prosecution or prosecution with administrative sanction; if the request concerns executive documents that were solely set up for the purpose of disciplinary measures, insofar as the possibility of a disciplinary measure exists, and finally if

[98] Council of State 29 March 2010, no. 202.459, Sevenhans.

[99] Art. 12 Flemish Decree of 26 March 2004.

[100] For example, in the procedure before granting a permit, objections can be made by citizens. A request for disclosure of these objections may conflict with the right to privacy. The decision to reject access to the identity of the submitter of the objections is justified under the exception of the protection of privacy (Flemish Appellate Body on the Openness of Government, no. 2007/23).

the request concerns executive documents which contain information voluntarily provided by a third party without being obligated to do so and if the information is explicitly labelled as confidential, except if the third party has given its consent to the disclosure. These exceptions have to be applied by all instances and not only the instances within the Flemish Community or the Flemish Region.[101]

The relative mandatory exceptions also have to be applied by all instances. The Flemish Decree requires instances to decline a request for access to information if they decide that the interest of disclosure does not prevail over one of the following interests: an economic, financial or commercial interest of an instance mentioned in Article 4, §1, the confidential character of the international relations of the Flemish Community or the Flemish Region and the relations of the Flemish Community or the Flemish Region with supranational institutions, the federal government and other Communities and Regions, the confidential character of commercial and industrial information, when this information is protected in order to preserve a legitimate economic interest (except if the person who provided the information gives his consent to the disclosure), legal procedings in a civil or administrative lawsuit and the possibility for a fair trial; the confidentiality of the actions of an instance insofar as the confidentiality is necessary for the pursuit of administrative enforcement, the execution of an internal audit or political decision-making, and lastly, public order and security.[102]

Finally, the optional exceptions of the Flemish Decree can only be applied by public instances within the Flemish Community and the Flemish Region. These instances can decline a request, over and above the exceptions mentioned previously, if the request is clearly unreasonable or too vague. However this exception can only be invoked after a request has been made by the instances to the applicant to specify or resubmit the request as soon as possible. The instance must state the reasons why the request is clearly unreasonable or too vague and, if possible, indicates which data concerning the information requested are necessary to be able to grant the request. If the request still remains clearly unreasonable or

[101] Art. 13 Flemish Decree of 26 March 2004.

[102] Art. 14 Flemish Decree of 26 March 2004.

See, for example, Flemish Appellate Body on the Openness of Government, no. 2008/146: a rejection was based on the economic interest of the government. In this case the information consisted of estimates that were used during negotiations on the purchase of land.

too vague afterwards, the instance can decline the request.[103] Secondly, the instance can decline a request concerning an unfinished or incomplete executive document.[104] This last point was illustrated when a citizen of Tienen, a Flemish city, wanted to get access to a monthly report of a not-for-profit organisation which stimulated municipal commerce. As long as the monthly report had to yet to be approved at the next meeting, the document could not be considered as a final document. A refusal of access within that period is justified.[105] Also, a draft decision on a building permit cannot be considered as a finished administrative document. The disclosure can be rejected because of the fact that the administration itself does not decide on the building permit. The final decision has to be taken by a competent body (municipality, province or Flemish government); only after the signing of the decision will it be considered as a finished administrative document.[106]

The Council of State clarified[107] in its case law the concept as follows: an administrative document obtains a final status—and falls under public control—if this document is formally endorsed by the public service in question, even if the document is subsequently subject to change.

The fact that no particular interest is required to get access to documents does not imply permission to submit systematically applications and so to interrupt the normal operations of the public authority. Therefore, repeated applications may constitute an abuse of the law on disclosure and could thus be classified as unreasonable in the sense of Article 11, 1° of the Flemish Decree. However the Flemish Appellate Body on the Openness of Government argues that this is a delicate and difficult question to answer. In assessing the reasonableness of the application, different factors should be taken into account: (i) the number of applications and (ii) the time period within which the various applications are submitted.[108]

[103] Art. 11, 1° and art. 18 Flemish Decree of 26 March 2004.

[104] Art. 11, 2° Flemish Decree of 26 March 2004.

[105] Flemish Appellate Body on the Openness of Government 4 March 2008, no. 2008/11 (available at openbaarheid.vlaanderen.be).

[106] Example of the exception mentioned in article 11, 2° of the Flemish Decree 26 March 2004.

[107] Council of State 28 juni 2011, nr. 214236, Provincie Oost-Vlaanderen.

[108] Flemish Appellate Body on the Openness of Government 18 April 2011, no. 2011/56 (available at: openbaarheid.vlaanderen.be); Flemish Appellate Body on the Openness of Government 14 January 2010, no. 2009/176.

To clarify further the above-mentioned exceptions, we provide some examples to illustrate the problems and discussions in practice.

A first remarkable case concerning transparency was the case of Nils Dumortier against the Flemish Community.[109] Nils Dumortier, a Belgian student in journalism who did research on transparency for his thesis, requested access to the salaries of every person mentioned in the personnel chart of the VRT, the Flemish Radio and Television Organisation. The VRT denied access to this information by arguing that releasing the salaries of top managers would violate the privacy of employees or managers. Moreover, the disclosure of such information would not outweigh the economic, financial or commercial interests of the VRT.[110] Disclosure of the salaries would also cause harm to future wage negotiations at the VRT with existing or newly recruited staff members. The VRT also argued that no legal framework existed for the publication of salaries of top managers at Flemish institutions. Dumortier appealed the decision of the VRT with the Flemish Appellate Body on the Open Government. The Appellate Body confirmed the decision of the VRT by arguing that the invoked exceptions by the VRT were justified and sufficiently reasoned.

Dumortier lodged an appeal before the Council of State to annul the decision of the Appellate Body. He argued that the VRT offered no specific justification that the disclosure would prejudice the protection of individual privacy. The fact that the privacy exception is an absolute mandatory exception did not mean that the VRT could invoke this without any *in concreto* rationale. With regard to the exception of economic, financial or commercial interest, the applicant (Dumortier) argued that the VRT had not effected a balance of interests. They had not shown that the economic, financial or commercial interest transcended the interests of disclosure. The VRT argued that it operated in a competitive media landscape in which the disclosure of information concerning the remuneration of its staff would provide an unfair advantage to its competitors when trying to persuade VRT staff to come work for them, especially due to the fact that their competitors did not fall within the scope of the Flemish Decree.

The Council of State reiterated that every exception had to be concretely justified with reference to the specific circumstances of the case. The

[109] Council of State 2 May 2016, no. 234.609, Dumortier.

[110] The VRT invoked the exceptions of articles 13, 2° and 14, 1° of the Flemish Decree of 26 March 2004.

Council of State assumed that salary information belonged to the privacy interests of an individual. However, merely stating this was not sufficient to invoke the exception. The VRT did not prove why disclosure would violate privacy interests. The exception invoked did not stand for not granting access to the salaries of the members listed on the organisational chart of the VRT. The second exception, namely, economic, financial or commercial interests, was also not applicable in this case. The general interest may never be lost sight of when invoking an exception. It is in the general interest that taxpayers are informed about the use of government revenues, including staff costs. The Council of State thus annulled the decision of the VRT and the Flemish Appellate Body. The decision by the Council of State did not have the consequence that the salaries had to be made public. It only required that a new investigation of the balance of interests must be made and that, if the VRT still wanted to invoke those exceptions, it must justify their application concretely.

A second interesting case concerns a citizen that, in 2008, requested a copy of a study entitled 'The legal status of watermills' commissioned by the Department of Environment, Nature and Energy. The disclosure of the study was partially rejected by the Department. The citizen appealed both the partial refusal and the failure to implement the decision of partial disclosure. The Department argued that the implementation had not yet been completed because the study had to be censored first and that the screening of the full report was an extensive job and not a priority at all. The Flemish Appellate Body held that the Department failed to fulfil its legal obligations imposed by the Flemish Decree concerning open government. In general, a fast implementation of the decision to disclose is required. For disclosing the study only partially, the following exceptions were invoked by the Department: 'confidentiality of the actions of an authority insofar as this confidentiality is required for the political decision-making process'.[111] The study itself would in no way develop policies, but would only provide information to come to an integrated policy about watermills. The Appellate Body examined whether the interests for disclosure were outweighed by the protection of the confidentiality of the acts of the authority, insofar this confidentiality was required for the political decision-making process.[112] The study only covered a judicial view on an integrated policy on

[111] Art. 14, 5° and art. 15, 5° Flemish Decree of 26 March 2004.

[112] The term 'political decision-making process' has to be interpreted strictly (Explanatory Note Flemish Decree of 26 March 2004, 31).

watermills and was dated two years before the application. Within these two years, the study had not yet led to any concrete policy proposals. The proposals mentioned in the study did not form part of any political decision-making process. For these reasons the study should be fully released.

A third case also concerns a dispute over partial release of information. Here a request was made for access to a whole series of minutes from the Port Authority and this stretching over a long period.[113] The decision of the Appellate Body was appealed because it had agreed with the initial refusal decision that the request was unreasonable within the meaning of Article 11, 1 ° of the Flemish Decree.

The decision had considered the substantial volume of documents involved and the fact that these documents always had to be checked for possible exceptions. It was considered that without the required precautionary review, volume was determinative given the requested documents. But, according to the Council of State, the refusal of the fundamental right to disclosure pursuant to a quantitative criterion dictated the greatest caution. The screening of the minutes may have been a massive task, but it did not appear that this task should be considered as insurmountable. In this case, the information was requested from a large and capacious administrative authority, which may be expected to know how to organise its affairs to meet such disclosure requests.

A fourth case concerns a small local community where minutes of meetings were requested also. The complainant alleged that the complete minutes had to be released, at least partially. It was up to the concerned community to take the necessary steps and, if necessary, to redact the information that was protected through privacy interests. The Appellate Body declared the appeal unfounded:

> Whereas in the production of the minutes of aldermen a whole list of topics will be discussed: individual planning cases, individual environmental permits, decisions concerning immovable property owned by individuals, individual staff files of officials, administrative sanctions, different social allowances to individuals, exam results, subscriptions and removing from population registers… and that they really intertwined information and entries regarding the privacy of an individual; that the municipal administration holding the requested minutes should have to examine the extent to which certain parts of the minutes could not be made public for the protection of privacy;

[113] Council of State 21 November 2014, nr. 229.270, Katoen Natie, e.a.; see also Council of State 8 November 2016 nr. 236.367.

> that these sections then each have to be made unreadable before a copy can be provided to the applicant; that this is a heavy administrative task for an administrative authority, that would have as a result that barely legible signed documents remain in the minutes; Concerning that the 'cleansing' of the minutes (more than 20 pages by meeting) of personal information in that case has no sense and that disclosure of the requested documents must be rejected in this case, referring to the application of Article 13, 2 ° Flemish Decree and the protection of privacy of a whole range of individuals; Concerning that the action with regard to this (minutes of aldermen), must be regarded as unfounded. [114]

The Council of State held similarly in another case[115] that the principle of partial disclosure and separation of the information contained in Article 9 of the Flemish Decree was not absolute. The argument of the applicant that 'in practice (…) to separate [is] always possible by blackening certain passages' could not be accepted. In the present case, it was sufficient for the Council of State to declare that 'the applicant submits no further elements which could justify a partial disclosure of the documents in the file'. The infringement was therefore rejected.

6 Special Regime for the Access to Environmental Information

The reason for separate legislation about environmental information lies in the implementation of the Aarhus Convention and Directive 2003/4/EC of 28 January 2003 on public access to environmental information. The implementation is done in different manners depending on the legislative level. On the federal level and in the Brussels Region, there are separate laws regarding environmental information. On the Flemish level, access to environmental information is integrated in the general Decree regarding access to information. In the Walloon Region, it is integrated in the Environmental Code.

On the federal level, specific regulations were adopted to deal with access to environmental information, namely, the Federal Act of 5 August

[114] Flemish Appellate Body on the Openness of Government 12 July 2013, no. 2013/90. Contra case 2015/82 the Appellate Body argued that (full) refusal was not allowed and that the local authority had to blacken words/sentences as to allow a partial disclosure.

[115] Council of State 24 June 2014, no. 227.809, Verrycken.

2006 concerning access to environmental information.[116] It was the intention of this Act to guarantee a right of access to environmental information held by (federal) public authorities and to establish the rules and practical arrangements for exercising that right. The reason for a different legal instrument on the federal level and not on the Flemish level is easily explained. The law represents a conversion of Directive 2003/4/EG, while the Flemish Decree was adopted after the publication of the Directive and automatically could include these principles in its general body.

The federal legislator opted not to use the term 'administrative authority' to define the scope *ratione personae* of the Federal Act of 5 August 2006. The statute determines three categories of 'environmental bodies': (i) a legal person or body established by the Constitution, a law, a decree or a rule referred to in Article 134 of the Constitution; (ii) a natural or legal person performing public administrative functions, including specific duties, activities or services in relation to the environment; and (iii) a natural or legal person under the control of a body or person referred to in (i) or (ii) responsible for providing public services relating to the environment.[117]

The Aarhus Convention defines in detail what is covered by the term 'environmental information'. It includes, for example, the state of the elements of the environment, environmental agreements, human health and safety, including any contamination of the food chain and so on.[118] The Flemish Decree defines 'information on the environment' as information about the environment; measures and activities that lead or may lead to pressure on the environment; nature, building and areas of cultural beauty; the health, safety and living conditions of the population and the impact on these, and so on.[119] A similar definition occurs in the federal legislation.[120]

[116] Federal Act of 5 August 2006 concerning the access to environmental information, *BS* 28 August 2006, 42538.

[117] Art. 3, 1° Federal Act of 5 august 2006; Explanatory note accompanying the Federal Act of 5 August 2006 concerning the access to environmental information, *Parl. St.* Kamer 2005–2006, no. 2511/001, 12–13.

[118] See Aarhus Convention and EU Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *Pb. L.* 14 February 2003, 41/26.

[119] Art. 3, 5° Flemish Decree of 26 March 2004.

[120] Art. 3, 4° Federal Act of 5 August 2006.

With regard to the Flemish appeal procedure for access to environmental information, we can refer to the general discussion (*infra 7. Administrative and judicial remedies*). On the federal level, the appeal procedure is different for environmental information than for non-environmental information. The Federal Act of 5 August 2006 established a specific Appellate Body for environmental information, namely, the Federal Appellate Body on the Access to Environmental Information.[121]

The most important difference in the field of environmental information is the exceptions established by the Federal Act of 5 August 2006 and the Flemish Decree of 26 March 2004. Not all the exceptions for the general documents can be applied to 'environmental documents'.

Under the Federal Act, there are only two exceptions which have an absolute mandatory character: when the request is manifestly unreasonable and when the request remains formulated in too general a manner after the authority has requested the reformulation of the first application.[122] A request can be considered unreasonable if it requests the disclosure of the entire international, European and national environmental framework.[123] Under the Flemish Decree, these exceptions also remain for environmental information only optional.[124]

In the grounds for exceptions for 'general information', a difference is made between the relative and absolute mandatory exceptions. This difference does not exist for environmental information (except in the two federal cases mentioned above). By invoking an exception to reject access to environmental information, the administrative body must always check if the protected interest prevails over the interest for disclosure.[125] The exceptions mentioned in the Federal Environmental Act are identical to those in the Flemish Decree: (i) the protection of individual privacy, unless the person concerned consents to the making public of the information[126]; (ii) the confidentiality of the deliberations of the Flemish/federal government and of the responsible bodies that depend

[121] Art. 33–42 Federal Act of 5 August 2006.

[122] Art. 32, §2 Federal Act of 5 August 2006.

[123] See Schram (2010), pp. 113.

[124] Art. 11 Flemish Decree of 26 March 2004.

[125] Art. 27 Federal Act of 5 August 2006; art. 15 Flemish Decree of 26 March 2004.

[126] Art. 15, §1, 1° Flemish Decree of 26 March 2004; art. 27, §1, 1° Federal Act of 5 August 2006.

on it[127]; (iii) the confidential nature of administrative documents that were compiled exclusively for criminal or administrative penal proceedings[128]; (iv) the protection of information provided by a third party without this party being compelled or obliged to do so and which the said party has explicitly designated as confidential, unless this person consents to its being made public[129]; (v) the confidential nature of the international relations of the government[130]; (vi) the confidential nature of commercial and industrial information, when this information is protected to safeguard a legitimate economic interest, unless the party from whom the information originates agrees to the public nature thereof[131]; (vii) the dispensation of justice in civil or administrative proceedings and the possibility to obtain a fair trial[132]; (viii) public order and safety[133]; and the protection of the environment the information relates to. Further, the Flemish Decree contains two exceptions which are not mentioned in the Federal Environmental Act: (i) the confidential nature of administrative documents compiled exclusively for the possible implementation of disciplinary measures, for as long as the possibility of a disciplinary measure continues,[134] and (ii) the confidentiality of the actions of an environmental authority insofar as this confidentiality is required for administrative enforcement, the performance of an internal audit or the political decision-making process.[135] To the extent the requested information concerns emissions, some grounds for exception do not apply in both the Federal Act

[127] Art. 15, §1, 2° Flemish Decree of 26 March 2004; art. 27, §1, 6° Federal Act of 5 August 2006.

[128] Art. 15, §1, 3° Flemish Decree of 26 March 2004; art. 27, §1, °4 Federal Act of 5 August 2006.

[129] Art. 15, §1, 5° Flemish Decree of 26 March 2004; art. 27, §1, 8° Federal Act of 5 August 2006.

[130] Art. 15, §1, 6° Flemish Decree of 26 March 2004; art. 27, §1, 3° Federal Act of 5 August 2006.

[131] Art. 15, §1, 7° Flemish Decree of 26 March 2004; art. 27, §1, 7° Federal Act of 5 August 2006.

[132] Art. 15, §1, 1° Flemish Decree of 26 March 2004; art. 27, §1, 1° Federal Act of 5 August 2006.

[133] Art. 15, §1, 10° Flemish Decree of 26 March 2004; art. 27, §1, 2° Federal Act of 5 August 2006.

The Federal Act gives two examples: the physical protection of radioactive materials and the defence of the country.

[134] Art. 15, §1, 4° Flemish Decree of 26 March 2004.

[135] Art. 15, §1, 9° Flemish Decree of 26 March 2004.

and the Flemish Decree.[136] To conclude, some grounds for exceptions are absolute mandatory for 'general information', but are relative mandatory for the environmental information.

7 Administrative and Judicial Remedies

Both the Federal Act and the Flemish Decree contain provisions regarding an appeal procedure when the application for access to documents is explicitly or implicitly rejected or in the event of the decision being carried out reluctantly.[137] They both stipulate the obligation to mention the remedies and modalities of the specific administrative appeal procedure in the decision sent to the person(s) concerned. A non-observance of that obligation has the effect that the limitation period to file a complaint is not running.[138] This will only begin to elapse four months after the person was notified of the act or decision of individual application.

When under the Federal Act on transparency the right of access is rejected, a complex administrative appeal procedure is available. In such a case the applicant must address a question for reconsideration to the authority that has rejected access and simultaneously address a question for advice to the Commission for Access to and Reuse of Administrative Documents.[139] Within a period of 30 days, the Commission shall report to the denying authority with non-binding advice to grant or to reject access. Finally, the initial administrative authority takes the final decision within 15 days after that advice or after the expiry of the term to give advice.[140] If no decision is made within this period, it is assumed that the authority has taken a decision to reject access.[141] This is an organised administrative appeal, because the law explicitly provides for an administrative appeal. The fact that the appeal is organised determines the competences of the Council of State.[142] Before a complaint

[136] Art. 15, §2 Flemish Decree of 26 March 2004; art. 27, §2 Federal Act of 5 August 2006.

[137] Art. 8, §2 Act of 11 April 1994; art. 22 Flemish Decree of 26 March 2004.

[138] Art. 2, 4° Act of 11 April 1994; art. 35 Flemish Decree of 26 March 2004.

[139] Art. 8 Act of 11 April 1994.

[140] If the advice is not made within this period, then the administrative authority can decide without the advice.

[141] Art. 8, §2, para. 3 Act of 11 April on access to administrative documents; Council of State 29 May 2012, no. 219.523, Gozin.

[142] Council of State 18 October 1999, no. 82.935, Duez.

can be launched before the Council of State, the organised administrative appeal process must be exhausted. The period for going to appeal with the Council of State is normally 60 days, unless when no decision is taken or if the appeal possibilities are not mentioned in the decision. In these circumstances, the period only starts four months after the decision was brought to the attention of the applicant.

In comparison with the Federal Act, the Flemish Decree established a new body of appeal: the Flemish Appellate Body on the Openness of Government. It is not a request for reconsideration with the same body, but an appeal with another body against the earlier decision. The appeal of the applicant must be in writing, by letter, by fax or by e-mail and must be submitted within a period of 30 calendar days.[143] The Appellate Body adjudicates on the appeal and notifies the applicant of its decision within a period of 30 calendar days.[144] In the case that the Appellate Body does not grant access, the applicant can lodge an appeal before the Council of State within 60 days. In the past 12 years, only 55 cases were lodged before the Council of State regarding the Flemish Decree on open government. Thirty-nine of the cases were already judged by the Council of State, which only (partially) annulled nine decisions of the Flemish Appellate Body.[145] The low number of requests to the Belgian Council of State constitutes a solid argument in the direction of the effectiveness of the administrative appeal (Fig. 4.4).[146]

In no case does the Council of State set itself in the place of the administrative authority: the Council of State performs a marginal judicial review in this respect. The administrative judge (Council of State), upon determining an illegality, will only annul the contested decision without recognising any further rights for the requesting party. If the Council of State annuls a decision, it does not automatically imply that access to documents is granted. It only implies that the administrative authority has to render a new decision,

[143] Art. 22 Flemish Decree of 26 March 2004.

[144] Art. 24, §1 Flemish Decree of 26 March 2004.

This period can exceptionally extend the deadline within 15 days if the appeal body is of the opinion that the information requested will be difficult to collect in a timely fashion or if the verification of the application as regards the grounds for exception is difficult to complete in time.

[145] Flemish Appellate Body on the Openness of Government, *Year Report 2015–2016*, Brussel 2016, available at http://openbaarheid.vlaanderen.be/nlapps/data/docattachments/20170130145617589.pdf.

[146] See Veny (2014), pp. 189.

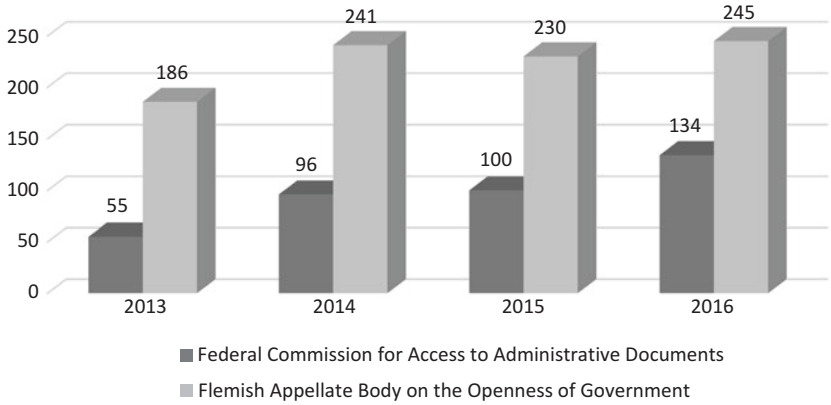


Fig. 4.4 Overview of the amount of administrative appeals on access to administrative documents

which could be the same as the annulled decision but with other reasoning. In comparison to the Appellate Bodies, the Council of State does not make a decision on the case *de novo*.

8 Active Transparency or *Ex Officio* Transparency

Article 32 of the Belgian Constitution only covers the passive component of transparency, namely, that citizens have to request documents and information. Yet transparency has two dimensions: an active one and a passive one. In the following section, we will discuss the relevant provisions regarding the active transparency of administrative authorities.

8.1 Active Transparency on the Federal Level

The Federal Act contains a couple of provisions concerning active transparency. Evidently these are merely minimum requirements which do not prevent each authority from undertaking further initiatives to develop its communication policy.[147]

Four obligations are laid down in the Federal Act to ensure that the public is aware of the activities of the federal administrative authorities. Firstly, a Royal Decree determines the organisation and the tasks of the

[147] Explanatory Note Federal Act of 11 April 1994, 12.

federal public service and the federal administrative authorities which are obliged to establish a specialised body. The notion 'body' has to be interpreted broadly. It can be a specialised institution or a staff member in charge (full time or part-time) of the information policy. This specialised body is entrusted with the conception and the realisation of the information policy. It is not necessary that these bodies provide the information themselves. They mainly have a guiding function.[148]

Secondly, each federal administrative authority has to publish a 'where to go' document with a description of its competences, its organisation and other information that is relevant for the public, such as the opening hours of public services. This document must improve accessibility of the administration for citizens. After all, an accessible administration can only be attained when it is clear to the public which authority or which staff member is competent for which specific matter. This document will be provided to anyone on request.[149]

Thirdly, all outgoing correspondence from a federal administrative authority must mention the contact person who can give more information regarding the case. The following information about the contact person must be given: name, function, address and phone number.[150]

Fourthly, there is an obligation to mention the appeal procedures that can be undertaken against an administrative decision with individual scope. This information has to be given in the same document in which the administrative decision is notified. The information about the appeal procedures includes the competent bodies for the appeal and their address, the period wherein the appeal has to be made and the applicable procedures.[151]

The information that must be provided according to the requirements of active transparency must be drafted in an understandable manner. This means that the information has to be adapted to the target group. In addition, the information must be objective and complete.[152]

[148] Article 2, 1° Federal Act of 11 April 1994; Explanatory Note Federal Act of 11 April 1994, 12.

[149] Article 2, 2° Federal Act of 11 April 1994; Explanatory Note Federal Act of 11 April 1994, 12–13.

[150] Article 2, 3° Federal Act of 11 April 1994.

[151] Article 2, 4° Federal Act of 11 April 1994; Explanatory Note Federal Act of 11 April 1994, 13.

See, for example, Council of State 31 January 2012, no. 217.627, De Baere; Council of State 18 October 1999, no. 82.935, Duez.

[152] Explanatory Note Federal Act of 11 April 1994, 12.

The principle of active transparency does not imply that the government should on its own initiative provide access to a file for a person without prior request.[153]

8.2 Active Transparency on the Flemish Level

8.2.1 Principle

The Flemish Decree is more comprehensive than the Federal Act regarding the active dimension of transparency.[154] The instances mentioned in Article 4, §1, 2°–8° of the Flemish Decree of 26 March 2004 are obliged to inform the public about their policy, regulations and service provisions as well as about the rights of the people covered by this decree.[155] An aspect of the policy, the regulations or the provided services can either concern the public in general or a limited target group. The communication has to be directed to whom the information is relevant. Furthermore, the information has to be given in a systematic (consequently not *ad hoc*), correct (the instances must make every possible effort in order to disseminate only correct information and, if needed, rectify false information immediately), well-balanced (the instances must avoid one-sided information; they have to mention the outlines of each problem, without focusing more on some parts of it), timely (at the moment when the information is necessary or useful for the recipient) and understandable (the instances must adapt the information in the light of the foreknowledge of the target group) manner.[156] However, the requirements within the framework of active transparency cannot lead to the dissemination of information which falls under the mandatory exceptions of passive transparency.[157]

[153] Council of State 8 March 2011, no. 211.844, XXX.

[154] In fact, the Flemish Decree has the broadest policy concerning active access to documents within Belgium (see Schram (2011), pp. 688).

[155] Art. 28, §1 Flemish Decree of 26 March 2004. Furthermore, the Flemish executive can name the instances as mentioned in article 4, §1, 10° which also have to respect this obligation.

[156] Art. 28, §1 Flemish Decree of 26 March 2004; Explanatory Note Flemish Decree of 26 March 2004, 44.

[157] Art. 28, §2 Flemish Decree of 26 March 2004.

8.2.2 'Where to Go' Information and First-Line Information

A database with 'where to go' information and first-line information about the executive instances as mentioned in Article 4, §1 of the Flemish Decree will be developed. The 'where to go' information indicates where someone can find information about a specific subject or where someone can go for the handling of a problem or an administrative procedure. First-line information is basic information that is not related to a specific case.[158] For example, first-line information answers questions such as 'When are the school holidays this year?' or 'How much is a fishing licence?' For more complex information or information related to a specific case, the information seeker is referred to the competent executive instance.[159]

In order to grant access to the database in the most customer-friendly way as possible, access can be given electronically, by phone or over the counter. Because of the proximity of local authorities (municipalities and provinces), it is recommended that especially these authorities make the 'where to go' information and the first-line information accessible through their service counters. In addition, access to this database will be open and free of charge for anyone.[160] The obvious beneficiaries of the database are individual citizens, companies, institutions and associations: thus mostly private entities who are seeking information. However the database will also be useful for the executive instances themselves. Executive instances often have to refer applicants to each other, but it is not always clear for themselves which instance is competent for the matter requested. The database will make this easier for them. Overall it is expected that the rate of return and the time savings will outweigh the investments each executive instance has to make in order to realise the database.[161]

The Flemish government is responsible for the development and the direction of this database, with the assistance of the executive instances as mentioned in Article 4, §1 of the Flemish Decree.[162] Given the complexity and the magnitude of this project, the Flemish legislator chose for a graduated approach. In the first step the 'where to go' information and the first-line information of the Flemish government will be made available in a

[158] Art. 29, §1 Flemish Decree of 26 March 2004.

[159] Explanatory Note Flemish Decree of 26 March 2004, 45.

[160] Art. 29, §1, last paragraph Flemish Decree of Flemish Decree of 26 March 2004; Explanatory Note Flemish Decree of 26 March 2004, 45.

[161] Explanatory Note Flemish Decree of 26 March 2004, 45.

[162] Art. 29, §3 Flemish Decree of 26 March 2004.

product catalogue of the Flemish government. Later on, the information of other executive instances will be implemented.[163]

As long as the database is not complete, the provinces and the municipalities have to comply with their obligations under the Federal Act of 12 November 1997.[164] This means that each province and each municipality must publish a document with a description of the competences and the organisation of every administrative authority that falls within the province or the municipality.[165]

8.2.3 Communication Officer

A communication officer has to be appointed in each Flemish ministry, each internal autonomous public body with legal personality, each external autonomous public body, each province, each municipality and each public centre for social welfare.[166] Moreover the Flemish executive can appoint a communication officer in an internal autonomous public body without legal personality.[167]

Especially for public centres for social welfare ('OCMW'), a communication officer is considered to be of great importance. The reason for this is that public centres for social welfare usually work with target groups that are difficult to reach, such as the underprivileged, the elderly and members of an ethnic minority. While research has shown that these target groups have the most need for government information, these groups are the least

[163] Omz. VR 2006/26 concerning access to information. Available on http://openbaarheid.vlaanderen.be/nlapps/docs/default.asp?id=26#19 (26 July 2016). The product catalogue is available on the following website: http://productencatalogus.vlaanderen.be/.

[164] Federal Act of 12 November 1997 concerning access to information in the provinces and the municipalities, *BS* 19 December 1997.

See also Explanatory Note Flemish Decree of 26 March 2004, 45.

[165] Art. 3, 2° Federal Act of 12 November 1997 concerning access to information in the provinces and the municipalities, *BS* 19 December 1997; art. 29, §2 Flemish Decree of 26 March 2004 concerning access to administrative documents.

[166] The obligation to appoint a communication officer does not imply that it has to be a full-time function. Depending on the size of the municipality or public centre of social welfare and the dimension of the communication needs, the function can be either full time or part time. A full-time function is recommended in municipalities of at least 20,000 citizens. In smaller municipalities there are possibilities for collaborations between municipalities. Another possibility is that one communication officer is appointed for both the municipality and the public centre for social welfare.

See Explanatory Note Flemish Decree of 26 March 2004, 47–48.

[167] Art. 31, §1–3 and §5 Flemish Decree of 26 March 2004.

reached by traditional communication methods. Therefore it is necessary that special efforts are made to reach these target groups.[168]

The communication officer is in charge of the preparation and realisation of the communication policy. He stimulates, coordinates and guides the communication of the concerned executive instance. Among other tasks, his includes principally informing the public and the concerned target groups about the policy, specific decisions that affect them and the services provided by the concerned executive instance. In addition, the communication officer makes sure that all executive documents that are directed at citizens are drafted in correct and understandable language.[169] The requirement of understandable language implies that the vocabulary used and the sentence structure are adapted to the target group.[170]

In order to fulfil their tasks, communication officers are entitled to access all useful documents.[171]

Although the communication officer has an extensive range of duties concerning communication, the Flemish legislator has emphasised that the communication officer is not solely responsible for the execution of the entire communication policy. On the contrary, communication is a task for the whole government.[172]

8.2.4 Annual Report

The Flemish Decree imposes on the Flemish executive an obligation to make an annual global report and an evaluation of the communication and the communication policy of the Flemish ministries, the internal autonomous public bodies with legal personality and the external autonomous public bodies. This annual report must be notified to the Flemish parliament.[173]

In order to increase the efficiency of communication and to obtain a maximum recognition of the Flemish government, the Flemish executive can impose further regulations on the instances mentioned in the paragraph above, concerning the generic aspects of and the coordination of the communication policy. The generic aspects of communication are elements that are not specific for one instance but apply systemically to the entire (or at least multiple sections of the) Flemish government. Examples of generic

[168] Explanatory Note Flemish Decree of 26 March 2004, 47–48.
[169] Art. 32, §1–2 Flemish Decree of 26 March 2004.
[170] Explanatory Note Flemish Decree of 26 March 2004, 48.
[171] Art. 32, §3 Flemish Decree of 26 March 2004.
[172] Explanatory Note Flemish Decree of 26 March 2004, 48.
[173] Art. 33, §1 Flemish Decree of 26 March 2004.

aspects are the corporate design, the use of symbols and the manner in which the instances announce themselves abroad as official bodies of the Flemish government.[174]

8.2.5 Requirements Regarding the Correspondence

All outgoing correspondence from an instance within the Flemish Community or the Flemish Region—the instances mentioned in Article 4, §1 of the Decree—must mention the name, the capacity, the address and the phone number of the person who can give more information about the case.[175] Each decision or administrative act with individual scope that aims to create legal effects for one or more citizens or for another instance must mention the possible appeal procedures that can be undertaken against the decision and the modalities of the appeal procedure. If these elements are not included in the notification, the period for appeal shall begin four months after the notification of the decision or the act with individual scope.[176]

9 Overall Assessment and Some Concluding Remarks

Access to information has in the last years become a very powerful instrument for citizens. As we have explained, the regulation on access to documents in Belgium is very fragmented. Other than the Constitution which enshrines a general right, legislation also exists at the federal and federated, regional level. However, as has become clear in this article, most of the time at the regional and federal levels, similar rules apply. In this article we have explored the scope and exceptions at the federal level and gave some practical examples and issues. The contribution made clear that the duty to provide information has a very broad scope. It is not limited to the traditional authorities but also refers to natural and legal persons which have the characteristics of government (e.g. because of their special powers). It is also not limited to formal documents.

The exceptions applied in the regulations studied are not entirely the same, but they quite often protect the same interests so that there are no major differences in practice. Administrative and judicial protection ensures the strict application of the exceptions. Having said that, discussions often

[174] Art. 33, §2 Flemish Decree of 26 March 2004; Explanatory Note Flemish Decree of 26 March 2004, 48.

[175] Art. 34 Flemish Decree of 26 March 2004.

[176] Art. 35 Flemish Decree of 26 March 2004.

arise in practice on partial disclosure and/or on multiple requests. This is no coincidence. The requests can impose a very heavy burden on the administrative organisation of a government. The answer to the question of what is reasonable and where unreasonableness begins is based on a delicate balance.

Lastly, in Belgian law much attention is also paid to active transparency. The importance of this in practice, especially through the online provision of information through websites, continues to increase. This is a good thing for democracy and accountability.

Active transparency prevents citizens from starting time-consuming procedures. Furthermore, it creates more transparency in the functioning of the administration and saves effort in the administration-focused searches. The documents are, after all, online. Two very recent initiatives illustrate perfectly this trend.

The Flemish government since September 2016 has made all the notes and notices relating to weekly government decisions available online (except for the documents in individual decisions (regarding a personal legal situation) and some confidential documents). By making these government documents public, the Flemish government committed itself to greater openness and transparency and wanted to give more insight into the way policy is made.

A similar movement is noticeable at the federal level where, after legislative intervention, the advice on legislation and regulations, together with the texts which the advice relates to, of the Council of State are systematically (since 1 January 2017) disclosed.[177] That decision was very welcomed by academia.

Annex 4.1 Overview of Access to Documents in Belgium

Section	*Federal Act*	*Flemish Decree*
Beneficiaries of access to information	Everyone (natural persons, NGOs, non-profit organisations, public or private companies, etc.)	Everyone (natural persons, NGOs, non-profit organisations, public or private companies, etc.)
Entities which are bound by the law	(Federal) Administrative authorities	(Flemish) Public authorities
Request for access	Written (interpreted broadly)	Written (interpreted broadly)

(*continued*)

[177] Law of 16 August 2016, *BS* 14 September 2016.

(continued)

Section	*Federal Act*	*Flemish Decree*
Detection of interest	Only for information of personal nature	Only for information of personal nature
Response answer	No obligation	No obligation
Time frames to respond	30 days, extendable to 45 days	15 days, extendable to 30 days
Exceptions	Three categories: (i) relative mandatory exceptions, (ii) absolute mandatory exceptions and (iii) discretionary exceptions. This last category can only be invoked by federal administrative authorities	Three categories: (i) relative mandatory exceptions, (ii) absolute mandatory exceptions and (iii) discretionary exceptions. This last category can only be invoked by Flemish public authorities
Fees and costs	No costs, except for copy	No costs, except for copy
Administrative remedies	Federal Commission on Access to and Reuse of Administrative Documents	Flemish Appellate Body on the Openness of Government
Judicial remedies	Council of State	Council of State

Annex 4.2 Exceptions on Access to Documents in the Flemish Decree of 26 March 2004 Concerning Access to Administrative Documents

Exception	*Access to administrative documents*	*Access to environmental information*		
		General information	***Information regarding emissions***	***Information regarding Seveso's***
Optional exceptions				
The application remains manifestly unreasonable or formulated in a too general manner	X	X	X	X
Unfished or incomplete administrative documents	X	X	X	X
Mandatory exceptions				
Obligation to secrecy	Absolute	/	/	/

(*continued*)

(continued)

Exception	*Access to administrative documents*	*Access to environmental information*		
		General information	***Information regarding emissions***	***Information regarding Seveso's***
Protection of individual privacy	Absolute	Relative	/	Relative
Confidentiality of deliberations of Flemish authorities falling under the scope of the decree	Absolute	Relative	/	/
Documents compiled exclusively for criminal or administrative penalty proceedings	Absolute	Relative	Relative	Relative
Documents compiled exclusively for possible implementation of disciplinary measures	Absolute	Relative	Relative	Relative
Information voluntarily provided by a third party and designated as confidential	Absolute	Relative	/	Relative
Economic, financial or commercial interest	Relative	/	/	/
Confidential nature of international relations	Relative	Relative	Relative	Relative
Confidential nature of commercial and industrial information	Relative	Relative	/	Relative
Dispensation of justice in civil or administrative proceedings and possibility to obtain a fair trial	Relative	Relative	Relative	Relative
Confidentiality of actions of authority insofar as this confidentiality is required for administrative enforcement, performance of internal audit or political decision-making process	Relative	Relative	/	/
Public order and safety	Relative	Relative	Relative	Relative
Protection of environment	/	Relative	/	/

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CHAPTER 5

Transparency and Access to Government Information in the Netherlands

Kars J. de Graaf, Albert T. Marseille, and Hanna D. Tolsma

1 Introduction

Some years ago, the Netherlands was regarded as a leading country in terms of transparency and access to government information. The Government Information (Public Access) Act (WOB, *Wet openbaarheid van bestuur*) came into force in 1980. Since then, many countries have introduced freedom-of-information legislation, and there are doubts as to whether practice and legislation in the Netherlands still meet present-day requirements with regard to transparency and access to information. The Netherlands has fallen behind in comparison with other countries that have recently introduced a Freedom of Information Act.[1]

This chapter starts with a summary of information legislation in the Netherlands (Sect. 2) and provides information about the number of applications for the disclosure of documents (Sect. 3). Access to information

[1] *Kamerstukken II* (Parliamentary Papers) 2011–2012, 33,328, No. 3, pp. 2–3.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_5

will then be discussed in detail, in the context of the Government Information (Public Access) Act (hereinafter WOB), which stipulates that the government is obliged to provide information both on the basis of an application and voluntarily (Sect. 4). After this we focus on legal remedies (Sect. 5) and on future developments (Sect. 6). This chapter concludes with some final remarks (Sect. 7).

2 Access to Information in the Netherlands: An Overview of the Legislation

In order to ensure 'good democratic governance', the Netherlands has had a Government Information (Public Access) Act since 1980.[2] This legislation is based on Article 110 of the Dutch Constitution: 'In the exercise of their duties, government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament'. The WOB is based on the principle of disclosure, with regard to providing information on request as well as voluntarily. In particular, systematic and technical legal amendments to the original act resulted in the current WOB, which came into effect on 1 May 1992.[3] It has been amended several times since then, in order to comply with (new) European and international requirements. In 2005, for example, specific provisions about environmental information were incorporated in the WOB by means of the act implementing the Directives on the first and second 'pillars' of the Aarhus Convention.[4] Provisions regarding the re-use of government information have also been incorporated in the WOB by the act implementing the Directive on the Re-use of Public Sector Information.[5]

In addition to the WOB, the Netherlands has legislation on public access and disclosure/non-disclosure in many fields. The Youth Act (*Jeugdwet*), for example, contains provisions about the confidentiality and disclosure of documents concerning young persons. The Financial Supervision Act (WFT, *Wet op het financieel toezicht*) contains regulations on confidential data/information supplied or obtained pursuant to the WFT. The relationship between the WOB and other specific legislation and regulations is set out in Article 2 (1) of the WOB:

[2] Act of 9 November 1978, Bulletin of Acts and Decrees 1978, 581.
[3] Act of 31 October 1991, Bulletin of Acts and Decrees 703.
[4] Act of 23 June 2005, Bulletin of Acts and Decrees 2005, 341.
[5] Act of 22 December 2005, Bulletin of Acts and Decrees 2006, 25.

> An administrative authority shall, in the exercise of its functions, disclose information in accordance with the present Act, without prejudice to provisions laid down in other statutes.

It follows from this provision that the WOB is a general piece of legislation over which specific disclosure regulations formally laid down in legislation take precedence. It is established case law of the Administrative Jurisdiction Division of the Council of State (hereinafter ABRvS, *Afdeling bestuursrechtspraak van de Raad van State*) that specific disclosure regulations of a comprehensive nature that are formally laid down in legislation take precedence over the WOB.[6] Regulations are deemed to be comprehensive when they are designed to prevent the application of the WOB from detracting from the proper functioning of material provisions in the special legislation.

The Open Government Act (WOO, *Wet open overheid*) was adopted by the House of Representatives on 19 April 2016.[7] The bill is currently before the Senate and will, if adopted by the Senate, replace the WOB.[8] According to the explanatory memorandum, the aim of this legislation is to make public and parastatal bodies more transparent in order to better serve the openness of public information for the democratic state, citizens, governance and economic development.[9] According to the initiators, new legislation is needed because the current WOB no longer aligns with current thinking on the value of and need for openness. In practice in the Netherlands, too little information is disclosed voluntarily under the current WOB. In addition, the grounds for exemption exclude too much information from public scrutiny, and people requesting information may be faced with high costs.[10] The new legislation is not undisputed. The Association of Netherlands Municipalities (VNG, *Vereniging van Nederlandse Gemeenten*) supports the principles of the legislation, but there are major concerns about its practicability, the cost and the pressure it will exert on the democratic decision-making process. According to a study commissioned by the Minister of Foreign Affairs and Kingdom Relations (the report 'Quick scan impact Wet open overheid' on the consequences of the WOO for the civil service), the new legislation is not

[6] ABRvS 30 June 2010, ECLI:NL:RVS:2010:BM9675.
[7] *Kamerstukken I* 2015–2016, 33,328, A (amended bill).
[8] See Sect. 6.
[9] *Kamerstukken II* 2013–2014, 33,328, No. 9, p. 5.
[10] *Kamerstukken II* 2013–2014, 33,328, No. 9, p. 2.

practicable and will lead to high extra costs that are not covered in the multi-year budget.[11] The Senate will consider these findings in its discussions on the legislation.

3 Number of Applications for the Disclosure of Documents

How often do administrative authorities receive applications for the disclosure of government information? This is not an easy question to answer. Information about the number of applications for information is not recorded on a systematic basis.

A study carried out in 2010 contains a summary of the processing of applications for information that were received by 334 administrative authorities.[12] The study shows that the vast majority of applications for information are submitted to the police. In 2010 there were more than 17,000 applications. The combined total of applications received by all other authorities in that year was 8,000. More recent data, from 2013, are consistent with those of the 2010 survey.[13]

Figure 5.1 clearly shows the difference between the police and other public authorities. Most applications to the police concern information about determining speed violations with automated roadside speed camera

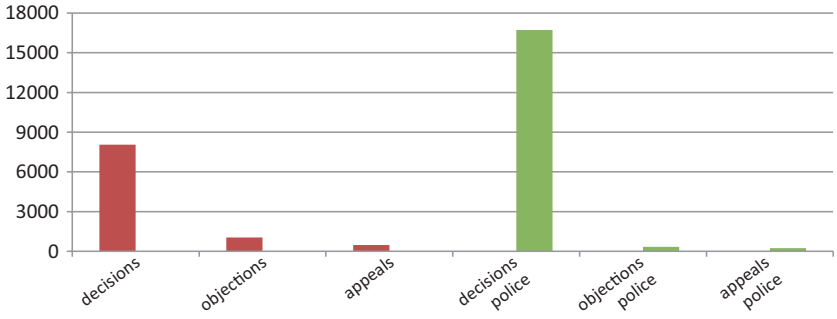

Fig. 5.1 Applications for information: numbers of decisions, objections and appeals

[11] *Kamerstukken II* 2016–2017, 33,328, No. 37.
[12] Van Haeften et al. (2010).
[13] Boonstra (2013).

systems. Figure 5.1 also incorporates figures on objections and appeals against decisions on applications for information. Here, too, the difference is considerable. The number of objections lodged against decisions on applications for information is relatively higher in the case of authorities other than the police. In general, government disclosure decisions lead to an objection procedure in 13% of cases. An estimated 30% of government decisions on objections are challenged in the administrative courts.[14] Far fewer objections are lodged with the police. Only 2% of decisions on applications for information result in an objection procedure. Decisions on objections are challenged no less often in the case of other government bodies. The police dealt with 334 objection procedures, and 251 police decisions resulted in appeals and further appeals.

How many applications for information do administrative authorities receive each year? If we exclude the police, the average number of applications made per year is 14 per administrative authority. The frequency varies considerably from authority to authority.

A number of differences evident in Fig. 5.2 are not surprising. Obviously, the number of applications varies depending on the size of municipality. However, the number of applications received in proportion to the number of inhabitants is lower in large municipalities than in small municipalities: municipalities with a population of up to 20,000 receive 10 applications per municipality per year on average. Municipalities with a population of between 20,000 and 50,000 receive 12 per year, municipalities with a population of between 50,000 and 100,000 receive 18 per year, and municipalities with a population of more than 100,000 receive 32 per year. Notably, a relatively high number of applications are received by ministries, but the number received by non-departmental public bodies is very low.

The 2010 study is merely a snapshot and does not show whether the number of applications from year to year is stable, rising or falling. Internal numbers about applications for information at central government ministries in 2016, provided by the central government to the authors, don't indicate major changes. In 2010 survey reported that ministries received 1,187 requests in 2010. In 2016 they received 1,191 requests.

[14] Precise numbers are not available. It is known only that there were 1,049 objection procedures and 483 appeals.

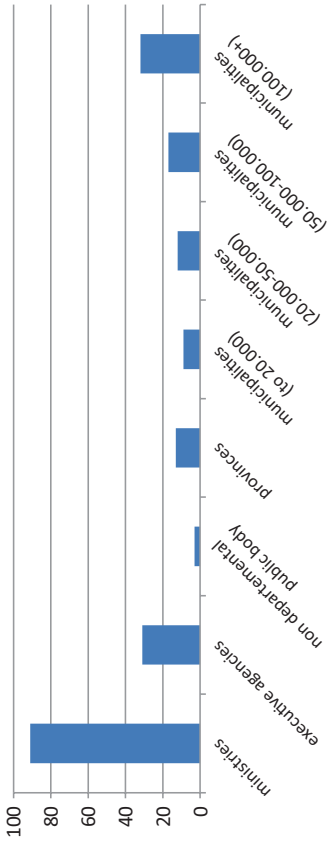

Fig. 5.2 Average number of applications submitted to different categories of administrative authorities

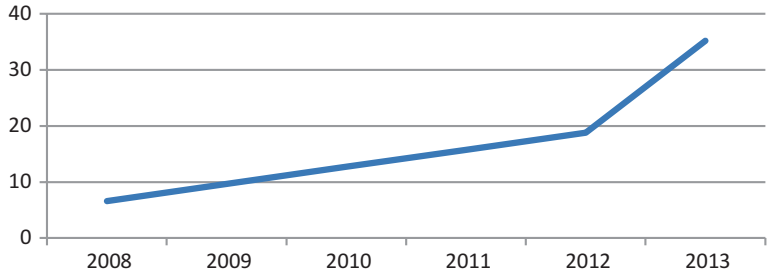

Fig. 5.3 Average number of applications per year per municipal authority

A study carried out in 2014 compared three years (2008, 2012 and 2013), based on a survey among municipal authorities.[15] Data were gathered from 224 municipal authorities. In the survey, municipal officials responsible for dealing with information requests were asked how many requests were received in 2008, 2012 and 2013 (Fig. 5.3).

The figure shows a clear increase.[16] In 2008, an average of 6.6 requests were submitted per year. In 2012, this figure had almost trebled to 18.8 applications per year. In 2012 there was a further increase, to 35.2 applications per year.

Anyone searching for further systematic information on the numbers of information requests has to rely on the data provided by individual administrative authorities, which is scarce. If administrative authorities publish such information on their websites, in many cases this is merely a selection of documents disclosed in response to an application for information.

On the basis of the information available, we may conclude that the number of applications for information varies widely from authority to authority. The police and central government authorities receive particularly large numbers of applications. A further notable trend is the increase in the number of applications in the past decade, which is particularly visible in the case of municipal authorities.

[15] http://docplayer.nl/11253612-Afrekenen-met-de-wob-onderzoek-naar-oneigenlijk-gebruik-van-de-wet-openbaarheid-van-bestuur-bij-gemeenten-en-politie.html.

[16] The numbers for 2008 are based on 140 observations, those for 2012 on 189 observations and those for 2013 on 206 observations. The survey did not ask for the precise number of applications, but whether, in each of the three years, the number was between 0 and 3, 4 and 10, 11 and 20, 21 and 30, 31 and 40, 41 and 50, or 50+. In order to estimate the average number, we have assumed that the averages for the different categories are 1, 7, 15, 25, 35, 45 and 60 requests.

4 Access to Information Pursuant to the WOB

4.1 Introduction

The WOB stipulates that information must be provided on request. Article 3 of the WOB stipulates that anyone may apply to an administrative authority or to an agency, service or company carrying out work under the responsibility of an administrative authority for information contained in documents concerning an administrative matter. This section will first discuss the relevant terms that determine the scope of the WOB, such as 'administrative body', 'document', 'administrative matter' and 'anyone' (Sect. 4.1). The formal aspects of an application for access to information will then be discussed, including the formalities surrounding the application, decision period and cost (Sect. 4.2). In addition to stipulating that information must be provided on request, the WOB also stipulates that administrative authorities must provide information voluntarily (Sect. 4.3).

4.2 Information on Application

It follows from Article 3 of the WOB that applications for information may be submitted to an *administrative authority*. In the WOB, the term 'administrative authority' has the same definition as in Article 1:1 (1) of the General Administrative Law Act (GALA, *Algemene wet bestuursrecht*). The starting point is that all administrative authorities fall within the scope of the WOB, unless excluded by an Order in Council (AMvB, *Algemene Maatregel van Bestuur*). Article 1a of the WOB specifies the administrative authorities to which the act applies, namely: ministers; the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations; and administrative authorities carrying out activities under the responsibility of these authorities and such other administrative authorities are not excluded by Order in Council. The relevant Order in Council (the Administrative Authorities (WNO and WOB) Decree) excludes only a few administrative authorities and only for certain duties, for example, the Dutch Broadcasting Foundation (NOS, *Nederlandse Omroep Stichting*). In the case of administrative authorities in the latter category that are excluded through Order in Council, Article 1a (2) of the WOB states that the legislation does apply to the provision of environmental information.

Article 1:1 of the GALA defines two categories of administrative authorities. The first are administrative authorities of legal entities that have been established by public law (e.g. the mayor, aldermen and council that are part of a municipal authority). The GALA applies to all aspects of the functioning of this category of administrative authorities. Secondly, other persons and boards are also designated as administrative authorities if they are vested with public authority to any extent. Examples include bodies of a legal entity established by private law (foundation) that are not government authorities but do have powers pertaining to public law. Bodies in this category are only designated as an administrative authority insofar as public authority is vested in them. Finally, Article 1:1 (2) of the GALA summarises the authorities, persons and bodies that are not deemed to be an administrative authority. These include the legislature, the upper and lower houses and the joint session of Parliament, authorities charged with the administration of justice and the National Ombudsman. Although the monarch is not named, it follows from the jurisprudence of the ABRvS that he/she is not designated as an administrative authority either.[17] Pursuant to Article 1:1 (3) of the GALA, an authority, person or body corporate excluded under the provisions of subsection 2 is nonetheless deemed to be an administrative authority insofar as it makes orders or performs acts in relation to a public servant within the meaning of the Central and Local Government Personnel Act (*Ambtenarenwet*).

Under Article 3 (1) of the WOB, the scope of the legislation is extended to agencies, services or companies carrying out work under the responsibility of an administrative authority. One example of such a company is a municipal public-transport company. Finally, it should be noted that the scope of the Dutch term *bestuursorgaan* (administrative authority) is more limited than the scope of the term 'public authority' as defined in the Tromsø Convention, which applies to judicial and legislative bodies insofar as their tasks involve the performance of administrative duties. The Netherlands is currently not a signatory to the Convention.[18] If the Netherlands ever becomes a signatory, this will have consequences for the current restriction of the WOB's scope to 'administrative authorities'.[19]

Applications for access to information submitted under Article 3 of the WOB must relate to information contained in *documents*. In Article 1 (a)

[17] ABRvS 6 June 2007, ECLI:NL:RVS:2007:BA6497.
[18] *Kamerstukken II* 2010–2011, 32,802, No. 1, pp. 3–4.
[19] Daalder (2015), p. 141.

of the WOB, 'document' is defined as 'a written document or other material containing data that is held by an administrative authority'. Examples mentioned in the explanatory memorandum of material containing data include photos, films and material in digital form.[20] It is evident from the above that the term 'document' is very broadly defined. This broad definition is also reflected in case law. For example, video images, emails and electronically recorded information on a hard drive fall within the scope of the term document.[21] Websites not managed by the administrative authority consulted by officials are not considered documents.[22]

The term 'document' delineates the scope of the WOB. Applications for information that consist only of informative questions are not regarded as 'WOB requests'.[23] Applications must relate to documents held by an administrative authority. The WOB does not require administrative authorities to gather information. In the case of applications relating to documents held by another administrative authority, Article 4 of the WOB stipulates that the applicant must be referred to that authority if necessary. Administrative authorities are not obliged to trace requested documents that are held by another authority.[24] In case of applications concerning information that is not contained in a document, it follows from the WOB that the administrative authority is not required to create a document with the information requested. This is not altered by the fact that the information may be easy to compile from existing (digital) sources.[25]

It follows from legal precedent that if an administrative authority discovers after investigation that it does not hold a certain document, and such a statement does not come across as unreasonable, in principle it is the responsibility of the person making the request to demonstrate that the document *is* held by the administrative authority.[26] In the case of documents that are not held by the administrative authority but that should be held by it (e.g. pursuant to the Public Records Act, *Archiefwet*), the administrative authority is expected to take all reasonable steps to obtain the documents.

[20] *Kamerstukken II* 1986–1987, 19,859, No. 3, p. 21.

[21] ABRvS 19 December 2012, ECLI:NL:RVS:2012:BY6779, ABRvS 12 August 2009, ECLI:NL:RVS:2009:BJ5104 and ECLI:NL:RVS:2006:AV5076.

[22] ABRvS 16 August 2006, ECLI:NL:RVS:2006:AY6317.

[23] ABRvS 7 August 2013, ECLI:NL:RVS:2013:642.

[24] ABRvS 9 April 2014, ECLI:NL:RVS:2014:1205.

[25] ABRvS 5 June 2013, ECLI:NL:RVS:2013:1205.

[26] ABRvS 20 October 2010, ECLI:NL:RVS:2010:1205.

In accordance with Article 3 of the WOB, a request for information must relate to an *administrative matter*. In Article 1 (b) of the WOB, an 'administrative matter' is defined as 'a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies'. According to the legislative history[27] and precedents, the term 'administrative matter' must be interpreted broadly: it relates to public administration in all its facets. The agendas and minutes of meetings and the annual reports of Works Councils relating to the internal organisation of municipalities must be designated as documents on administrative matters within the meaning of the WOB.[28] Information relating to the recording of decisions/decrees and other documents, and the outgoing and incoming mail records, are also regarded as administrative matters,[29] as are mediation reports on the implementation of urgency policy.[30] There are relatively few examples of legal precedent regarding applications for information that do not relate to an administrative matter. According to the ABRvS, administrative matters do not include insurance policies held by third parties for various premises or leases between the owners and tenants of the premises.[31]

Article 3 of the WOB stipulates that *anyone* may apply to an administrative authority for information contained in documents concerning an administrative matter. The legislative history shows that the applicant's interest is not relevant in the processing of applications for information.[32] In 2004, this was specified in the implementation of the Aarhus Convention in Article 3 (3) of the WOB, which stipulates that the applicant does not need to state an interest.

4.3 Formal Aspects Relating to Applications for Access to Information

The WOB contains hardly any requirements regarding how to submit WOB requests. It follows from Article 3 (2) of the WOB that the applicant must specify the administrative matter, or the document relevant to it,

[27] *Kamerstukken II* 1986–1987, 19,859, No. 3, p. 25.

[28] For example, ABRvS 8 July 2015, ECLI:NL:RVS:2015:2118; ABRvS 21 January 2009, ECLI:NL:RVS:2009:BH0453.

[29] ABRvS 5 December 2012, ECLI:NL:RVS:2012:BY5117.

[30] ABRvS 21 August 2013, ECLI:NL:RVS:2013:796.

[31] ABRvS 30 November 2011, ECLI:NL:RVS:2011:BU6348.

[32] *Kamerstukken II* 1986–1987, 19,859, No. 9, p. 13–14.

about which he wishes access. The starting point is that there is no specified format for WOB requests. The WOB contains no formal requirements as to how WOB requests for information must be submitted. Applications may be made verbally or in writing.[33] Administrative authorities may specify forms for submitting applications for information. The use of standard forms may prevent uncertainty as to the status of applications and can prevent 'concealed requests' that constitute misuse of the WOB. However, it follows from legal precedent that administrative authorities must not oblige applicants to use such forms.[34] According to the ABRvS, Article 4:4 of the GALA, on specifying the use of forms, does not apply to WOB requests. Therefore, an administrative authority may not refuse to deal with WOB applications (Article 4:5 of the GALA) if the applicant has not used the specified form.

Article 5 of the WOB states that decisions on applications may be given verbally or in writing. In certain situations, however, the administrative authority is required to issue a decision in writing. A decision in writing is required in the event of a refusal to disclose all or part of the information requested in writing. A decision in writing is also required if the applicant requests this when applying for information verbally and also if the application for information relates to a third party that has requested a written decision. A written decision issued by an administrative body in response to a WOB request is a decision within the meaning of Article 1:3 of the GALA. This means that decision-making norms in the GALA also apply to the processing of WOB requests, such as the requirement to gather information (Article 3:2 of the GALA), the requirement to substantiate the request (Article 3:46 of the GALA) and the requirement to hear the views of interested parties (Article 4:8 of the GALA). This requirement to hear views is relevant if the information requested relates to a third party.

In accordance with Article 6 (1) of the WOB, administrative authorities must decide on the application for information as soon as possible and in any case no later than four weeks after the date of receipt of the application. Under Article 6 (2) of the GALA, the administrative authority may postpone the decision for up to four weeks and must communicate this in writing to the applicant, stating reasons, before the end of the first period. If an interested (third) party is to be given the opportunity to make its views known (Article 4:8 of the GALA), the decision will be deferred until

[33] *Kamerstukken II* 1987/88, 19,859, No. 6, p. 24.
[34] ABRvS 17 August 2016, ECLI:NL:RVS:2016:2273.

the date on which the party makes its views known or until the period allowed for this has elapsed. If the administrative authority decides to supply the information, it will do so when the decision is issued. The only exception to this is cases where interested parties are expected to object. In such cases, the information is not supplied until at least two weeks after the decision has been issued (Article 6 (5) of the WOB). The period of two weeks gives the third party the opportunity to prevent the disclosure of the information by requesting a temporary injunction.[35] In accordance with European Directives, a different decision period applies to requests for environmental information. It follows from Article 6 (6) that the maximum decision period is two weeks, with the possibility of postponement if the amount or complexity of the environmental information justifies this.

If the administrative authority decides to disclose the requested information, it must then decide on the form in which the information will be supplied. Article 7 of the WOB contains several options: issuing a copy, granting access to the contents of the documents, supplying an extract from the documents or a summary of their contents or supplying information contained in the documents. The principle is that the administrative authority supplies the information in the form required by the applicant. This does not apply if the administrative authority cannot reasonably be expected to supply the information in the form requested by the applicant or if the information is already available in another form to which the applicant has easy access. In accordance with the legislative history, the administrative authority may determine this on the basis of what can reasonably be required of an applicant. Applicants must demonstrate that they do not have easy access to the information they are requesting.[36] In the case of applications for environmental information, the administrative authority must—'if necessary and if the information is available'—also supply the information about the methods used to gather the environmental data.

Article 12 of the WOB provides a foundation for central government administrative bodies to establish regulations about charging fees for providing copies of documents or providing extracts or summaries of documents. The relevant regulations are laid down in the Open Government

[35] *Kamerstukken II* 2008–2009, 31,751, No. 3, p. 4.
[36] *Kamerstukken II* 2004–2005, 29,877, No. 3, p. 9.

(Charges) Decree (*Besluit tarieven openbaarheid van bestuur*).[37] The following fees may be charged for supplying copies of documents: fewer than 6 copies, free of charge; 6 to 13 copies, €4.50; and 14+ copies, €0.35 per copy. The charge for providing copies of digital documents must not exceed the cost price. A fee of €2.25 per page may be charged for extracts and summaries. The wording of Article 12 of the WOB does not refer to administrative authorities that are not part of central government. It follows from legal precedent that these authorities may also establish regulations for charging fees to cover the cost of providing copies, extracts and summaries.[38]

4.4 Exemptions and Restrictions

In principle, administrative authorities must grant applications for information contained in documents relating to administrative matters (see Article 3 (5) of the WOB). When deciding whether or not to supply the information, authorities must take account of the exemptions in Article 10 of the WOB and the restrictions on this principle of disclosure that are specified in Article 11 of the WOB.

4.4.1 Exemptions

Article 10 of the WOB summarises the grounds for exemption that apply to applications for information (Article 3 of the WOB) as well as to decisions by administrative authorities to disclose information of their own accord (Article 8 of the WOB). Exemptions are sub-divided into two categories.

First, Article 10 (1) sets out four grounds for exemption that are absolute. In other words, if a ground for exemption arises, there is no scope for weighing the interest of disclosure against the interest that the ground for exemption is designed to protect. According to legal precedent, the grounds for exemptions must be interpreted restrictively. The requested information will not be disclosed if it might damage the unity of the Crown (Article 10 (1) (a) of the WOB). The Dutch government consists of the King and the Ministers, and Article 42 of the Constitution stipulates that the Ministers, and not the King, shall be responsible for acts of govern-

[37] Bulletin of Acts and Decrees 1993, 112 as amended by Decision of 14 September 2000, Bulletin of Acts and Decrees 2001, 415.

[38] ABRvS 22 August 2012, ECLI:NL:RVS:2012:BX5240.

ment. Article 10 (1) (a) of the WOB guarantees that this basic rule cannot be jeopardised by the disclosure of information. This means that information contained in the correspondence between the King and the Ministers is not disclosed.[39] Requested information will not be disclosed if it might damage the security of the State (Article 10 (1) (b) of the WOB). This includes, for example, the importance of countering terrorism and guaranteeing military secrets. Case law shows that if an administrative authority uses this ground for an exemption, it has to underpin this with an expert report. The personal view of the Minister who did not want to disclose information about his use of a government-provided service car because this might damage the security of the State is insufficient in that regard.[40] The third ground for exemption concerns the information that relates to companies and manufacturing processes and was handed to the government in confidence by natural or legal persons (Article 10 (1) (c) of the WOB). Legal precedent shows that any ground for exemption has to be interpreted restrictively. Company and manufacturing data is therefore narrowly defined as 'if and insofar as such information can be read or distracted with regard to the technical management or production process or as regards the marketing of the products or the circuit of customers and suppliers'.[41] As an example we could point to the title of research on animal testing that was considered outside the scope of this definition.[42] Lastly the requested information will not be disclosed if the application relates to personal data within the meaning of Article 2 of the Personal Data Protection Act, unless it is apparent that the disclosure of the personal data does not infringe privacy rights (Article 10 (1) (d) of the WOB). The personal data within the meaning of the WBP relate to a person's religion or philosophy of life, race, political persuasion, health and sexual life, trade-union membership as well as personal data concerning a person's criminal behaviour or unlawful or objectionable conduct connected with a ban imposed with regard to such conduct.

Secondly, Article 10 (2) of the WOB defines seven grounds for exemption that are 'qualified'. This means that, in reaching the decision on whether to grant an application for information, the application is subjected to a public interest test: the public interest is weighed against the interests specified

[39] ABRvS 25 November 1999, ECLI:NL:RVS:1999:AA4098.
[40] ABRvS 15 June 2006, ECLI:NL:RVS:2006:AX9049.
[41] Daalder (2015), p. 357. ABRvS 30 November 2016, ECLI:NL:RVS:2016:3165.
[42] ABRvS 23 December 2015, ECLI:NL:RVS:2015:3976.

in the grounds for exemption. The interest of the applicant is not taken into account in the deliberation. The court comprehensively assesses whether the interest defined in the ground for exemption is relevant and shows restraint in terms of weighing up the interests. The principle of disclosure must outweigh other interests.[43] The seven grounds for exemption are as follows: (a) relations between the Netherlands and other states or international organisations; (b) the economic and financial interests of the State and administrative authorities; (c) the investigation of criminal offences and the prosecution of offenders; (d) inspection, control and oversight by administrative authorities; (e) respect for personal privacy; (f) the importance to the addressee of being the first to be able to take cognizance of the information; and (g) the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

In practice, the ground for exemption relating to respecting privacy is often cited. Information in this context includes names, bank accounts, employment positions and images. The ground for exemption does not apply if the person concerned has agreed to the disclosure of the information (see Article 10 (3) of the WOB). Also relatively frequently cited is the last ground for refusal to disclose, which functions as a safety net and is formulated in such a way that recourse to it is always possible, either separately or in combination with other grounds for refusal. It is worth noting that this exemption does not apply to a refusal to grant an application for information because granting it would place an unreasonable burden on the capacity of the administrative authority.[44]

4.4.2 Restrictions

Article 11 of the WOB contains a special provision that applies to applications concerning information contained in documents drawn up for the purpose of *internal consultation*. 'Internal consultation' is defined as 'consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter' (Article 1 (c) of the WOB). This concerns, for example, official recommendations with proposals for administrative decision-making, internal criteria for evaluating decisions, preparatory documents for official meetings and recom-

[43] ABRvS 25 March 2009, ECLI:NL:RVS:2009:BH7681.
[44] ABRvS 7 October 2009, ECLI:NL:RVS:2009:BJ9484.

mendations by lawyers.[45] Article 11 of the WOB stipulates that no information must be disclosed concerning *personal opinions* on policy contained in internal-consultation documents. A 'personal opinion' is defined as 'an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof' (Article 1 (f) of the WOB). The rationale behind this restriction on the principle of disclosure is that ministers, administrative courts and civil servants have the right for opinions put forward during internal consultations to remain confidential.[46]

Article 11 (2) of the WOB stipulates, however, that information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. This is a power under which the administrative authority has policy freedom. The court exercises restraint in its assessment of the application and decides only whether it would be unreasonable to refuse to apply Article 11 (2) of the WOB. If those who expressed the opinions in question agree, information may be disclosed in a form which may be traced back to individuals.

4.4.3 Article 10 of the European Convention on Human Rights

A successful appeal on Article 10 of the ECHR may result in access to more information than the administrative authority is obliged to provide under the WOB. The criteria for a successful appeal on Article 10 of the ECHR are set out by the European Court of Human Rights in the case of 8 November 2016 (Magyar Helsinki Bizottsag/Hungary).[47] That ruling shows that under certain circumstances a refusal of a request for access to information to an administrative authority infringes Article 10 of the ECHR. This is the case if the request has an instrumental function in exercising the right to freedom of expression and the right to receive and share information without interference with the public authority. It requires that the purpose of the request is to stimulate the social debate, the request concerns a socially relevant topic, the applicant has a social function as a public watchdog and the government has the information. If the request meets these conditions, this restriction is only justified if it is provided for by law,

[45] For details, see Daalder (2015), p. 295.

[46] *Kamerstukken II* 1987–1988, 19,859, No. 3, p. 4.

[47] ECHR 8 November 2016, ECLI:CE:ECHR:2016:1108JUD001803011 (Magyar Helsinki Bizottsag/Hungary).

serves a legitimate purpose and is necessary in a democratic society. In the Netherlands this legal ruling of the ECHR seems to have changed and nuanced the case law on rights of applicants on access to information under Article 10. Previously the Administrative Jurisdiction Division of the Council of State ruled that Article 10 implies a right on access to information to *anyone* and that the exemptions under the WOB generally constitute a legitimate infringement.[48] Nowadays the court assesses—in line with the ECHR case law—whether or not the applicant of the WOB request qualifies as 'a public watchdog', which is a prerequisite for granting the right of access to public information pursuant to Article 10 of the ECHR.[49]

4.5 Environmental Information

A special procedure applies when assessing applications for access to environmental information. A distinction is made between environmental information relating to emissions and environmental information as defined in the Environmental Management Act (*Wet Milieubeheer*). The basis is provided by the implementation of the Aarhus Convention and the EU Directive on public access to environmental information.[50] It follows from Article 10 (4) of the WOB that the requirement to disclose environmental information on emissions is absolute, even when grounds for exemption are applicable. The rationale is that, given the possible impact of emissions on the environment and human health, it is considered reasonable that government bodies are required to disclose information on emissions, even if one of the exemptions applies. In practice the distinction between environmental information relating to emissions and other environmental information relevant for the assessment is sometimes disputed. The court considered, for example, that underlying data relevant for the data on emissions (fuel consumption at refineries at plant and source levels) is not to be considered environmental information relating to emissions. Concentration data on the emissions per installation (data directly related to the smoke from a chimney) are however considered to fall within the definitions of emissions in the Dutch Environmental Management Act. With regard to other environmental information, the

[48] ABRvS 14 May 2014, ECLI:NL:RVS:2014:1708.
[49] ABRvS 22 February 2017, ECLI:NL:RVS:2017:498.
[50] *Kamerstukken II* 2004–2005, 29,877, No. 3.

exemptions in the WOB apply to a limited extent. Article 10 (6) of the WOB, for example, states that the exemption of Article 10 (2) (g) of the WOB (the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties) does not apply to environmental information. Therefore an administrative authority could not refuse to disclose information on agriculture censure data (data about crops, croplands, grassland and the business area) referring to the exemption of Article 10 (2) (g) of the WOB.[51] In the case of environmental information, the absolute exemption regarding data relating to companies and manufacturing processes becomes a 'qualified' exemption, the exemption relating to economic or financial interests of an administrative authority may only be applied in the case of actions that are confidential, and the general exemption (disproportionate advantage or disadvantage) does not apply at all. Article 11 (4) of the WOB stipulates that, in the case of environmental information, the interest of protecting the privacy of personal policy opinions must be weighed against the public interest.

4.6 Information Provided Voluntarily

4.6.1 The Legal Framework of the WOB

In addition to stipulating that administrative authorities must provide information on request, the WOB stipulates (in Article 8) that those authorities must also provide information of their own accord regarding policy and its preparation and implementation, 'whenever the provision of such information is in the interests of effective, democratic governance'. This disclosure obligation pursuant to Article 9 of the WOB also applies to policy recommendations that the authority receives from independent advisory committees. Article 8 (2) of the WOB stipulates the form in which the information is to be supplied, namely, in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them to make their views known to the administrative authority in good time.

Article 8 of the WOB is an instruction to administrative authorities, and this means that citizens cannot, at law, require authorities to provide information voluntarily.[52] It follows from legal precedent that Article 8 of the

[51] ABRvS 30 June 2010, ECLI:NL:RVS:2010:BM9643.

[52] *Kamerstukken II* 1986–1987, 19,859, no. 3, p. 29. ABRvS 3 September 2014, ECLI:NL:RVS:2014:3263.

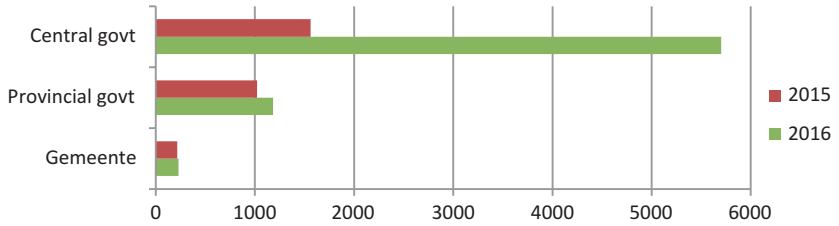

Fig. 5.4 Access to government data

WOB does provide a foundation for taking decisions within the meaning of Article 1:3 of the GALA. Decisions on 'active' disclosure should be based on the same material assessment as decisions on 'passive' disclosure. Parties whose interests are directly affected by active disclosure of information have the same recourse to legal protection as parties whose interests are directly affected by a disclosure decision based on an application under Article 3 of the WOB.[53]

4.6.2 Other Channels of Proactive Information and Communication

Openness may involve more than the voluntary disclosure of government information. In certain cases it may also include government activities designed to give citizens the opportunity to play an active part in law-making and decision-making, for example, voluntary disclosure of information held by the government, engaging citizens in the creation of laws and the preparation of decisions.

Voluntary Disclosure of Information Held by the Government

The Dutch government is generating more and more digital information and data files. This concerns data gathered for the purpose of, and in the course of, performing its public service task (e.g. data on traffic, safety and education and on the awarding of funding or issuing permits). If unlimited free access is granted to this information, it becomes 'open data'.

Usage of data depends on what information is disclosed and on the degree of interest in it. These two factors determine the importance of allowing public access to the data. What is the situation regarding public access to government data in the Netherlands? If we look at the years 2015 and 2016, we see the following (Fig. 5.4).

[53] ABRvS 31 May 2006, ECLI:NL:RVS:2006:AX6362.

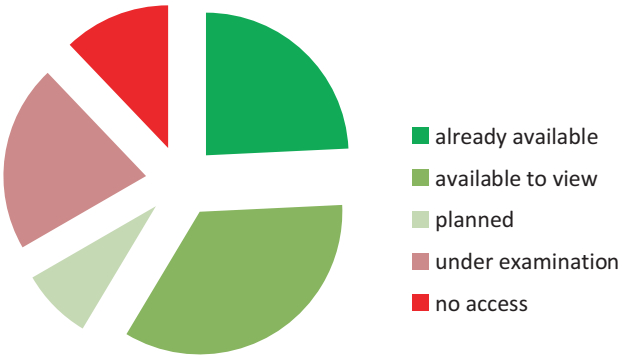

Fig. 5.5 Data sets: public/non-public

The figure shows the number of data sets disclosed by each level of government. When we look at the figure, we notice two things. First, there is a striking increase in the number of data sets disclosed at central government level. This is mainly due to the fact that Statistics Netherlands (CBS, *Centraal Bureau voor de Statistiek*) granted access to all its data sets in this period. Second, municipal authorities make far fewer data sets available than central government. However, there is no information available on the number of data sets disclosed in comparison to the total number of data sets held by the various levels of government. It is therefore difficult to establish what progress the levels of government have made with regard to disclosing data.

A degree of insight is provided by inventories of the data sets of different ministries. The figure below shows the situation regarding the disclosure of these (Fig. 5.5).[54]

The figure shows that, currently, only a minority of data sets are public but also that there appear to be few obstacles to disclosing the vast majority of available data sets.

All in all, the trend appears to be that, gradually, more and more government data are being disclosed. However, it is not yet clear why certain information has been disclosed while other information has not.

[54] This concerns a total of 944 data sets.

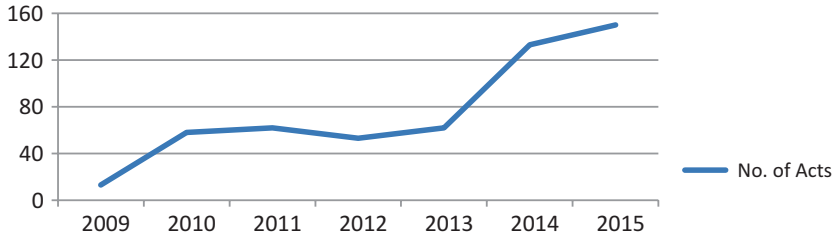

Fig. 5.6 Internet consultation

Engaging Citizens in Law-Making

In the Netherlands, internet consultation is often used as an instrument for involving citizens in law-making. Draft legislation, Orders in Council (*Algemene Maatregelen van Bestuur*) and ministerial regulations are placed on the website 'Internetconsultatie' for a period of time (usually one month). Anyone can respond by filling in an online form.

Visitors to the site who respond are kept informed about the process. At the end of the permitted response period, all the responses are posted on the website. Later, usually after the draft legislation has been discussed by the Council of Ministers (*ministerraad*), a report is posted on the website. The report describes how the responses have been taken into account. When the draft legislation is presented to the House of Representatives (*Tweede Kamer*), the outcome of the consultation is included in the explanatory memorandum.

The purpose of internet consultation is to improve the transparency of the legislative process and contribute to the quality of legislation. The responses to the draft legislation give the government the opportunity to make use of the knowledge and insights in society regarding the subject of the legislation. This may result in amendments to the legislation that enhance its quality and support base.

Research into internet consultation shows that it is used with increasing frequency, particularly in recent years (Fig. 5.6).

In the first few years, the number of consultations fluctuated around 60. In 2014 the figure increased to 133 and further to 150 in 2015.[55]

[55] This is an estimate based on the number of laws subject to public consultation up to the end of July 2015 (88).

The number of responses received with regard to internet consultation varies. The piece of legislation for which the most responses were received was the Nature Act (*Wet natuur*), on which there was public consultation in 2011 (5,428 responses). Two other pieces of legislation also generated more than 1,000 responses. If we look at the ten acts that received the most responses, we see that the one in tenth place received 137 responses. The average number of responses is slightly fewer than 20. Many pieces of legislation did not generate more than five responses.

The research does not show what percentage of the legislation dealt with each year is subject to public internet consultation. In the light of openness, it is particularly important that members of the public have the opportunity to express their views on planned legislation.

Engaging Citizens in the Preparation of Decisions

We can be brief about this aspect of openness. The basic principle of administrative law in the Netherlands is that only interested parties need to be involved in the preparation of decisions. The term 'interested party' is defined as 'a person whose interest is directly affected by an order'.

It does happen, however, that persons other than interested parties are involved in preparing certain decisions. Certain statutory regulations stipulate that 'anyone' should have the opportunity to give their views on the content of decisions during the preparatory phase. This concerns decisions on the adoption of zoning plans and decisions relating to infrastructure projects. In addition, the government may—even if it is not required to do so—choose to allow persons other than interested parties to express their views on draft decisions. The GALA makes provision for this (Articles 3:10 to 3:18). There is no known research on the frequency with which administrative authorities voluntarily make use of these provisions.

5 Legal Protection Against the Refusal to Provide Information

5.1 Introduction

All applications to disclose public information need a response from the administrative authority. The WOB stipulates that the competent authority decides within four weeks and in requests concerned with environmental information within two weeks. Before it decides the administrative authority may offer the parties concerned an opportunity to submit views

about the disclosure of information that can affect their interests; in that case the decision is postponed (Article 6 (3) WOB). The decision has to be accompanied by a statement of reasons and must contain information on available legal remedies. In accordance with the general provisions of Chaps. 6, 7 and 8 of the GALA, the law provides for legal remedies against the decision on the application, regardless whether access to the information was granted or refused.

In this section we will briefly explain some of the legal provisions arranging for legal protection against such decisions. These provisions of the GALA are general in nature and apply to all legal procedures aimed at the judicial review of decisions by administrative authorities. More specifically, we pay attention to two legal questions that have proven to be particularly relevant when access to information is at stake. *Firstly*, these concern the question what are the possibilities for legal protection against untimely decision-making by administrative authorities. *Secondly*, these concern the question whether the applicant can abuse his right to apply for access to information in such a way that it could be a ground for refusing access to the information and also a ground for the administrative courts to judge the appeal against WOB decisions inadmissible, leaving the applicant without legal protection.

5.2 Objection Procedures, Court Procedures, Preliminary Injunctions

Applicants not satisfied with an incomplete answer, an insufficient answer or a refusal as a response to their request for access to information are provided with legal protection in accordance with the general (procedural) rules on judicial review stipulated in Chaps. 6, 7 and 8 of the GALA. The same is true for all interested parties concerning any decision under the WOB. All interested parties whose interests are directly affected (Article 1:2 of the GALA) may appeal against a decision (Article 1:3 of the GALA) made by an administrative authority (Article 1:1 of the GALA) but are required to first lodge an objection with the administrative authority that decided on the request in order to allow the competent authority to reconsider its decision.[56] If the decision on the objection remains unsatisfactory, the interested party may turn to the District Court (administrative sector) for judicial review

[56] The requirement of first lodging an objection is in accordance with Articles 8:1 and 7:1 GALA.

of the decision by filing an appeal with the court. Appeal against the District Court's judgement is allowed and may be filed with the ABRvS. All procedures are in place to allow applicants to safeguard their legal rights and must be instigated within six weeks after publication of the decision or judgement. As in practically all procedures before the administrative courts, there is no mandatory legal representation. However, when an interested party files an appeal, there is an obligation to pay a relatively small court fee. The administrative courts review the lawfulness of decisions made by an administrative authority *ex tunc* without considering facts and circumstances that became relevant after the date of the decision. In reviewing the appealed decision, Dutch administrative courts attach great significance to the administrative authority's observance of the principles of due care and adequate reasoning. The exercise of discretionary powers by administrative authorities triggers the courts to limit judicial review to the question whether the administrative powers have been exercised reasonably. Where the court carries out this test of reasonableness, it tends to concentrate its review of the decision on the more procedural standards which the administrative authority has to observe.

When a decision based on the WOB mandates a (partial) disclosure, interested parties may wish to lodge an objection or file an appeal against such a decision. When the information or the documents will become public before their disclosure is reconsidered in the objections procedure or the court procedure, there can be a need for a preliminary injunction (Article 8:81 of the GALA). In such a case, an administrative court will be more likely to find an interim relief (meaning that the information shall not be made public yet) than in cases where the decision entails a refusal and the administrative court is asked for an interim relief meaning that the requested information will be disclosed. In the main administrative court procedure against decisions to refuse access to information, the courts are competent to demand information of the administrative authority. In cases concerned with the WOB, Article 8:29 of the GALA is of particular relevance. It allows administrative authorities to send information to the court asking it not to disclose the information to the applicant. This is what could occur in a case that concerns the refusal of a request to disclose information. Only in cases where the applicant explicitly allows the court to take a look at the information provided and allows the court to decide the case on the basis of that information even though the applicant didn't have access to the information could the information influence the verdict of the court. When the administrative court decides that there is no (reasonable) ground to refuse disclosure, it could order information to be disclosed.

5.3 Legal Protection Against Untimely Decisions

Legal protection can also be necessary in cases of failure to give timely decisions. In the Netherlands it has proven to be common that administrative authorities are not able to decide on all requests for information within the time frame granted by the WOB. In what way could an interested party force an administrative authority to provide a substantive response to a request? Since judicial review by administrative courts is only open against decisions by an administrative authority and untimely decision-making does not qualify as such a decision, the GALA needs to provide regulation for this situation. It states in Article 6:2 that the fact that an administrative authority has not been able to decide within the prescribed time period will be treated as a decision for the purpose of legal protection. Administrative courts are therefore competent to rule in such situations. Important amendments in 2009 stipulate that lodging an objection is no longer required against untimely decision-making, which means that any interested party may now file an appeal directly with the court against inaction of an administrative authority. The only requirement is that the interested party sends—after the decision time has expired—a notice of default to the administrative authority and then waits two weeks before filing the appeal (Article 6:12 of the GALA). The court should pronounce judgement within eight weeks (Article 8:55b of the GALA). If the court finds that a decision was not made within the stipulated time period and a decision is still not made, it will order the administrative authority to decide within two weeks after the judgement.[57]

5.4 Abuse of the Right to Apply for Access to Information

The WOB appears to be legislation that is fairly open to misuse. For persons involved in a dispute with the government, the WOB is a weapon that is used to throw a spanner in the works of governance. Dealing with WOB applications is a time-consuming process. The larger the number of requests and/or the more complex they are, the more time-consuming it is for an administrative authority to process them.

One of the most spectacular amendments of the GALA is related to timely decision-making and the system of judicial review just described.

[57] This court order is subject to a penalty, usually €100 a day with a maximum of €15,000. Administrative courts can assess whether the administrative authority has made its decision known within the prescribed time frame and order the administrative authority to decide.

Next to the new possibility to file an appeal against untimely decision-making directly with the court, the 2009 amendment of the GALA introduced the penalty that is legally forfeited in each situation where an administrative authority has not responded to an application within the set time period and two weeks have passed since the applicant has sent a notice of default to the administrative authority after the time period for a response has expired (Article 4:17 of the GALA). The penalty changes over time and runs up to a maximum of €1,260 after 42 days. This penalty is paid by the administrative authority to the applicant and has unexpectedly been an incentive to file as many requests for disclosure of information as they can with a view to making money.

Although the introduction of the penalty was of course also a reason for administrative authorities to aim at deciding within the time period provided, there have been some remarkable and striking examples of requests that seem to serve no other purpose than the applicant's wish to collect the penalty payments. Since anyone is allowed to request disclosure of information, the possibilities seem endless.

Soon after the amendment of the GALA was introduced in 2009, the impression arose that there was extensive improper use of the WOB. A number of studies provide information on this. A study in 2010 looked in the first place at how much work the applications create for the relevant administrative authorities.[58] The survey asked what proportion of applications for information took more than ten working days to process. In the study, these were categorised as 'complex' applications. The study showed that there were considerable differences between the different categories of administrative authorities.

Figure 5.7 shows that ministries receive relatively more complex applications than municipal authorities or the police.

The study of 2010 also looked at inappropriate applications for information, differentiating between three types. Applications may be inappropriate because the effect they are designed to have is that the administrative authority does not give a timely decision and is therefore required to make a penalty payment to the applicant. Applications designed to frustrate decision-making are also deemed inappropriate. They are mainly submitted by applicants who make many and/or complex requests. There are citizens who submit hundreds of applications every year to the same administrative authority. A third category comprises requests from appli-

[58] Van Haeften et al. (2010).

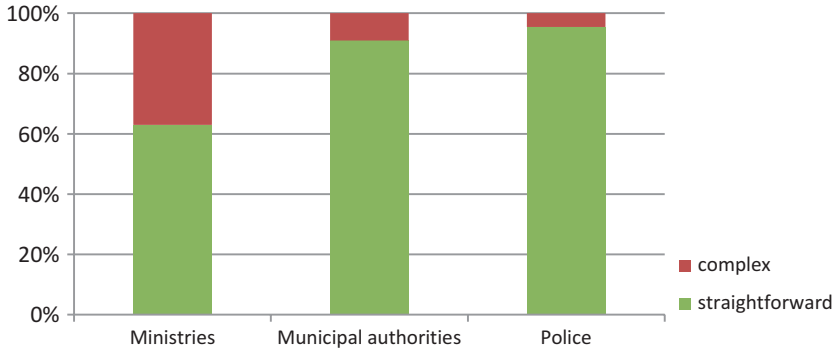

Fig. 5.7 Proportion of straightforward and complex applications

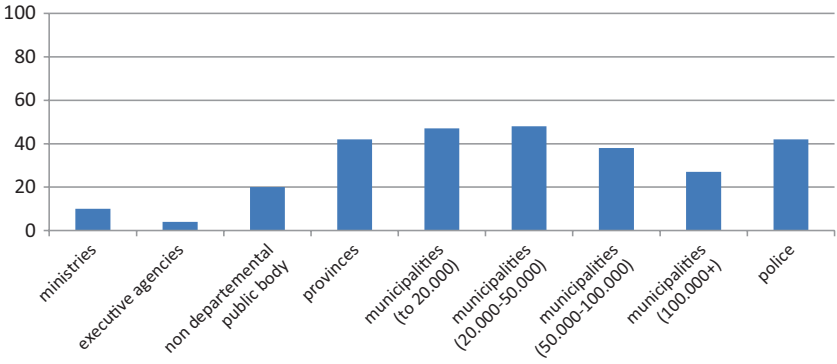

Fig. 5.8 Inappropriate applications for information submitted to different categories of administrative authorities (as a percentage of the total number of applications)

cants who obsessively gather information. The aim of this type of application is not to frustrate the functioning of government, although they do have this effect.

What percentage of applications for government information may be deemed inappropriate?

Figure 5.8 shows that the number of these applications is relatively high. Provincial authorities, small and medium-sized municipal authorities and the police all reported that more than 40% of applications for informa-

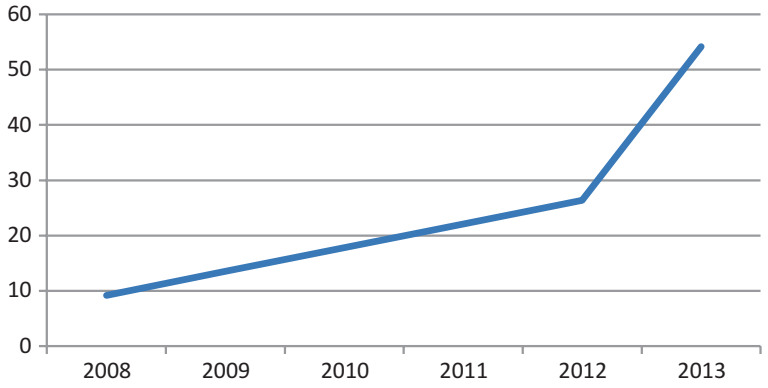

Fig. 5.9 Applications submitted for financial gain

tion were inappropriate. The number of inappropriate applications with a view to financial gain and the number that aim to frustrate decision-making were roughly equal. Together they accounted for 95% of inappropriate applications. The remaining 5% were requests from applicants who obsessively gather information. For most administrative authorities, the categories 'financial gain' and 'frustrating decision-making' were, quantitatively speaking, roughly equal.

A study carried out in 2014 also looked at inappropriate applications.[59] The officials who were interviewed were asked how many applications, in their view, were made with a view to financial gain. A spectacular rise in such applications is evident (Fig. 5.9).

The figure shows that 9% of applications submitted in 2008 were made with a view to financial gain. This figure rose to 26% in 2012 and 54% in 2013. It should be noted that the information in the report was obtained from self-reports by municipal authority officials. It is possible that this gives a slightly distorted picture (e.g. because the number of applications geared to financial gain was underestimated in the past and the number of recent requests made for that purpose is overestimated). Even if this is the case, the increase is still considerable.

The survey also asked about the possible consequences of applications made with the aim of financial gain. As mentioned above, an administra-

[59] http://docplayer.nl/11253612-Afrekenen-met-de-wob-onderzoek-naar-oneigenlijk-gebruik-van-de-wet-openbaarheid-van-bestuur-bij-gemeenten-en-politie.html.

tive authority that does not give a timely decision on an application for information may be declared to be in default, and—if the notice of default does not result in a decision within two weeks—the applicant is entitled to receive a penalty payment from the authority. It appears that administrative authorities, in following up requests for information, are not declared to be in default very often. In 2012, 4% of applications ultimately resulted in notice of default due to failure to give a timely decision. The figure for 2013 was 6%. The fact that an administrative authority is declared to be in default does not necessarily mean that it will be liable to pay a penalty. In 2012 as well as 2013, only 0.6% of applications ultimately resulted in penalty payments. Finally, the survey asked how often applications result in court cases, as a result of which decisions are quashed and the administrative authority is required to pay the applicant's legal costs. In 2008, this was the result of 0.1% of applications. This figure rose to 0.5% in 2012 and 0.9% in 2013. These numbers are low, but show a clear increase.

All in all, government bodies were experiencing a growing burden from applications for information that—at least in the perception of the civil servants who have to deal with them—were not primarily geared to obtaining information but to obtaining financial gain or designed to frustrate decision-making processes. In terms of the amount of time it took administrative authorities to prepare decisions on applications, the effect was considerable. However, the financial consequences (penalty payments, orders for costs) were limited.

5.5 Case Law and Legislation Aimed at Preventing Abuse

5.5.1 Case Law

One of the legal questions that has been at the centre of the case law that emerged in the past years is whether it would be possible to limit the possibilities of applicants—or even their representatives—to abuse the competence to file requests on the basis of Article 3 of the WOB. Article 3:13 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) states explicitly that private persons and legal persons can use their competences in such a way that it constitutes abuse. Article 3:15 of the BW even stipulates that the provision for abuse of competence is applicable in other legal relationships than those in private law insofar as the nature of this legal relationship does not oppose it. Never had an administrative court ruled that the competence of filing a request could be abused by either citizens or their representatives.

On 29 November 2014, the ABRvS however pronounced judgement in a case that had so many special circumstances that the case triggered the highest court in these matters to conclude that the appeal by the applicant was inadmissible because of abuse of both the competence to file a request and to appeal against the response to the request. The case was about a woman that did not agree with a traffic fine. As a consequence her representatives filed several requests for the disclosure of information related to the traffic fine although they knew this information is also available in the legal procedures against the traffic fine. Several other aspects of the case lead the court to the conclusion that the only reason for filing these requests is the possibility the administrative authority could forfeit penalties and that the competence of filing the requests and filing an appeal against the decisions about the requests was abused (Article 3:13 of the BW) and that the appeal is therefore inadmissible. This conclusion was however not reached light-heartedly and is closely related to the specific circumstances of the case. The court's statement goes as follows:

> For the inadmissibility of an appeal brought to court because of abuse of the competence to appeal against a decision, compelling grounds are required, since the inadmissibility of the appeal will deny the interested party the right of access to court. This is especially true when it comes to an appeal brought by a citizen against the government in view of the – sometimes far-reaching – powers of the government which citizens usually do not have. In light of that, and in view of article 3:13 of the BW and the decision of the Division of 21 July 2003 in Case No. 200302497/1, in these sorts of cases such compelling grounds are present, among other things, if competences have been so obviously used without a reasonable purpose or for a purpose other than that given to them, that the use of those competences proves bad faith. As follows from the ruling of 21 July 2003, a more or less excessive appeal to government-provided facilities generally does not in itself constitute an abuse of competence. Any appeal to these facilities causes costs to the government and the government will have to bear these costs. However, the number of times a particular right or a particular competence is used can, in combination with other circumstances, contribute to the conclusion that the competence was abused.[60]

The conclusion in this case was that the legal representatives had used the competence to submit requests on the basis of Article 3 of the WOB in bad

[60] ABRvS 29 November 2014, ECLI:NL:RVS:2014:4129.

faith since they used it with obviously no other purpose than to collect money from the government and for another purpose than the purpose for which that competence was given. According to the court, this applies equally to the use of the competence to appeal to the court. The appeal is therefore inadmissible. Although this judgement means a substantial change in the case law of the highest administrative court of the Netherlands, legal scholars are reluctant to acknowledge that this judgement can easily be applied in many cases since the specific circumstances of the case seem to be very relevant and it is not entirely clear what circumstance would lead the courts to rule that there are compelling grounds for an exception to the right of access to justice.

5.5.2 Legislation

Despite the new case law that has emerged, resistance against requests that seem solely aimed at financial gain grew fast and government bodies and Members of Parliament asked the government to intervene. Consequently the government introduced a draft legislative bill to amend the WOB in order to remove the element that potentially makes it so lucrative to request the disclosure of information. On 1 October 2016, this legislative act came into force.[61] It stipulates that those provisions in the GALA concerned with the forfeiting of a penalty for untimely decision-making are, effective immediately, no longer applicable to requests on the basis of the WOB. Furthermore it allows the applicant to choose between directly filing an appeal with the administrative court and lodging an objection with the competent authority when a decision is not made within the decision period. This means that the rights of applicants were better safeguarded before the introduction of these amendments, but that the benevolent applicants have to suffer the consequences of the actions of those malicious applicants that only request disclosure of information for financial gain.

5.6 Empirical Data About Court Cases Relating to Applications for Information

How often do requests for information result in the lodging of objections with the administrative authority or in court appeals? And in such cases, how often does this result in the authority retracting its decision to withhold disclosure or the court requiring it to supply the requested information?

[61] Act of 13 July 2016, Bulletin for Acts and Decrees 2016, 301.

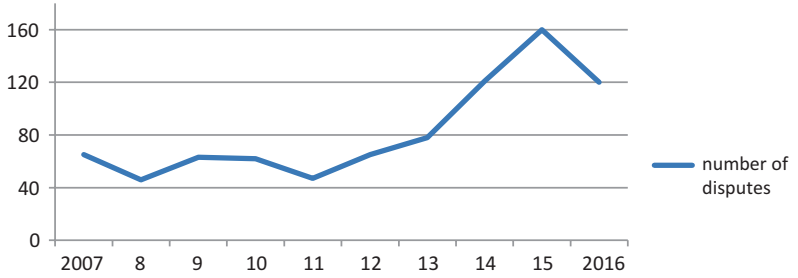

Fig. 5.10 Number of disputes taken to appeal concerning applications for information

There are very few figures available to answer these questions. For the overall number of requests, we know only how many in 2010 resulted in objection and appeal procedures. In order to find out something about the processing and outcomes of rejected applications for information, we must refer to the information available on the website of the ABRvS, the highest Dutch administrative court that deals with disputes concerning government decisions in responses to applications for information. The ABRvS publishes all its rulings on the internet.[62] This makes it possible to obtain an accurate picture of the number, nature, processing and outcomes of appeals against decisions to withhold disclosure. Indirectly, the rulings also provide information on court cases at first instance.

The first thing we notice when looking at the figures on appeal procedures is the substantial increase in the number of appeals relating to information requests.

Figure 5.10 shows that the number of procedures to 2012 varied between 50 and 75 per year. It then rose to 160 in 2015 and fell to 120 in 2016.

We have collected information on the 120 procedures that resulted in a ruling in 2016. Who brought the appeal? What was it about? Who won the appeal?

In the first place, it is notable that more appeals are brought by citizens than by administrative authorities. In 77% of cases the appeal was brought by the citizen, in 18% of cases by the administrative authority and in 5% of cases by both.

[62] https://www.raadvanstate.nl/uitspraken.html.

The number of appeals brought by citizens or administrative authorities, respectively, depends partly on the outcome of the appeal at first instance. Only the losing party has a reason to bring an appeal. It is known that, in approximately 30% of appeals, the court finds in favour of the appellant and in 70% of cases in favour of the defending administrative authority. It is also known that administrative bodies that lose an appeal in the administrative court are more likely to bring an appeal against the decision than citizens who lose an appeal.[63]

If we look at appeals concerning information requests in comparison to all other appeals, we see that the over-representation of appeals brought by citizens in the latter category is much greater than in appeals concerning information requests. Looking at all appeals, 88% are brought by citizens (compared to 77% in the case of information requests), 8% by administrative bodies (compared to 18% in the case of information requests) and 4% by both (compared to 5% in the case of information requests).[64] There are two possible explanations for the fact that cases involving applications for information are brought relatively more often by administrative authorities. It is possible that courts more often find against administrative authorities in this category. It is also possible that, if courts find against administrative authorities in this type of case, the authorities quite often lodge a further appeal.

A second notable finding from the analysis of appeal procedures involving applications for information is that, in half the cases, the object of dispute is the question of whether an application constitutes misuse of the law. As we have seen, in November 2014 the ABRvS ruled that, in certain circumstances, an application for information may be regarded as misuse of the law. If this is the case, the administrative authority must automatically refuse the application. Half the number of appeals now concern decisions by administrative authorities to refuse to grant an application for information because it is deemed to constitute misuse of the law. If citizens bring an appeal, in 43% of cases, this is because they do not agree with the decision of the lower court that the application involves misuse of the law. If administrative authorities bring an appeal, in no less than 60% of cases, this is because they do not agree with the lower court's decision that the application did *not* involve misuse of the law. More than half the total number of appeals relate to the question of whether the administra-

[63] If the citizen loses, the probability that he/she will lodge an appeal is 43%. If the administrative authority loses, the probability is 11%.

[64] Marseille and Wever (2016), p. 848.

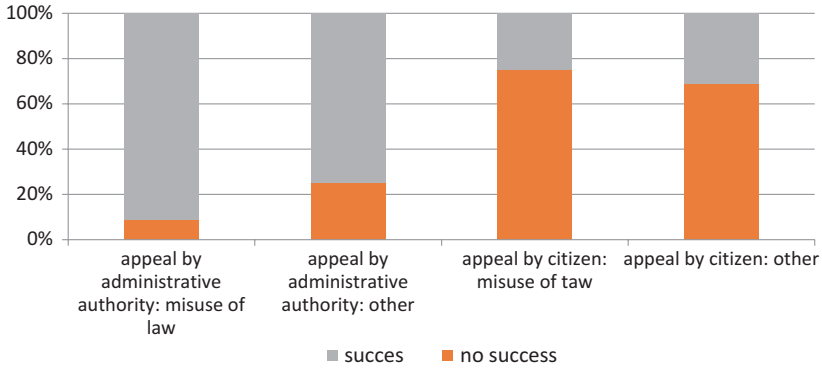

Fig. 5.11 Object of dispute and chance of winning (percentage of appeals brought)

tive authority was justified in refusing to grant the application for information on the ground that it constituted misuse of the law.

With regard to the outcomes of appeals, there is a difference between appeals lodged by administrative authorities and those lodged by citizens. If administrative authorities lodge an appeal, they have a 69% chance of success. Citizens who lodge an appeal have a 30% chance of success. In comparison to administrative court cases in general, administrative authorities have a 50% chance of success if they lodge an appeal. Citizens who lodge an appeal have a 17% chance of winning. Appeals concerning information requests differ from normal administrative appeals in two respects. In the first place, administrative authorities are more likely than citizens to win normal appeals than they are to win disputes on information requests. It is even more striking that, in disputes on information requests, the ruling of the higher court is more likely to differ from that of the court at first instance than in normal administrative disputes. In disputes on applications for information, the decision of the appeal court differs from that of the court of first instance in 34% of cases. In normal cases the figure is only 19%.[65]

Also notable are the differences in the likelihood of citizens and administrative authorities winning disputes on inappropriate use, compared to other disputes involving requests for information.

Figure 5.11 shows that an administrative authority's chance of success in an appeal is greater if the object of dispute is whether the application for information constitutes misuse of the law than if the dispute relates to the

[65] Marseille and Wever (2016), p. 847.

content-related criteria on which decisions to disclose or withhold information are based. In the case of citizens, the reverse is true.[66] The figure also shows that, irrespective of the object of dispute, the appeal court is more critical of lower court rulings if they go against the authority than if they go against the citizen.

Analysis of the rulings of higher administrative courts strongly indicates that, if an administrative authority decides to refuse an application for information because it considers it to constitute misuse of the law, the decision is more likely to survive a court review than a decision to refuse disclosure for other reasons. How can this result be explained? Partly given the intense scrutiny by the courts of decisions to refuse disclosure of information on the ground of misuse of the law, it can be assumed that administrative authorities are fairly cautious in refusing applications on that ground. The fact that, despite this, almost half of appeals relate to misuse of the law reinforces the impression that this is a genuine problem for administrative authorities. The question is whether the introduction of the WOO will solve this problem, now that almost half the inappropriate requests are made with a view to frustrating the decision-making process, rather than with a view to extracting a penalty payment from the administrative authority on the basis of its failure to give a timely decision.

6 Towards a New Legislative Act on Transparency?

There is a very realistic scenario that the Netherlands will have a new act on access to information in the near future. Considering the importance of good democratic governance and the practical difficulties with the implementation of the WOB, including the problems mentioned in the previous section such as the fact that information is usually not disclosed actively by administrative authorities and that there are many reasons for not disclosing information on the basis of an application, several Members of Parliament used their right to submit an initiative bill to Parliament in 2012. The initiative bill was intended to introduce a new act that would not have the implementation problems of the WOB. Goal of the submitted initiative bill, called *Wet open overheid* (WOO, Open Government

[66] It should be noted that—perhaps counter-intuitively—it was quite possible that citizens would also have been more likely to win the appeal if it had concerned the issue of misuse than if it had concerned the question of whether the application met the content-related criteria for the disclosure or withholding of information.

Act), is to replace the WOB.[67] After the draft legislative bill was submitted to Parliament, deliberations started in order to seek a majority for it. Following the reactions from political parties, the government and the official advice of the Council of State on the proposed bill, the initial proposal for the WOO was amended on several points. As we mentioned above, the bill was adopted by the House of Representatives in April 2016 and will be addressed in 2017 by the Senate.[68] Whether the WOO will be enacted and come into force is not sure however. Despite the association of Dutch municipalities endorsing the goals of the new regulation, it considers the WOO as adopted by the House 'impractical and too expensive'. Also the first impact analysis we mentioned in Sect. 2 concludes that this is indeed the case. As a consequence of the act, governments in the Netherlands will have to publish billions of documents each year and will have to invest in information technology and necessary training for civil servants. On top of that, the act will add to the complexity of the regulation of transparency. Deliberations of the WOO as adopted by the House will not commence in the Senate before another study on the impact of the new act is completed. Since the bill is an important indication of the law concerning public access to government information in the future, this section is dedicated to providing a short overview of the key changes proposed by the WOO.[69]

The purpose of the bill is to make government bodies and quasi-government bodies transparent to the public. According to the explanatory memorandum, the importance of public access to public information for the democratic rule of law, for civilians, for government and for economic development will be better served by the new regulation. Public access to public information is explicitly stipulated in Article 1.1 WOO that provides all citizens the right to access to (records with) public information: 'Everyone has the right to access public information without having to state a reason for their interest, subject to limitations prescribed by law.' The WOO has a wider scope than the WOB (Articles 2.2 and 2.3 of the WOO). Where the WOB particularly applies to administrative authorities as defined in Article 1:1 of the GALA, the WOO stipulates that the main provisions of the legislative act also apply to other public institutions, such as the House and the Senate and the Council for the Judiciary, but also to

[67] See *Kamerstukken II* 2011–2012, 33, 328, No. 2.
[68] See for the most recent text in *Kamerstukken I* 2015–2016, 33, 328, No. A.
[69] Van der Sluis (2016a, 2016b).

the Council of State and the Ombudsman. The proposal stipulates that entities in the semi-public sector should be required to provide access to information. On the basis of the new legislative act, an Order in Council shall designate those semi-public authorities that shall be subject to the WOO regulation. This can concern organisations that have public authority vested in them and have a duty to defend the public interest, organisations that are granted more than €100,000 a year from public funds or whose shares are owned by public entities for more than 50%. In this Order in Council, it must be stipulated to what specific information the designation relates. For example, when the information concerns the use of public funds, the protection of the public interest and the adoption of decisions relating to other topics when administrative authorities influence these decisions. Specific administrative authorities will have to be indicated in the Order in Council to disclose the information on behalf of the designated organisations; the designated organisation is obliged to immediately provide information at the request of the administrative authority.

Like the relevant regulation, we discussed in the sections above the WOO makes a distinction between active and passive disclosure. Active disclosure concerns spontaneous disclosure of documents and information. Passive disclosure concerns the responding to requests for access to information. The WOO aims to increase and broaden the government's duty to disclose documents and information (Section 3 WOO). For this purpose, the act stipulates a list of categories of information that must be published (Article 3.3 WOO). They include laws, other general binding regulations, decisions of general application, emissions data, information that provides insight into the organisation and operation, including the tasks and responsibilities of the departments, and information on the accessibility of government bodies and their departments and how a request for information may be submitted. One of the main changes is that WOO introduces a 'Transparency Register'. This public Transparency Register is mandatory, is held by administrative authorities and provides a register of all documents held by them.

Those who drafted the legislative bill introducing the WOO have been aware of the problems concerning the abuse of the ample opportunities to submit requests for information. Therefore, the WOO introduces an explicit provision to prevent abuse (Article 4.6 of the WOO). The article reads: 'If the applicant clearly has a different purpose than obtaining public information or the application is obviously not related to an administrative matter, the administrative authority can – within two weeks after receipt of

the request or immediately after it is clear that the applicant apparently has a different purpose than the disclosure of information – decide not to process the request.' Substantive examination of the application can therefore be dispensed with in cases of evident abuse of the broad duty of administrative authorities to make information public. Should a request be processed because there is no abuse, then the decision period is—as it is in the WOB—four weeks. Since some specific amendments to the WOB came into force on 1 October 2016 (see Sect. 4), the legal effects of untimely decision-making by an administrative authority in the WOB are aligned with those proposed in the WOO. The new bill stipulates that the administrative authorities in this case are not subject to a penalty. The applicant also has the choice to either lodge an objection or directly file an appeal with the administrative court in order to have it declare that the decision was indeed not taken in a timely manner. Prior written notice of the administrative authority—like it is under the amended WOB—is not required.

The substantive rules for granting or refusing access to public information on the basis of an application will change slightly under the WOO. The basic premise remains the same however: anyone can submit a request for information and does not have to state an interest for his application for access to information. Similarly as under the WOB, the substantive assessment of applications for access to information under the WOO will be fundamentally aimed at the disclosure of the requested information. All grounds for refusing to make the information publicly accessible shall be explicitly stipulated in the WOO itself. The exceptions to disclosure are virtually identical to those in the current WOB. There are however some differences. One relevant difference is that 'business and manufacturing data' is no longer to be subsumed under the absolute but under the relative grounds for refusal. This means that disclosure of information can only be refused in those cases where the interest of disclosure is outweighed by the importance of confidentiality of business and manufacturing data, often provided to the government in confidence by companies or industry and other businesses that are sensitive for competition. This absolute ground for refusal under the WOB is thus changed into a relative ground under the WOO. Another relevant change is the fact that one specific ground for refusal that served as a residual category under WOB will not return in the WOO. Refusing disclosure when 'disproportionate advantage or disadvantage would occur' is no longer a ground for refusal under the WOO. Finally, there is a significant change in the regulations

regarding applications for access to information that could be refused on the basis of the grounds for refusal stipulated in the WOO. All such applications may nevertheless be granted when there are compelling reasons to disclose the information or documents despite the grounds for refusal. Also historical, statistical, scientific or journalistic research could be a reason to provide access to information such as competitively sensitive business and manufacturing data. Conditions may be attached to this reason for providing access to this information, including the condition that the information obtained is not to be distributed further without prior decision of the administrative authority. Of great importance for administration of justice in general besides the changes mentioned here is that information and documents should be publicly accessible when this information is older than five years unless the administrative authority is able to explain why the grounds for refusal stipulated in the WOO outweigh the public interest of disclosure despite the passage of time.

In addition to innovations mentioned above the WOO could bring to the Dutch system if adopted in the Senate, it also seems appropriate to pay attention to a proposed instrument of the bill that did not survive deliberation in the House. Originally the proposal for the new act also introduced a so-called Information Commissioner. The bill stipulated that there would be an Information Commissioner that will promote and stimulate the implementation and the proper application of the law, to supervise and to provide advice to administrative authorities on transparency. The idea was that applicants who had their application refused could file an appeal against that decision with this Information Commissioner. Due to criticism concerning this part of the proposed legislation, the Information Commissioner as an institute is not reflected in the legislative act the House adopted. For those in favour of the introduction of an Information Commissioner, the only consolation is that the law will be evaluated and that the evaluation shall pay attention to whether the introduction of an Information Commissioner is necessary.

Finally, it seems rather appropriate to reiterate the important perspective that we also mentioned at the beginning of this section and in Sect. 2. Although the House adopted the bill in April 2016, it remains to be seen whether the Senate will give its approval to the WOO. All political parties and government authorities concerned endorse the idea of broad public access to government information that is deemed so important for effective, democratic governance. However, they differ on whether the Open

Government Act (*Wet open overheid*, WOO) provides the appropriate instruments and makes fitting choices to achieve its goal of an open government. It is therefore far from certain that this act will indeed come into force.

7 Conclusion

The WOB offers an adequate legal framework for the promotion of a transparent government in the Netherlands. However, the law itself and the way in which it is applied has a number of disadvantages. Among other things, because anyone can request access to information, the right to apply for information is easy to abuse. In addition, the WOB implements a large number of exceptions to disclosure that provide the government with sufficient grounds to not disclose information. Finally, provisions requiring government bodies to disclose information on their own initiative are missing.

Recently for all of these problems, solutions have been sought. To solve the first of these problems, last year a legislative act came into force that stipulates that those provisions in the GALA concerned with the forfeiting of a penalty for untimely decision-making are no longer applicable to requests on the basis of the WOB. The WOO, a bill that is aimed to replace the WOB, intends to make public and parastatal bodies more transparent in order to better serve the transparency of information that ought to be publicly accessible for citizens in any democratic state and should allow for good governance and could stimulate economic development. The future will learn whether the legal measures introduced by the WOO will sort the intended effect.

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CHAPTER 6

Freedom of Information in Germany

Christoph Emanuel Mueller, Bettina Engewald, and Marius Herr

List of German Abbreviations

BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority)
BGB	Civil Code in the version promulgated on 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (BGBl. I p. 3719). A translation can be found at https://www.gesetze-im-internet.de/englisch_bgb/index.html
BGBl	Bundesgesetzblatt (Federal Law Gazette)
BDSG	Federal Data Protection Act in the version promulgated on 14 January 2003 (BGBl. I p. 66), as most recently amended by Article 1 of the Act of 14 August 2009 (BGBl. I p. 2814). A translation can be found at https://www.gesetze-im-internet.de/englisch_bdsg/index.html
BeckRS	Beck Rechtssache (journal)

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_6

BfDI	Bundesbeauftragter für Datenschutz und Informationsfreiheit (Federal Commissioner for Data Protection and Freedom of Information)
BMI	Bundesministerium des Innern (Federal Ministry of the Interior)
Brem.GBl	Bremisches Gesetzblatt (Law Gazette of Bremen)
BT-Drs.	Bundestagsdrucksachen (Documents of the German Parliament)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgericht (collection of decisions of the BVerfG)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
DJV	Deutscher Journalisten-Verband (German Federation of Journalists)
GBl.	Gesetzblatt (Law Gazette of Baden-Württemberg)
GG	Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I p. 2438). A translation can be found at https://www.gesetze-im-internet.de/englisch_gg/index.html
GMBl.	Gemeinsames Ministerialblatt (Official Gazette of the Federal Ministries)
GVBl.	Gesetz- und Verordnungsblatt (Law Gazette of Rhineland-Palatine)
HessVGH	Hessischer Verwaltungsgerichtshof (Higher Administrative Court of Hesse)
HmbGVBl.	Hamburgisches Gesetz- und Verwaltungsblatt (Law Gazette of Hamburg)
IFG	Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act) of 5 September 2005 (BGBl. I, p. 2722), last amended by Article 2 (6) of the Act of 7 August 2013 (BGBl. I, p. 3154). A translation can be found at https://www.gesetze-im-internet.de/englisch_ifg/index.html
IFGGebV	Informationsgebührenverordnung in the version promulgated on 2 January 2006 (BGBl. I p. 6), as most recently amended by Article 2 Section 7 of the Act of 7 August 2013 (Federal Law Gazette I p. 3154)
JurionRS	Jurion Rechtssache (journal)

NRW	Nordrhein-Westfalen (North Rhine-Westphalia)
OVG	Oberverwaltungsgericht (Higher Administrative Court)
SÜG	Sicherheitsüberprüfungsgesetz in the version promulgated on 20 April 1994 (BGBl. I p. 867), as most recently amended by Article 2 of the Act of 29 March 2017 (BGBl. I p. 626)
UIG	Umweltinformationsgesetz in the version promulgated on 27 "October 2014 (BGBl. I p. 1643)
UrhG	Copyright Act of 9 September 1965 (BGBl. I, p. 1273), as last amended by Article 1 of the Act of 20 December 2016 (BGBl. I, p. 3037). A translation can be found at https://www.gesetze-im-internet.de/englisch_urhg/index.html
Urt.	Urteil (Court Ruling)
VG	Verwaltungsgericht (Administrative Court)
VwGO	Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991. A translation can be found at https://www.gesetze-im-internet.de/englisch_vwgo/index.html
VwVfG	Verwaltungsverfahrensgesetz in the version promulgated on 23 January 2003 (BGBl. I p. 102), as most recently amended by Article 5 of the Act of 29 March 2017 (BGBl. I p. 626)

1 Introduction

Guaranteeing open access to government information by means of freedom of information (FOI) laws has long been considered to be a powerful measure for achieving a variety of goals such as increasing accountability, improving governance, decreasing public sector corruption, empowering citizens and journalists, constraining politicians, and increasing bureaucratic efficiency.[1] In light of these expectations, it is not surprising that over 80 countries around the world—including Germany—have passed FOI laws to "institutionalize transparency by creating legal guarantees of the right to request government information".[2]

Due to the nature of the federal system, the development of FOI legislation in Germany has taken place at different levels, namely, the federal

[1] See, for example, Berliner (2014); Escaleras et al. (2010); Vadlamannati and Cooray (2016); Worthy (2010).

[2] See Berliner (2014), p. 479.

and the state levels. At the federal level, FOI legislation reached its pinnacle at the end of 2005 when the Bundestag[3] passed a comprehensive FOI law denoted as the Federal Act Governing Access to Information held by the Federal Government[4] (IFG). The IFG provides access to government information for everyone without prerequisites. Yet the process of developing FOI laws that guarantee access to information without prerequisites started already in 1994, when Germany reacted to EU legislation[5] by passing the Environmental Information Act[6] (UIG). Thus, one could say that the impetus for FOI legislation in Germany at the federal level actually came from outside the country.[7] In a European and international comparison, Germany was a bit late in passing a federal FOI law.[8] By 1998 there was already a draft of a federal FOI law, prepared by the Federal Ministry of the Interior (BMI). The legislative process spanned three legislative periods and, from 2002 on, was accompanied by an ad hoc alliance of representatives of journalist and civil rights organisations who tried to contribute to the discussion with their own draft of the law.[9] In the end, the IFG entered into force in January 2006.

Before the IFG came into force, four Länder[10] already had started to pass FOI laws at the state level, beginning with Brandenburg in 1998 and followed by Berlin (1999), Schleswig-Holstein (2000), and North Rhine-Westphalia (2001). By May 2018, 12 out of the 16 Länder had passed FOI laws. Four of these (Hamburg, Rhineland-Palatinate, Bremen, and Schleswig-Holstein) even passed transparency laws which oblige the proactive disclosure of government information. Table 6.1 provides a summary of FOI legislation in Germany since 1998.

The distinction between FOI laws at the federal and the state level in Germany is crucial because both types of laws bind different types of gov-

[3] Germany's federal parliament.

[4] Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act) of 5 September 2005 (BGBl. I, p. 2722), last amended by Article 2 (6) of the Act of 7 August 2013 (BGBl. I, p. 3154). A translation can be found at https://www.gesetze-im-internet.de/englisch_ifg/index.html.

[5] Council Directive 90/313/EEC, No. L 158 of 23.06.1990, 56.

[6] Umweltinformationsgesetz in the version promulgated on 27 Oktober 2014 (BGBl. I p. 1643).

[7] See Mecklenburg and Pöppelmann (2007).

[8] See Schoch (2009a).

[9] See Mecklenburg and Pöppelmann (2007).

[10] The term Länder refers to the 16 federal states of Germany.

Table 6.1 Freedom of information laws in Germany

State	*Year*	*Name of the regulation*
Freedom of information acts without obligation for proactive disclosure of information		
Brandenburg	1998	"Akteneinsichts- und Informationszugangsgesetz" (*Records Inspection and Information Access Law*)
Berlin	1999	"Gesetz zur Förderung der Informationsfreiheit im Land Berlin" (*Act to Promote Freedom of Information in the State of Berlin*)
Schleswig-Holstein	2000	"Informationszugangsgesetz für das Land Schleswig-Holstein" (*Access to Government Information Act for the State of Schleswig-Holstein*)
North Rhine-Westphalia	2001	"Gesetz über die Freiheit des Zugangs zu Informationen für das Land Nordrhein-Westfalen" (*Act on Freedom of Access to Government Information for the State of North Rhine-Westphalia*)
Germany (federal law)	**2005**	**"Gesetz zur Regelung des Zugangs zu Informationen des Bundes" (*Federal Act Governing Access to Information held by the Federal Government*)**
Hamburg	2006	"Hamburgisches Informationsfreiheitsgesetz" (*Hamburg Freedom of Information Act, replaced by the Hamburg Transparency Law in 2012*)
Bremen	2006	"Gesetz über die Freiheit des Zugangs zu Informationen für das Land Bremen" (*Act on Freedom of Access to Government Information for the State of Bremen*)
Mecklenburg-West Pomerania	2006	"Gesetz zur Regelung des Zugangs zu Informationen für das Land Mecklenburg-Vorpommern" (*Act to Regulate Access to Government Information for the State of Mecklenburg-West Pomerania*)
Saarland	2006	"Saarländisches Informationsfreiheitsgesetz" (*Saarland Freedom of Information Act*)
Thuringia	2007	"Thüringer Informationsfreiheitsgesetz" (*Thuringian Freedom of Information Act*)
Rhineland-Palatinate	2008	"Landesgesetz über die Freiheit des Zugangs zu Informationen" (*Federal State Act on Freedom of Access to Government Information, replaced by the Federal State Transparency Law in 2015*)
Saxony-Anhalt	2008	"Informationszugangsgesetz Sachsen-Anhalt" (*Access to Government Information Act of Saxony-Anhalt*)

(*continued*)

Table 6.1 (continued)

State	*Year*	*Name of the regulation*
Baden-Württemberg	2015	"Gesetz zur Regelung des Zugangs zu Informationen in Baden-Württemberg" (*Act to Regulate Access to Government Information for the State of Baden-Württemberg*)
Transparency laws with obligation for proactive disclosure of information		
Hamburg	2012	"Hamburgisches Transparenzgesetz" (*Hamburg Transparency Law*)
Rhineland-Palatinate	2015	"Landestransparenzgesetz" (*Federal State Transparency Law*)
Bremen	2015	"Gesetz über die Freiheit des Zugangs zu Informationen für das Land Bremen" (*Act on Freedom of Access to Government Information for the State of Bremen*)
Schleswig-Holstein	2017	"Informationszugangsgesetz für das Land Schleswig-Holstein" (*Access to Government Information Act for the State of Schleswig-Holstein*)

ernmental bodies, institutions, and organisations. Although both the IFG as well as the FOI laws at the Länder level are worthy of discussing, we focus on the IFG in the remainder of this chapter out for three reasons. First, empirical evidence by which to assess the FOI laws on state level is very scarce. Conversely, we do have access to the data from a comprehensive evaluation of the IFG conducted in 2012.[11] Second, we believe that readers who are not familiar with the German federal system may be more interested in regulations at the federal rather than at the Länder level, as the former are presumably more comparable to the other regulations presented in this book. Finally, due to the sheer number of FOI laws at the Länder level, it is simply not possible to cover all of them with sufficient detail in a chapter-length contribution.

Our contribution is organised as follows. We firstly present empirical evidence on the total number of requests and the beneficiaries of access to information. Subsequently, we describe the entities bound by the law, the nature of the request for access, and the nature of the response/answer. We continue with providing insights into the relationship between documents and information, the methods of providing public information ex officio, and excepted information. Finally, we outline the timeframes for answering the requests, we describe the administrative and judicial remedies, and we provide some insights into the fees and expenses charged for requests. We conclude with a brief overall assessment of the IFG.

2 Total Requests and Beneficiaries of Access to Information

Since the IFG came into force in 2006, the BMI has kept detailed statistical information about the requests submitted to the bodies bound by the law. This data shows that from 2006 to 2015, federal authorities received a total of 40,156 requests. The variation of requests over time is presented in Fig. 6.1. In the first years after the IFG came into force, relatively few requests were submitted. The numbers range from 2,287 in 2006 down to 1,556 in 2010. After 2006, the number of applications fell slightly and remained at a constant level. Since 2011, the number of requests has

[11] See Ziekow et al. (2012). The results of the evaluation study were also published in a book: Ziekow et al. 2013. *Bewährung und Fortentwicklung des Informationsfreiheitsrechts. Evaluierung des Informationsfreiheitsgesetzes des Bundes im Auftrag des Deutschen Bundestages.* Baden-Baden: Nomos.

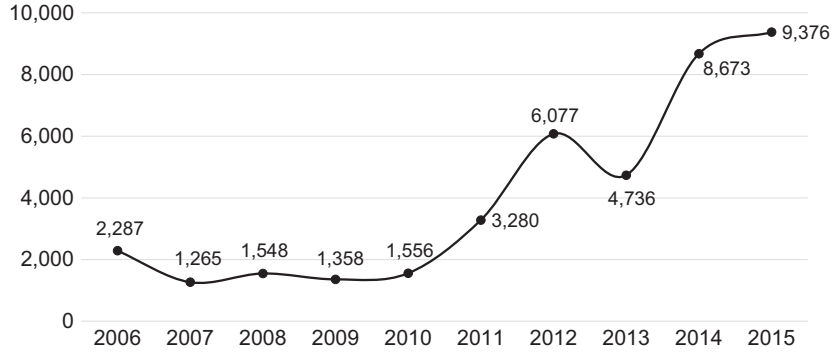

Fig. 6.1 Total number of IFG requests submitted from 2006 to 2015. (Source: Own presentation based on official data from the Federal Ministry of the Interior (http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Open-Government/Informationsfreiheitsgesetz/informationsfreiheitsgesetz_node.html; last visited on 25 January 2017))

increased almost continuously year after year, up to a total number of 9,376 requests in 2015.

Unfortunately, we do not have any data that could help identify the determinants of the relatively low request levels through 2010, nor do we have any insights into the reasons why there was an increase in numbers starting in 2011. We believe, however, that an important reason for the increased numbers from 2011 onward is the growing public interest in FOI and thus in the IFG. When compared with other countries, the presented numbers may seem a bit small, especially in light of Germany's population. Yet when interpreting the results one has to consider that the IFG only applies to institutions at the federal level. Because 12 out of 16 Länder also have FOI laws at the state level, we strongly believe that the total number of requests submitted in Germany is considerably higher than the requests reported only for the IFG.

Figure 6.2 provides another important piece of information, namely, the status of the requests within the years from 2005 to 2015. First of all, until 2014 more requests were granted with full access to the demanded information than with partial access. Only in 2015 did the number of partial accesses granted exceed the amount of full accesses, presumably because of the increased total number of submitted requests in 2014 and 2015. Taken together, from 2006 to 2015, 19,289 requests were granted with full access to the demanded information, whereas partial access was granted

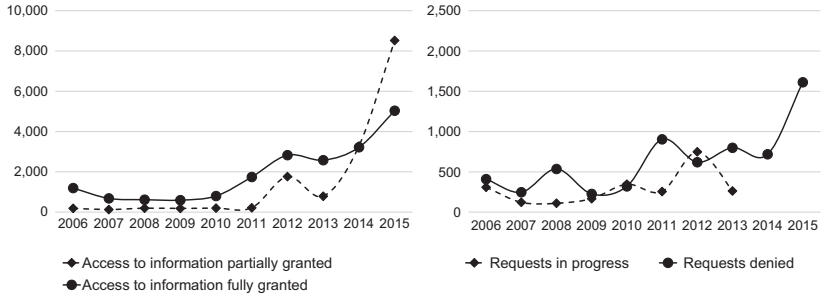

Fig. 6.2 Status of requests within the years 2006–2015. (Source: Own presentation based on official data from the Federal Ministry of the Interior (http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Open-Government/Informationsfreiheitsgesetz/informationsfreiheitsgesetz_node.html; last visited on 25 January 2017))

in 15,451 of the cases. Figure 6.2 further shows that until 2014, the number of denied requests was below 1,000 in every year. Only in 2015 did the number of denied requests increase considerably, which we presume is due to the increased total number of submitted requests in 2014 and 2015. In sum, 6,392 requests have been denied. Finally, the figure shows that in every year there were still requests being processed at the end of the year, most of which were probably processed in the subsequent year.

With regard to the beneficiaries of the IFG, the law does not restrict access to information to certain groups of actors. According to Section 1 (1), sentence 1 IFG,[12] everyone is entitled to official information from the authorities of the Federal Government in accordance with the provisions of the Act. But who are the beneficiaries of the access to information in reality? Empirical data from the IFG evaluation in 2012[13] provides an answer to this question from 2006 to the first term of 2011. The evaluation team collected data from bodies bound by the law via a standardised survey and analysed who the claimants were.[14]

The results, presented in Fig. 6.3, show that the lion share of the requests was submitted by citizens with a private interest (43%), followed by lawyers (24%), journalists/media enterprises (10%), and commercial enterprises

[12] Articles in a statute are either cited as "articles" or "sections"/"§" in German laws. The laws indicate themselves how they want to be cited.

[13] See Ziekow et al. (2012).

[14] The response rate was 86%.

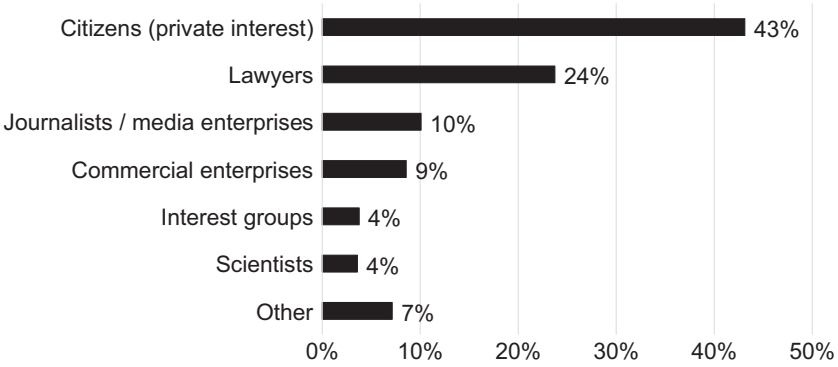

Fig. 6.3 Beneficiaries of access to information (2006–2011 [first term]). (Source: Own presentation based on data from Ziekow et al. (2012))

(9%). The remaining 14% of requests were from interest groups such as trade or environmental associations, scientists, or other individual or collective actors (e.g. members of parliament, political parties, unions, etc.).

A key finding of the results presented in Fig. 6.3 is that the IFG seems to be well accepted by citizens. This group submitted by far the greatest number of requests. However, the report of the IFG evaluation[15] indicates that the number of requests submitted by journalists and particularly by lawyers was increasing over the period of the evaluation. Unfortunately, there is no data available that could tell us whether or not these developments continued after the first term of 2011.

A reason for the great number of requests submitted by citizens may be found in the promoting role of NGOs. There are several NGOs in Germany that are concerned with the issue of FOI, for example, *Transparency International Deutschland*, the *Open Knowledge Foundation Germany*, *Netzwerk Recherche*, the *Humanistische Union*, the *Chaos Computer Club*, or *Mehr Demokratie*. These organisations provide information about FOI and the IFG on their websites and within various print publications, plan, and implement events such as presentations or talks, or—as it is the case with the Open Knowledge Foundation—even directly support citizens in submitting their requests by providing a website exclusively designed for that purpose (fragdenstaat.de). Unfortunately, we are

[15] See Ziekow et al. (2012).

not aware of any empirical evidence on the effects of NGOs' promotion efforts. However, we believe that they contributed and still contribute to the public debate on FOI in Germany.

3 Entities Which Are Bound by the Law

The IFG defines the entities bound by the law as follows: This Act shall apply to other Federal bodies and institutions insofar as they discharge administrative tasks under public law, Section 1 (1), sentence 2 IFG. For the purposes of these provisions, a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law, Section 1 (1), sentence 3 IFG.

The authorities of the Federal Government are the Federal Ministries and the subordinate authorities which directly or indirectly report to them.[16] Other Federal bodies and institutions include the administrations of Bundestag, the Bundesrat, the Office of the Federal President, the German Federal Bank, the Federal Audit Office, and the five Federal Supreme Courts.[17,18] Moreover, it is not the private person who is bound by the law but the authority which avails the person, Section 7 (1), sentence 2 IFG.

The term "authority" is oriented towards the general definition of the public authority in Section 1 (4) of the Federal Administrative Procedure Act[19] (VwVfG).[20] A public authority is every entity which performs public administrative functions. For the purpose of access to information, this includes the preparation of Acts of Parliament by the Federal Ministries.[21] In order to meet the definition of the term "authority" in accordance with the IFG, an administrative body requires a certain degree of organisational independence, its own staff, and administrative director.[22] The entity needs

[16] See Ziekow et al. (2012), p. 81.

[17] The Federal Constitutional Court, the Federal Administrative Court, the Federal Finance Court, the Federal Social Court, the Federal Supreme Court, and the Federal Labour Court.

[18] See Ziekow et al. (2012), p. 81.

[19] Verwaltungsverfahrensgesetz in the version promulgated on 23 January 2003 (BGBl. I p. 102), as most recently amended by Article 5 of the Act of 29 March 2017 (BGBl. I p. 626).

[20] See Ziekow et al. (2012), p. 120.

[21] See Deutscher Bundestag (2004), p. 8.

[22] OVG NRW, Urt. v. 2.11.2010 – 8 A 475/10, Juris No. 52.

to be oriented on operations with an outward focus.[23] The authorities of the Federal Government are only bound by the IFG as long as they perform administrative duties.[24]

Aside from the bound entities, the other key term of the Act is the term "official information". For the purposes of this Act, official information shall be defined as every record serving official purposes, irrespective of the mode of storage, Section 2 (1), sentence 1 IFG. Official information is information related to the official activity of the bound entity and is not private information.[25] However, it suffices if the information becomes permanently part of the bound identity's overall information.

4 The Request for Access

Everyone is entitled to official information in accordance with the provisions of the IFG. The entitlement is free and unconditional.[26] The entitled beneficiaries do not need to claim to have a legal or justified interest in the requested information.[27] The claimants do not need to reveal their identities.[28] The entitlement persists even if the claimants wish to get the information as evidence to support their claim for compensation against the public authority they seek information from.[29]

However, the public authorities have an interest in a specification of the request and in the beneficiaries giving some reason as to why they requested the information so that they can classify the request.[30] For instance they may wish to distinguish requests motivated by economic interests and requests motivated by academic research. The public authorities may wish to charge an extra fee for economically motivated requests while they would like to answer academically motivated requests with less bureaucracy and therefore more efficiently than intended by the IFG. The public authorities recognise the possibility that claimants may abuse their right of

[23] See Rossi (2006), § 1 No. 41.
[24] See Deutscher Bundestag (2004), pp. 7f.
[25] See Deutscher Bundestag (2004), p. 9.
[26] See Deutscher Bundestag (2004), p. 7.
[27] See Deutscher Bundestag (2004), p. 6.
[28] See Ziekow et al. (2012), p. 164.
[29] HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 7; Beschl. v. 30.4.2010 – 6 A 1341/09, Juris No. 6; VG Frankfurt a. M., Urt. v. 23.6.2010 – 7 K 1424/09.F, UA, p. 10.
[30] The information contained in this paragraph stem from Ziekow et al. (2012), pp. 82 f., 94.

access to information for their own ends and may even use it to try to obstruct the administration.

The IFG has been criticised because it does not regulate under which circumstances the request has a sufficient legal certainty, that it requires the request be in written form, and that the public authority is under no obligation to counsel or assist the claimant.[31]

Nevertheless the claimants need to state in their request which information they hope to find in the requested file.[32] This condition is not stated in the IFG but rather is an overall principle of German administration procedure.[33] Section 25 VwVfG does foresee a responsibility of the public authority to counsel the claimant, but this responsibility does not imply obligation and the counselling starts only after the initial request has been made.

Following from another general principle of the German administrative procedure, Section 10 VwVfG, the request does not need to follow a certain form because the procedure is not formal. Therefore, the request can be written, in person, by call or even by conduct.[34] However, in particular cases the public authority can demand a written or more specified request.[35] This is accepted[36] because of the legal certainty, the legal clarity, and the legal protection that follows.

The public authority should be able to determine the identity of the claimant.[37] However, this does not give the authority the right to violate the claimant's right to data protection[38] and Section 3a of the Federal Data Protection Act[39] (BDSG) states that the request of unnecessary data is to be avoided.

There is no obligation to provide a motive for submitting a request except under Section 7 (1), sentence 3 IFG, when third-party interests are

[31] Schoch (2009b), § 7 No. 117.
[32] See Walz (2009).
[33] See Fluck and Theuer (2010), § 7 No. 46; Walz (2009).
[34] See Deutscher Bundestag (2004), p. 14; BfDI (2016); BMI (2005).
[35] See Deutscher Bundestag (2004), p. 14; BfDI (2016).
[36] See Kloepfer (2006).
[37] See Deutscher Bundestag (2004), p. 14.
[38] See Schoch (2009b), § 7 No. 17.
[39] Federal Data Protection Act in the version promulgated on 14 January 2003 (BGBl. I p. 66), as most recently amended by Article 1 of the Act of 14 August 2009 (BGBl. I p. 2814). A translation can be found at https://www.gesetze-im-internet.de/englisch_bdsg/index.html.

concerned.[40] In those cases the third party needs the motive in order to know if they should grant permission, and the public authority needs the motive when weighing the interests of the claimant and the third party.[41]

5 The Response/Answer

The response to the request can be either positive or negative. The positive response entails the provision of the demanded information, which can be provided in various ways. The authority may furnish information, grant access to files, or provide information in any other manner, Section 1 (2), sentence 1 IFG. Information may be furnished verbally, in writing, or in electronic form, Section 7 (3), sentence 1 IFG. Where an applicant requests a certain form of access to information, the information may only be provided by other means for good cause, Section 1 (2), sentence 2 IFG. When examining official information, the applicant may take notes or arrange to have photocopies and printouts produced, Section 7 (4), sentence 1 IFG.

There is no formal form for the positive answer.[42] How access to the information is provided is at the discretion of the public authority, as the different information channels available can all be equally appropriate.[43] The amount of work required for providing access has to be weighed against the sufficiency of personnel and facilities.[44] The public authority should choose a form of access that takes both the right to information and the right to privacy of others into consideration.[45] With regard to the contents of the provided information, the IFG states: The authority is not obliged to verify that the contents of the information are correct, Section 7 (2), sentence 3 IFG.

The negative response entails the rejection of the request, which aside from some specified exceptions is possible only under certain circumstances. The application may be rejected in the event that the applicant is already in possession of the requested information or can reasonably be expected to obtain the information from generally accessible sources, Section 9 (3) IFG.

[40] See BMI (2005); BfDI (2016).
[41] See BMI (2005); BfDI (2016).
[42] See BfDI (2016).
[43] See BVerwG, Urt. v. 6.12.1996 – 7 C 64/95, Juris No. 15; Walz (2009).
[44] See Walz (2009).
[45] See Walz (2009).

Generally accessible sources are the same sources as referred to in Article 5 (1) of the German constitution, the Basic Law for the Federal Republic of Germany[46] (GG).[47] These are publications in all media, pictures, official administrative brochures, books, films, magazines, newspapers, web pages of the public authority, and so on.[48]

6 The Relation Between Documents and Information

After the legal and textual review of a request, the authorities are obliged to find out whether the requested information is available.[49] The situation gets particularly complicated if the required information is not available in the form of documents or document files.[50] If these documents do not exist, the authorities do not have to create some kind of documents with the collected information, which means that there is no need to edit documents for the claimants.[51] If a document or information is not available because it was already destroyed, the authority does not have to replace it.[52] In the case that the information was just given away to another authority, they just have to order it back.[53]

Basically, the search for information in document files and archives is mostly influenced by the quantity of human and time-related resources of the institution.[54] In general, for the authorities it is unproblematic to search information and respond to the requests as long as enough human and time-related resources are available. Yet sometimes the effort required

[46] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law. A translation can be found at https://www.gesetze-im-internet.de/englisch_gg/index.html.

[47] See VG Frankfurt a. M., Urt. v. 12.3.2008 – 7 E 5426/06(2), JurionRS 2008, 25765.

[48] See VG Frankfurt a. M., Urt. v. 12.3.2008 – 7 E 5426/06(2), JurionRS 2008, 25765.

[49] See Information in this paragraph stems i.a. from Ziekow et al. (2012), pp. 170 ff.

[50] See Ziekow et al. (2012), pp. 170 f.

[51] See Ziekow et al. (2012), p. 171 with reference to Rossi (2010) p. 559.

[52] See Ziekow et al. (2012), p. 173 with reference to VG Berlin, Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 38; BMI (2005), 1349 to III. 9. c); Deutscher Bundestag (2010), p. 3.

[53] See Ziekow et al. (2012), p. 173 with reference to OVG Berlin-Brandenburg, Beschl. v. 31.5.2011 – 12 N 20.10, Juris No. 13; VG Berlin, Urt. v. 20.11.2008 – 2 A 57.06, Juris No. 18; Rossi (2010), pp. 559 f.; Schomerus (2010), pp. 89 f.

[54] Information in this paragraph stems from Ziekow et al. (2012), pp. 213 ff. with further references.

of the authorities is disproportional.[55] This is particularly the case when many third parties are involved, the amount of document files is too large, the time-related resources are too scarce, and/or the editing would take too long.[56] These criteria for justification of a failure to provide requested information sometimes have been accepted in court decisions.[57] Nonetheless court decisions are highly depending on the specific case.[58]

7 Methods of Providing Public Information Ex Officio

Proactive disclosure of information at the federal level is not an obligation covered by the IFG. In Germany, there are only four FOI laws at the Länder level that include the obligation of proactive disclosure, namely, the transparency laws of Hamburg, Rhineland-Palatinate, Bremen, and Schleswig-Holstein. Three of these Länder established transparency portals on the web[59] where interested citizens and other actors can search for relevant information.

Although bodies bound by the IFG are not obliged to provide information ex officio, federal government authorities and subordinated agencies still voluntarily disclose some information to the public, for example, on the web portal "govdata.de". This portal was explicitly designed for the purpose of disclosing government data proactively at the federal, state, and local government levels and represents one measure included in the federal government's national action plan for implementing the Open Data Charter of the G8 countries,[60] which was signed by Germany in 2013. Moreover, federal government institutions already provide the public with selected data on their web pages or on specific portals.[61]

[55] See Ziekow et al. (2012), pp. 213 f. with further references.

[56] See Ziekow et al. (2012), pp. 213 f. with further references.

[57] See Ziekow et al. (2012), pp. 213 f. with further references and additional references to opposite court decisions.

[58] See Ziekow et al. (2012), p. 215 with reference to HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 34; Beschl. v. 28.4.2010 – 6 A 1767/08, Juris No. 34; VG Berlin, Urt. v. 12.10.2009 – 2 A 20.08, Juris No. 46.

[59] Hamburg: www.transparenz.hamburg.de; Rhineland-Palatinate: www.tpp.rlp.de; Bremen: www.transparenz.bremen.de/. The portal for Schleswig-Holstein will start in 2020.

[60] See BMI (2014).

[61] For example, the Federal Ministry of Justice and Consumer Protection hosts a website (https://www.gesetze-im-internet.de) on which everyone can read or download federal laws as well as directives of the executive branch.

Despite these attempts to provide the public with open government data, Germany ranks only 26th on the Global Open Data Index 2015,[62] which is a yearly assessment of the openness of specific government datasets.[63] In view of this relatively weak position, it is not surprising that NGOs as well as the parliamentary opposition in Germany have demanded more comprehensive measures for proactive disclosure. This would not only satisfy the public's interest in open government data but could also help to realise the presumed great economic potential connected with free access to government data.[64] In January 2017, the Bundesregierung released a draft for an Open Data Act.[65]

8 Excepted Information

8.1 Scope of the Exceptions

8.1.1 Importance of the Exceptions

It is difficult to weight the relative importance of the various different exceptions made in the IFG.[66] In many cases, more than one exception is relevant,[67] and the public authority tends to choose an exception which will cause the least administrative expense.[68]

8.1.2 Unreasonable Administrative Expenditure

While not named among the exceptions, the "unreasonable administrative expenditure" is working as one. Where an entitlement to partial access to information applies, the appurtenant application is to be granted to the extent to which information can be accessed without revealing information which is subject to confidentiality or without unreasonable administrative expenditure, Section 7 (2), sentence 1 IFG. It is unclear if an unreasonable administrative expenditure can be an exception outside of Section 1 (2), sentence 3 and Section 7 (2) IFG.[69] Section 1 (2) IFG is

[62] See http://index.okfn.org/place/.
[63] The Index is run by the NGO *Open Knowledge International* (https://okfn.org).
[64] See Dapp et al. (2016).
[65] http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2017/01/open-data-gesetz.html.
[66] See Ziekow et al. (2012), p. 72.
[67] See Deutscher Bundestag (2007).
[68] See Ziekow et al. (2012), p. 72.
[69] See Ziekow et al. (2012), p. 209.

interpreted in such a way that the unreasonable administrative expenditure does not constitute an exception but rather a way to switch to another form of access[70] such as switching from an examination to an oral disclosure. Some[71] interpret Section 7 (2) sentence 1 IFG in a way that the elements "accessed without revealing information which is subject to "confidentiality" and "without unreasonable administrative expenditure" are alternative elements meaning that an unreasonable administrative expenditure can result not just from a separation of confidential information. Most[72] interpret them as cumulative elements.

There is no definition of "administrative expenditure".[73] In the IFG only the administrative expenditure that results from the separation, redaction, and anonymisation counts.[74] It is equally unclear when the administrative expenditure is "unreasonable".[75] From the wording "substantially higher administrative expenditure", one can take that "unreasonable" must be more than substantially higher.[76] The courts have begun to specify this through casuistics.[77]

8.2 Nonexistence of the Document as an Exception to Freedom of Access

The claimants only have a right to access existing information,[78] and the IFG gives no entitlement to information procurement.[79] Information exists if it is actually and permanently available,[80] which is determined solely by the fact that the bounded authority can always access the

[70] See VG Köln, Urt. v. 2.9.2010 – 13 K 7089/08, UA, p. 8

[71] See HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 24; Beschl. v. 28.4.2010 – 6 A 1767/08, Juris No. 24.

[72] See VG Karlsruhe, Urt. v. 22.11.2006 – 11 K 1466/06, UA, p. 9.

[73] See VG Frankfurt a. M., Urt. v. 28.1.2009 – 7 K 4037/07.F, Juris No. 65.

[74] See BfDI (2016); Igstadt (2011).

[75] See HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 27; Beschl. v. 28.4.2010 – 6 A 1767/08, Juris No. 27; VG Frankfurt a. M., Urt. v. 28.1.2009 – 7 K 4037/07.F, Juris No. 65.

[76] See HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 27; Beschl. v. 28.4.2010 – 6 A 1767/08, Juris No. 27.

[77] For a detailed presentation of the casuistic see Ziekow et al. (2012).

[78] See OVG Berlin-Brandenburg, Beschl. v. 31.5.2011 – 12 N 20.10, Juris No. 10; VG Berlin, Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 36.

[79] See Rossi (2010).

[80] See VG Berlin, Urt. v. 8.9.2009 – 2 A 8.07, Juris No. 38; Urt. v. 12.10.2009 – 2 A 20.08, Juris No. 64; Beschl. v. 29.1.2010 – VG 2 A 134.08, UA, 5.

information and has the right to dispense the information.[81] The entitlement only gives a right to access the information in the form in which it is filed in the documents of the public authority.[82]

8.3 Partial Disclosure

If an exception prevents full disclosure of the requested information, partial disclosure is possible. Where an entitlement to partial access to information applies, the appurtenant application is to be granted to the extent to which information can be accessed without revealing information which is subject to confidentiality or without unreasonable administrative expenditure, Section 7 (2), sentence 1 IFG. Access is also denied if the separation or the redaction of some information could distort the remaining information.[83] However, some argue that this justification is not supported by the IFG, as according to Section 7 (3), sentence 2 IFG, the authority is not obliged to verify that the contents of the information are correct.[84] A partial disclosure is impossible if the file only concerns one person who is still recognisable after redaction.[85]

A partial disclosure is also possible if the applicant agrees to information concerning the interests of third parties being blanked out, Section 7 (2), sentence 2 IFG. "Third party" means everyone for whom information protected by Section 5 or 6 IFG can be found in the file.[86] Such agreement prevents the need to resort to the procedure after Section 8 IFG and leads to a faster decision.[87]

Partial disclosure does not apply if special public interests, Sections 3 and 4 IFG, are concerned.[88] Some support an analogue application of Section 7 (2) IFG because this would simplify the procedure.[89] Yet if one sees the reason for the existence of Section 7 (2) IFG being to avoid recourse to Section 8 IFG, such an analogue cannot take place because Section 8 IFG is not applicable for Sections 3 and 4 IFG.[90]

[81] See VG Berlin, Urt. v. 10.2.2011 – 2 K 23.10, Juris No. 24, zust. VG Berlin, Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 36.
[82] See Rossi (2010).
[83] See Deutscher Bundestag (2004), p. 15.
[84] See Rossi (2006), § 7 No. 31; Schoch (2009b), § 7 No. 72.
[85] See VG Frankfurt a. M., Beschl. v. 25.4.2008 – 7 L 635/08.F, Juris No. 29.
[86] See Ziekow et al. (2012), p. 190.
[87] See Deutscher Bundestag (2004), p. 15; BfDI (2016).
[88] See Ziekow et al. (2012), p. 190.
[89] See Schoch (2009b), § 7 No. 68.
[90] See Ziekow et al. (2012), p. 190.

Another possibility for a partial disclosure lies in the wording of some exceptions ("insofar as and for as long as", Section 4 (1), sentence 1 IFG) but the wording "where" in Sections 3 Nos. 1–4 and 6 IFG does not suggest this possibility is valid.

From an empirical perspective, the partial disclosure of information is the rule rather than the exception. Partial disclosure of information was only an exception during the first years after the IFG came into force, as most of the demanded information was fully granted in those years.[91] Since 2014, however, the share of partially granted information has increased considerably. In 2015, the number of cases in which information was only disclosed partially was about 63% higher than the number of cases in which the information was fully granted. Unfortunately, we do not have empirical evidence that could explain this increase in cases of partial disclosure. We assume, however, that there is a connection to the rapid rise in the number of submitted requests from 2011 on.

8.4 Excepted Info: Official/State Secrets, International Relations/Foreign Policy, Defence/National Security, and Third-Party Consent. The Economy of the State and Monetary and Financial Issues of the State

I Section 3 IFG

Information excepted from release for the protection of special public interests can be found in Section 3 IFG.

Section 3 No. 1 IFG: Detrimental Effects

The entitlement to access to information shall not apply where disclosure of the information may have detrimental effects on international relation; military and other security-critical interests of the Federal Armed Forces; internal or external security interests; monitoring or supervisory tasks of the financial, competition, and regulatory authorities; matters of external financial control; measures to prevent illicit foreign trade; and the course of current judicial proceedings, a person's entitlement to a fair trial, or the pursuit of investigations into criminal, administrative, or disciplinary offences,

[91] See Fig. 6.2.

Section 3 No. 1 IFG. It suffices if a detrimental effect is merely possible and evidence of endangerment, impairment, or damage is not necessary.[92]

Section 3 No. 1 lit. a) IFG: International Relations

Litera a) seeks to protect the interests of Germany in and outside of international negotiations and preserve diplomatic relations with other states and intergovernmental and supranational organisations.[93] The detrimental effects must result from the "disclosure", which necessarily includes the act of disclosing the information—and not the actual content of the information—and therefore lit. a) is applicable if international relations are disturbed because the Bundesregierung[94] "officially" discloses the information.[95] The Bundesregierung has a margin of discretion in this regard which is only revisable by the courts.[96] The court can only determine if the Bundesregierung used a correct factual basis, considered the significant points of view, and whether the prognosis of the detrimental effects is not obviously flawed, particularly self-contradictory, but not whether the result is correct or not.[97]

Section 3 No. 1 lit. b) IFG: Military and Other Security-Critical Interests of the Federal Armed Forces

Information from the non-military sectors of the Federal Armed Forces is included if it leads to conclusions about security-critical information.[98] It

[92] See OVG Berlin-Brandenburg, Urt. v. 1.10.2008 – OVG 12 B 49.07, Juris No. 23; VG Berlin, Urt. v. 31.5.2007 – 2 A 93.06, Juris No. 19 f.; Urt. v. 11.6.2008 – VG 2 A 69.07, UA, 10 f.; Urt. v. 22.10.2008 – 2 A 114.07, Juris No. 29; Urt. v. 26.6.2009 – 2 A 62.08, Juris No. 38.

[93] See Deutscher Bundestag (2004), p. 9.

[94] The Bundesregierung is Germany's federal government.

[95] See BVerwG, Urt. v. 29.10.2009 – 7 C 22/08, Juris No. 26.

[96] See BVerwG, Urt. v. 29.10.2009 – 7 C 22/08, Juris No. 15; OVG Berlin-Brandenburg, Urt. v. 1.10.2008 – OVG 12 B 49.07, Juris No. 24; VG Berlin, Urt. v. 31.5.2007 – 2 A 93.06, Juris No. 22; Urt. v. 22.10.2008 – 2 A 114.07, Juris No. 30; Beschl. v. 1.6.2011 – VG 20 L 151.11, BeckRS 2011, 41771.

[97] See BVerwG, Urt. v. 29.10.2009 – 7 C 22/08, Juris No. 20; OVG Berlin-Brandenburg, Urt. v. 1.10.2008 – OVG 12 B 49.07, Juris No. 24; VG Berlin, Urt. v. 31.5.2007 – 2 A 93.06, Juris No. 22; Urt. v. 22.10.2008 – 2 A 114.07, Juris No. 30.

[98] See Deutscher Bundestag (2004), p. 9.

is unclear if this applies to military alliances in which the Federal Armed Forces participate.[99]

Section 3 No. 1 lit. c) IFG: Internal or External Security Interests
Covered here are the interests of the non-military security sector, such as the intelligence services, as well as the safeguarding of business secrets that are considered vital to the security interests of the state, Section 24 ff. Security Clearance Check Act[100] (SÜG).[101] Lit. c) seeks to protect the free and democratic order, the existence, and the security of the Bund[102] and the Länder, including the functionality of the state and its public institutions, from attacks by foreign states (external security) and violent acts of individuals (internal security).[103] This does not require that the existence of Germany as such needs to be in danger; threats less than existential are included.[104] The Bundesregierung has the same margin of discretion as in lit. a).[105]

Section 3 No. 1 lit. d) IFG: Monitoring or Supervisory Tasks of the Financial, Competition, and Regulatory Authorities
Lit. d) is to protect the information that serves to check taxable persons according to the procedure in Section 30 (2) No. 1 lit a) and b) of The Fiscal Code of Germany, because if the taxable person has access to certain information it would reduce tax revenue.[106] Concerns of the Act against Restraints of Competition, the Telecommunications Act, or the Energy Industry Act are protected as well, because the public authorities receive business data which—if known publically—would hinder or distort the

[99] See Jastrow and Schlatmann (2006), § 3 No. 28; Rossi (2006), § 3 No. 14; Berger et al. (2006), § 3 No. 34; Schomerus (2010); Mecklenburg and Pöppelmann (2007), § 3 No. 14; Schoch (2009b), § 3 No. 29.

[100] Sicherheitsüberprüfungsgesetz in the version promulgated on 20 April 1994 (BGBl. I p. 867), as most recently amended by Article 2 of the Act of 29. März 2017 (BGBl. I p. 626).

[101] See Deutscher Bundestag (2004), p. 9.

[102] Another term for the German federal state.

[103] See VG Berlin, Urt. v. 10.2.2011 – 2 K 23.10, Juris No. 27; Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 32.

[104] See VG Berlin, Urt. v. 10.2.2011 – 2 K 23.10, Juris No. 28.

[105] See VG Berlin, Urt. v. 10.2.2011 – 2 K 23.10, Juris No. 30 ff.; Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 33.

[106] Ziekow et al. (2012), 281.

competition between companies.[107] The legal reporting obligations and the Monopoly Commission already ensure the transparency in these sectors.[108] But lit d) is not a general field-specific exemption because access to much of this information does not always have detrimental effects on the public authorities' activity.[109] To justify exception, access to a given piece of information needs to considerably and noticeably impair the public authorities' activity.[110]

Section 3 No. 1 lit. e) IFG: Matters of External Financial Control

Lit. e) protects information that the Federal Audit Office collects during its audit and advisory activities.[111] Some have asked if there is really a legitimate interest in keeping this information secret, as secrecy surrounding public budgets implies the existence of shadow budgets.[112]

Section 3 No. 1 lit. f) IFG: Measures to Prevent Illicit Foreign Trade

Foreign trade is illicit if it is forbidden or unauthorised.[113] Information which is collected in connection with the control of the export is protected under lit. f). This includes data which is collected to hinder illicit export and data in connection with economic sanction measures. The protection continues to have effect after the conclusion of the criminal proceedings and the non-compliance procedures.

[107] See Deutscher Bundestag (2004), p. 9.

[108] See Deutscher Bundestag (2004), p. 10.

[109] See BVerwG, Urt. v. 24.5.2011 – 7 C 6/10, Juris No. 13; HessVGH, Beschl. v. 2.3.2010 – 6 A 1684/08, Juris No. 15; Beschl. v. 28.4.2010 – 6 A 1767/08, Juris No. 10, 15; Beschl. v. 30.4.2010 – 6 A 1341/09, Juris No. 8; VG Frankfurt a. M., Urt. v. 2.7.2008 – 7 E 791/07 (1), UA, pp. 16 f., Beschl. v. 18.5.2010 – 7 K 1645/09.F, Juris No. 12.

[110] See BVerwG, Beschl. v. 23.6.2011 – 20 F 21/10, Juris No. 21; HessVGH, Beschl. v. 30.4.2010 – 6 A 1341/09, Juris No. 11 ff.; Beschl. v. 11.10.2010 – 27 F 1081/10, Juris No. 12; VG Frankfurt, a. M., Urt. v. 12.3.2008 – 7 E 5426/06(2), JurionRS 2008, 25765; Urt. v. 2.7.2008 – 7 E 791/07 (1), UA, pp. 17 f.; Urt. v. 11.11.2008 – 7 E 1675/07, Juris No. 24; Urt. v. 5.12.2008 – 7 E 1780/07, Juris No. 39; Urt. v. 28.1.2009 – 7 K 4037/07.F, Juris No. 38; Urt. 17.6.2009 – 7 K 2282/08.F (3), Juris No. 46; Urt. v. 26.3.2010 – 7 K 243/09.F, Juris No. 30; VG Frankfurt a. M., Beschl. v. 18.5.2010 – 7 K 1645/09.F, Juris No. 15; Urt. v. 23.6.2010 – 7 K 1424/09.F, UA, pp. 13 ff.

[111] See Deutscher Bundestag (2004), p. 10.

[112] See Berger et al. (2006), § 3 No. 57 f.

[113] The information in this paragraph stem from BT-Drs. 15/4493, pp. 10.

Section 3 No. 1 lit. g) IFG: The Course of Current Judicial Proceedings, a Person's Entitlement to a Fair Trial or the Pursuit of Investigations into Criminal, Administrative, or Disciplinary Offences

Lit. g) seeks to protect the right to fair a trial from being compromised due to access to information relevant to the trial.[114] For the most part,[115] lit. g) only protects the ongoing proceeding as such and not the involved parties. "Judicial proceedings" include arbitration proceedings.[116] The proceedings are "current" if the lawsuit is pending and the proceedings have not yet ended.[117] Proceedings in the foreseeable future are not "current"[118] and every exception has to be interpreted narrowly; thus a respective application shipwrecks.[119] Judicial proceedings include preliminary proceedings.[120] The proceeding is impaired if the access disturbs the preliminary proceeding and this affects the investigation results and may compromise the objective result.[121] All data gathered by the investigating authorities is protected.[122]

Section 3 No. 2 IFG: Public Safety

"The entitlement to access to information shall not apply where disclosure of the information may endanger public safety", Section 3 No. 2 IFG.

[114] See VG Berlin, Urt. v. 11.6.2008 – VG 2 A 69.07, UA, 8 f.; VG Berlin, Urt. v. 26.6.2009 – 2 A 62.08, Juris No. 37; VG Hamburg, Urt. v. 1.10.2009 – 9 K 2474/08, Juris No. 34; Urt. v. 24.2.2010 – 9 K 3062/09, Juris No. 33.

[115] See BfDI (2016); Fluck and Theuer (2010), § 8 No. 17; Rossi (2006), § 8 No. 2; Schoch (2009b), § 8 No. 22.

[116] See VG Berlin, Urt. v. 11.6.2008 – VG 2 A 69.07, UA, pp. 8 ff.

[117] See VG Hamburg, Urt. v. 1.10.2009 – 9 K 2474/08, Juris No. 35; Urt. v. 7.5.2010 – 19 K 288/10, Juris No. 45; Urt. v. 7.5.2010 – 19 K 974/10, BeckRS 2010, 49050; Urt. v. 27.8.2010 – 7 K 619/09, Juris No. 44.

[118] See VG Hamburg, Urt. v. 1.10.2009 – 9 K 2474/08, Juris No. 36; Urt. v. 27.8.2010 – 7 K 619/09, Juris No. 17.

[119] See BVerwG, Beschl. v. 9. 11. 2010 – 7 B 43/10, NVwZ 2011, 235 (236); OVG RP, Urt. v. 23.4.2010 – 10 A 10091/10, Juris No. 29; VG Hamburg, Urt. v. 7.5.2010 – 19 K 288/10, Juris No. 46; Urt. v. 7.5.2010 – 19 K 974/10, BeckRS 2010, 49050; VG Neustadt a.d. Weinstraße, Urt. v. 16.12.2009 – 4 K 1059/09.NW, BeckRS 2010, 56840; VG Gelsenkirchen, Urt. v. 16.9.2010 – 17 K 5018/09, BeckRS 2010, 54109.

[120] See VG Frankfurt a. M., Urt. v. 11.11.2008 – 7 E 1675/07, Juris No. 25; Beschl. v. 10.7.2009 – 7 L 1556/09.F, Juris No. 16; VG Frankfurt a. M., Beschl. v. 10.7.2009 – 7 L 1560/09.F, Juris No. 18; Beschl. v. 28.7.2009 – 7 L 1553/09.F, Juris No. 12; Beschl. v. 30.8.2010 – 7 L 1957/10.F, Juris No. 36.

[121] See VG Frankfurt a. M., Beschl. v. 18.5.2010 – 7 K 1645/09.F, Juris No. 34.

[122] See Ziekow et al. (2012), p. 288.

"Public safety" is the integrity of the legal system and of the essential institutions and activities of the state, and the integrity of the health, honour, freedom, property, and miscellaneous legal assets of the citizens.[123]

Section 3 No. 3 IFG: Necessary Confidentiality of International Negotiations or Consultations Between Authorities

The entitlement to access to information shall not apply where and for as long as the necessary confidentiality of international negotiations or consultations between authorities are compromised, Section 3 No. 3 IFG. Importantly, access is only postponed, as indicated by the wording "as long as".

Section 3 No. 3 lit. a) IFG: The Necessary Confidentiality of International Negotiations

Lit. a) supplements Section 3 No. 1 lit. a IFG to cover European and international negotiations.[124]

Section 3 No. 3 lit. b) IFG: Consultations Between Authorities Are Compromised

Some experts[125] consider the wording in lit. b) a linguistic fail because the "necessary confidentiality" is only included in lit. a) even if it should also be a part of lit. b). The legislator wanted to copy the exception in Section 8 (1) no. 2 UIG which mentions the necessary confidentiality of international negotiations and the necessary confidentiality of consultations between authorities and the legislator.[126] "Consultations" are the consultation process, the object of the consultation, the course of the consultation, and the result of the consultation.[127] Names and academic or professional titles are not protected.[128] Necessary confidentiality can exist in inter-administrative and intra-administrative consultations, in consultations between the executive and the legislature, and in consultations between the

[123] See Deutscher Bundestag (2004), p. 10.

[124] See Deutscher Bundestag (2004), p. 10.

[125] See BVerwG, Beschl. v. 18.7.2011 – 7 B 14/11, Juris No. 5; OVG NW, Urt. v. 2.11.2010 – 8 A 475/10, Juris No. 83; VG Köln, Urt. v. 13.1.2011 – 13 K 3033/09, Juris No. 60.

[126] See OVG NW, Urt. v. 2.11.2010 – 8 A 475/10, Juris No. 84.

[127] See Ziekow et al. (2012), p. 291.

[128] See VG Köln, Urt. v. 13.1.2011 – 13 K 3033/09, Juris No. 60.

administration and other establishments or labour unions.[129] Conducting a consultation as a closed session or labelling it as confidential does not suffice to prove necessity of confidentiality.[130] The consultation is considered to be compromised if it is impeded or inhibited.[131] A concrete danger, meaning a probability of impairment, is necessary and sufficient.[132]

Section 3 No. 4 IFG: Secrecy or Confidentiality by Virtue of a Statutory Regulation or the General Administrative Regulation on the Material and Organisational Protection of Classified Information

The entitlement to access to information shall not apply where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the material and organisational protection of classified information, or where the information is subject to professional or special official secrecy, Section 3 No. 4 IFG. This follows the principle of "as much information as possible, as much secrecy as necessary".[133]

Particularly important here are tax secrecy, the social secrecy, the statistics secret, the adoption confidentiality, medical confidentiality, and professional confidentiality of lawyers.[134] Important statutory confidentiality rules can be found in the Federal Act on the Protection of the Constitution, the Federal Intelligence Act, the SÜG, the German Code of Criminal Procedure, the Act on Regulatory Offences, the Act against Restraints of Competition, the Federal Bank Act, and the Banking Act. So far there are no clear-cut criteria for the delimitation between a special and an overall secrecy.[135] The courts have begun to specify this through casuistics.[136]

Section 3 No. 5 IFG: Temporarily Obtained Information

The entitlement to access to information shall not apply with regard to information obtained on a temporary basis from another public body

[129] See Deutscher Bundestag (2004), pp. 10 f.

[130] See BfDI (2016).

[131] See VG Berlin, Urt. v. 22.10.2008 – 2 A 114.07, Juris No. 20.

[132] See BVerwG, Beschl. v. 18.7.2011 – 7 B 14/11, Juris No. 11; OVG NW, Urt. v. 2.11.2010 – 8 A 475/10, Juris No. 96; VG Berlin, Urt. v. 22.10.2008 – 2 A 114.07, Juris No. 20; Urt. v. 17.12.2009 – 2 A 109.08, Juris No. 34; Urt. v. 9.6.2011 – 2 K 46.11, Juris No. 22.

[133] Deutscher Bundestag (2004), p. 11.

[134] See Deutscher Bundestag (2004), p. 11.

[135] See Schomerus (2010).

[136] For a detailed presentation of the casuistic, see Ziekow et al. (2012).

which is not intended to form part of the authority's own files, Section 3 No. 5 IFG. The public authority can forward the request to the public authority which has the information, give the claimant the name of the other public authority, or ask the other public authority for consent to give access to the temporarily obtained information.[137]

Section 3 No. 6 IFG: Fiscal Interests

The entitlement to access to information shall not apply where disclosure of the information would be capable of compromising fiscal interests of the Federal Government in trade and commerce or economic interests of the social insurance institutions, Section 3 No. 6 IFG. The Bund has a considerable interest in protecting its current fiscal receipts, and no. 6 is an equivalent to Section 6 IFG, which protects intellectual property and business or trade secrets.[138] Importantly, not every fiscal interest constitutes a valid exception, as shown in no. 6's restriction to trade and commerce.

Section 3 No. 7 IFG: Information Obtained or Transferred in Confidence

The entitlement to access to information shall not apply in the case of information obtained or transferred in confidence, where the third party's interest in confidential treatment still applies at the time of the application for access to the information, Section 3 No. 7 IFG. In many cases, public authorities depend on cooperation with citizens to gather information.[139] The willingness of the citizens to cooperate largely depends on the secrecy of the public authorities.[140] No. 7 serves to protect whistle-blowers by allowing them to decide if the claimant gets access to the information.[141] Only information transmitted freely is protected.[142] The information they provide is not meant for the public.[143] "In confidence" includes information gathered in confidence and information transmitted to the public authority in confidence. The transmission between public authorities is not

[137] See Deutscher Bundestag (2004), p. 11; BfDI (2016).

[138] See Deutscher Bundestag (2004), p. 11.

[139] See Deutscher Bundestag (2004), p. 11.

[140] See Deutscher Bundestag (2004), p. 11.

[141] See Mecklenburg and Pöppelmann (2007), § 8 No. 5; Rossi (2006), § 3 No. 60; Fluck and Theuer (2010), § 8 No. 17; Schoch (2009b), § 8 No. 22.

[142] See OVG NW, Urt. v. 26.10.2011 – 8 A 2593/10, Juris No. 145.

[143] See VG Berlin, Urt. v. 10.10.2007 – VG 2 A 102.06, BeckRS 2007, 28073; Urt. v. 22.10.2008 – 2 A 29.08, Juris No. 33; VG Köln, Urt. v. 30.9.2010 – 13 K 676/09, Juris No. 34.

protected.[144] It is necessary that the information giver and the information taker are in agreement that the information should be kept secret.[145] Otherwise confidence worthy of trust cannot be reliably expected.[146]

Section 3 No. 8 IFG: Field-Specific Exemption

Section 3 No. 8 exists to protect special public interests but works as a field exception.[147] The entitlement to access to information shall not apply with regard to the intelligence services and the authorities and other public bodies of the Federal Government, where these perform duties pursuant to Section 10, No. 3 of the SÜG, Section 3 No. 8 IFG.

8.5 Excepted Info: Protection of Personal Information and Privacy, Protection of Commercial Interest/Business Secrets; Protection of Decision Making or Formulation of Public Policy; Protection of Ongoing Proceedings and Investigations

Rules which protect personal data, intellectual property, and business trade secrets can be found in Sections 5 and 6 IFG.

Section 5 IFG: Protection of Personal Data from Third Parties

A third party must accept limitations on their right to informational self-determination if there is a predominant interest in access to their information[148] and as long as the "inviolable sphere of private life" is not concerned.[149] The IFG causes a cancellation of the original earmarking of the data.[150] This is consistent with European and constitutional requirements.[151]

[144] Deutscher Bundestag (2004), pp. 11 f.

[145] See VG Berlin, Urt. v. 10.10.2007 – VG 2 A 102.06, BeckRS 2007, 28073; VG Köln, Urt. v. 30.9.2010 – 13 K 676/09, Juris No. 34; Schoch (2009b), § 3 No. 192.

[146] See VG Berlin, Urt. v. 10.10.2007 – VG 2 A 102.06, BeckRS 2007, 28073.

[147] See BfDI (2016); Schnabel (2011); Schmitz and Jastrow (2005); Schoch (2006); Schaar and Roth (2011).

[148] See VG Berlin, Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 28; Schoch (2009b), § 5 No. 10.

[149] Deutscher Bundestag (2004), p. 13.

[150] See Kloepfer and v. Lewinski (2005); Rossi (2006), § 5 No. 2; Schoch (2009b), § 5 No. 11; Sitsen (2009).

[151] See Kloepfer and v. Lewinski (2005); Rossi (2006), § 5 No. 2; Schoch (2009b), § 5 No. 11; Sitsen (2009).

Access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's interests warranting exclusion of access to the information or where the third party has provided his or her consent, Section 5 (1), sentence 1 IFG. Special types of personal data within the meaning of Section 3 (9) of the BDSG may only be transferred subject to the express consent of the third party concerned, Section 5 (1), sentence 2 IFG. Section 5 (1), sentence 2 IFG, implements the Data Protection Directive.[152,153] "Personal data" means any information concerning the personal or material circumstances of an identified or identifiable individual (the data subject), Section 3 (1) BDSG. This includes actions, statements, and other behaviour.[154] Individuals are identifiable if their identity can be determined either by the data alone or with accessible further information, with the help of mathematic or statistical knowledge, or with recourse to external data processing capacity.[155]

The interest in the information can be composed of private and public interests[156] wherein a simple private interest normally does not outweigh the third party's interests.[157] "The applicants' interest in accessing information shall not predominate in the case of information from records relating to the third parties' service or official capacity or a mandate held by the third parties or in the case of information which is subject to professional or official secrecy", Section 5 (2) IFG. This complements Section 3 No. 4 IFG.[158]

The applicants' interest in accessing information outweighs the third parties' interest where the information is limited to the third party's name, title, university degree, designation of profession and function, official address, and official telecommunications number and where the third party has submitted a statement in proceedings in the capacity of a consultant or expert or in a comparable capacity, Section 5 (3) IFG. Consequently,

[152] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, L281, 23/11/1995, 31–50.

[153] See Deutscher Bundestag (2004), p. 13.

[154] See VG Berlin, Urt. 11.11.2010 – 2 K 35.10, Juris No. 41.

[155] See VG Berlin, Urt. v. 10.10.2007 – VG 2 A 102.06, BeckRS 2007, 28073.

[156] See Deutscher Bundestag (2004), p. 13; BfDI (2016); BMI (2005); Jastrow and Schlatmann (2006), § 5 No. 12; Mecklenburg and Pöppelmann (2007), § 5 No. 12; Schoch (2009b), § 5 No. 32.

[157] See BMI (2005); Deutscher Bundestag (2004), p. 13.

[158] See Deutscher Bundestag (2004), p. 13.

names, titles, university degrees, designations of professions and functions, official addresses, and official telecommunications numbers of desk officers are accessible where they are an expression and consequence of official activities, Section 5 (4) IFG.

Section 8 IFG: Procedure When Third Parties Are Involved

The authority shall grant a third party whose interests are affected by the application for access to information opportunity to submit a written statement within one month when there are indications that the said third party may have an interest warranting exclusion of access to the information, Section 8 (1) IFG. Interests worth protecting are the private interests protected by Sections 5 and 6 IFG. The interests protected by Sections 3 and 4 IFG are not included even if the interest may also protect private interests because insofar the third party has no disposition authority.[159] The authority's decision shall be written and notification shall be sent to the third party, Section 8 (2), sentence 1 IFG.

There are no rules about the transmission of the data of the claimant.[160] The third parties must be informed about who the claimant is before they decide about the release of their data.[161]

"The information may only be accessed when the decision is final and absolute in relation to the third party or if immediate enforcement has been ordered and a period of two weeks has elapsed since notifying the third party of the order", Section 8 (2), sentence 2 IFG. The decision is final when the time limit for administrative and judicial remedies has passed without such a remedy being initiated.[162]

If the public authority has violated the obligation of secrecy then the third party can seek compensation with a government authority liability claim, Article 34 GG and Section 839 of the German Civil Code[163]

[159] See Fluck and Theuer (2010), § 8 No. 17; Mecklenburg and Pöppelmann (2007), § 8 No. 5; Rossi (2006), § 8 No. 2; Schoch (2009b), § 8 No. 22.

[160] See Ziekow et al. (2012), p. 179.

[161] See Deutscher Bundestag (2004), p. 14.

[162] See Ziekow (2013).

[163] Civil Code in the version promulgated on 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (BGBl. I p. 3719). A translation can be found at https://www.gesetze-im-internet.de/englisch_bgb/index.html.

(BGB)[164] and the civil servant may be liable to prosecution according to Section 203 (2) no. 1, 353b (1) no. 1, 355 (1) No. 2 German Criminal Code.[165]

Section 6: Protection of Intellectual Property and Trade and Business Secrets

No entitlement to access to information shall apply where such access compromises the protection of intellectual property, Section 6, sentence 1 IFG.

8.5.1 Intellectual Property

Intellectual property encompasses copyrights, trademark rights, patent rights, utility model rights, and design rights.[166] The copyright law protects—pursuant to Article 2 (1) No. 1 Act on Copyright and Related Rights[167] (UrhG)—literary works, such as written works, speeches, and computer programs. Only the author's own intellectual creations constitute works within the meaning of this Act, Article 2 (1) UrhG. Trademark rights, patent rights, utility model rights, and design rights can't be violated by a request for access to information because they are published anyway.[168] The entitlement to information negatively affects the right of reproduction, Article 16 UrhG, and the right of distribution, Article 17 UrhG.

8.5.2 Protection of Business and Trade Secrets

Access to business or trade secrets may only be granted subject to the data subject's consent, Section 6, sentence 2 IFG. Business and trade secrets are considered to be all facts with regard to a company and its procedures which are not publicly known and where there is a legitimate interest in non-proliferation.[169] Such an interest exists when the disclo-

[164] See Fluck and Theuer (2010), § 8 No. 45.

[165] See Fluck and Theuer (2010), § 8 No. 45.

[166] See Deutscher Bundestag (2004), p. 14.

[167] Copyright Act of 9 September 1965 (BGBl. I, p. 1273), as last amended by Article 1 of the Act of 20 December 2016 (BGBl. I, p. 3037). A translation can be found at https://www.gesetze-im-internet.de/englisch_urhg/index.html.

[168] See Kloepfer (2006).

[169] See BVerfG, Beschl. v. 14.3.2006 – 1 BvR 2087, 2111/03, BVerfGE 115, pp. 230 f.

sure is likely to give currently exclusive technical or business knowledge to competitors and therefore negatively affect the holder's competitive position.[170]

9 Timeframes for Answering the Requests

According to Section 7 (5), sentence 1 IFG, the public authority needs to give access to the requested information without undue delay. "Undue delay" is defined in Section 121 of the BGB and means without culpable delay. The timeframe is one month according to Section 7 (5), sentence 2 IFG. Yet because of the special importance of obtaining access to information in a short period after the request and the ratio legis, having to wait a month before receiving an answer can constitute undue delay.[171]

Section 9 (1) IFG states that the claimant must be notified in the timeframe of Section 7 (5) IFG if the request is denied. This reference causes problems because it is unclear if the refusal has to be given without undue delay or within a month, or just regularly within a month.[172] Normally the time needed to process a request depends on the request.[173]

It is generally accepted that the timeframe of a month cannot be applicable for refusals in cases in which third-party interests are concerned, Section 7 (5), sentence 3 IFG.[174] The IFG has no regulation for the timeframe in which the public authority needs to decide about the appeal of a claimant. Finally, and with much criticism,[175] the IFG does not foresee what is to follow if the public authority does not meet the time limit. One possible solution is the action for failure to act, where the court condemns the authority to decide over the request.[176]

From an empirical perspective, data from the IFG evaluation sheds light on the actual amount of time required for processing requests.[177] Within the IFG evaluation, the bodies were asked how long it takes to answer requests submitted on the basis of the IFG. Figure 6.4 shows the

[170] See BVerwG, Urt. v. 28.5.2009 – 7 C 18/08, Juris No. 13.
[171] See Deutscher Bundestag (2004), p. 15.
[172] See Schoch (2009b), § 9 No. 14 ff.; Fluck and Theuer (2010), § 9 No. 14 f.
[173] See Ziekow et al. (2012), pp. 195.
[174] See Kloepfer and v. Lewinski (2005); Rossi (2006), § 9 No. 8; Schoch (2009b), § 9 No. 16 f.; Fluck and Theuer (2010), § 9 No. 16.
[175] See Griebel (2007).
[176] See Ziekow et al. (2012), p. 195.
[177] The following information stem from Ziekow et al. (2012), p. 198.

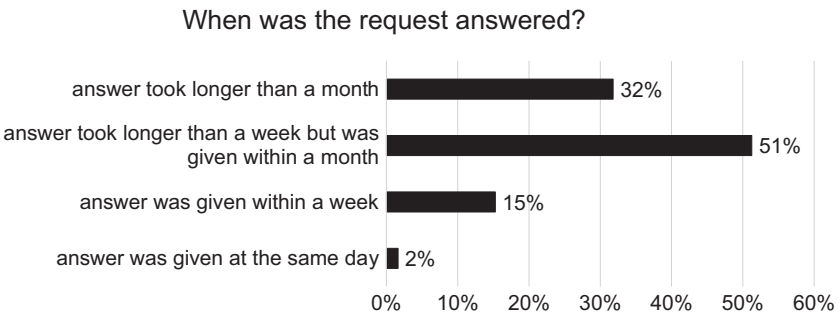

Fig. 6.4 Timeframes for answering the requests (2006–2011 [first term]). (Source: Own presentation based on data from Ziekow et al. (2012))

distribution of the answers. As is clearly visible, the majority of the requests (51%) were answered after a week but within a month after the request had been submitted. Almost a third of the requests (32%) took longer than a month to answer. Unfortunately, the data of the IFG evaluation do not tell us how much longer than a month answering those requests took. Given that the law stipulates a time limit of only one month for answering a request (Section 7 (5), sentence 2 IFG), it would have been interesting to see how long 32% of claimants had to wait until their requests were answered. About 15% of the requests were answered within a week after the requests had been submitted; only 2% were answered the day of the submission.

Because the one-month time limit for answering requests was exceeded in almost a third of all submitted requests, the IFG evaluation asked the responsible bodies why they could not meet the deadline in so many cases.[178] The wording of the question was: "If the time required for answering requests exceeded one month, what were the reasons for exceeding the specified time frame?" The distribution of answers to this question can be found in Fig. 6.5. According to the data, the most important reason was the complexity of the (legal) examination of the requests. A quarter of the interviewed institutions chose this option. An equally common (about 25%) reason for exceeding the one-month time limit was the requirement to consult third parties. In this context, it has to be noted that in the event that third parties have to be consulted, the time limit can

[178] The following information stem from Ziekow et al. (2012), p. 199.

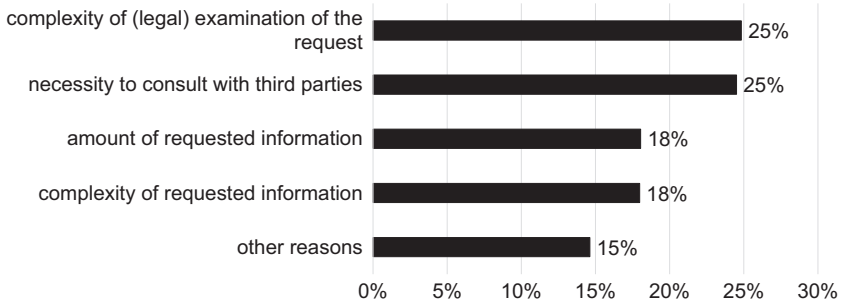

Fig. 6.5 Reasons for not answering requests within stipulated time limit (2006–2011 [first term]). (Source: Own presentation based on data from Ziekow et al. (2012))

be exceeded according to Section 8 (1) IFG.[179] Furthermore, the amount of requested information and the complexity of the requested information both resulted in exceeding the time limit in 18% of cases respectively. Finally, about 15% of the requests exceeded the time limit because of other reasons.

According to qualitative interview data collected from federal authorities bound by the IFG, responding to a request within a time limit of one month is considered more of a general guideline than a clear legal requirement. Despite this judgment, it nevertheless seems important for the authorities to inform claimants on the reasons for any delay in their requests. According to the interview data, authorities try to contact claimants as soon as possible and prepare them for potential delays. Analyses of interview data reveals that citizen claimants mostly understand and accept that it takes time for their requested information to be found and sent to them. Conversely, journalists/the media are not as flexible as ordinary citizens and often find delays unacceptable. Their need for information and haste in receiving it derives mostly from their need to report a story as accurately and as soon as possible—the time to air/print dilemma—and avoid being scooped.[180]

[179] See Ziekow et al. (2012), p. 202.

[180] Information presented in this paragraph stems from Ziekow et al. (2012), pp. 164, 195, 196, 198.

10 Administrative and Judicial Remedies

The administrative and judicial remedies are only partly regulated in Section 9 (4) and Section 8 (2) IFG; rather they are mostly covered in the Code of Administrative Procedure[181] (VwGO).

10.1 Remedies of the Claimant

10.1.1 Administrative Remedies

It is permissible to challenge the decision to reject the application by lodging an administrative appeal or bringing an action to compel performance of the requested administrative act, Section 9 (4), sentence 1 IFG. Administrative appeal proceedings pursuant to the provisions of Part 8 VwGO are also to be carried out when the decision has been reached by a supreme federal authority, Section 9 (4), sentence 2 IFG. The claimant can appeal not only against denial of access but also against the costs.[182] The only case in which the claimant does not need to appeal is in the event of silence on the part of the public authority, in which case they can directly pursue an action for failure to act.

10.1.2 Judicial Remedies

The legal route leads to the administrative courts.[183] When access is (partly) denied, the claimant has to seek an action of obligation, Section 9 (4), sentence 1 IFG.

When the public authority does not react to the request, the claimant has to seek an action for failure to act. It's unclear if the time limit for the action for failure to act is a month—following Section 9 (1) and Section 7 (5), sentence 2 IFG—or three months as foreseen by Section 75 VwGO.[184]

The public authority bears the burden of proof in establishing that the requested information is excepted from open access.[185] If the public authority does not provide detailed evidence to make its case, then the

[181] Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991. A Translation can be found at https://www.gesetze-im-internet.de/englisch_vwgo/index.html.

[182] See Rossi (2006), § 9 No. 25; Fluck and Theuer (2010), § 9 No. 38.

[183] See Ziekow et al. (2012), p. 355.

[184] See VG Köln, Urt. v. 25.2.2010 – 13 K 119/08, Juris No. 24.

[185] See Ziekow et al. (2012), p. 359.

court will not examine the exceptions.[186] The proof does not need to be so detailed that it is possible to draw immediate conclusions concerning the information,[187] but it must be detailed enough that the court has something to examine upon which to base its decision.[188] It is not valid to argue that certain documents are excepted just because documents of the same kind are often excepted.[189] For each information the public authority has to provide proof why this information specifically should be excepted.[190]

10.1.3 Interim Legal Protection

The claimants can also seek interim legal protection to give them the information, Section 123 (1), sentence 2 VwGO. The main problem with Section 123 (1), sentence 2 VwGO in these cases is that a ruling giving the claimants access to the information would anticipate the main proceedings.[191] Such anticipation is generally prohibited.[192] Interim legal protection can only be provisional because the court can't examine the facts thoroughly. In the main proceedings, it must be possible for the court to rule against its own interim ruling. In no case has the court granted access on the basis of this argument.[193] Another specific problem is that the courts can only decide after an in-camera if the denial of the request was justified. Yet an in-camera cannot be undertaken during an interim legal protection because the court cannot anticipate the conclusion of the in-camera.[194]

[186] See OVG Berlin-Brandenburg, Urt. v. 5.10.2010 – 12 B 13.10, Juris No. 21.

[187] See Ziekow et al. (2012), p. 359.

[188] See BVerwG, Beschl. v. 6.4.2011 – 20 F 20.10, Juris No. 8; OVG NW, Urt. v. 26.10.2011 – 8 A 2593/10, Juris No. 112.

[189] See Ziekow et al. (2012), pp. 359 f.

[190] See VG Berlin, Urt. v. 21.10.2010 – VG 2 K 89.09, Juris No. 22.

[191] See HessVGH, Beschl. v. 15.09.2009 – 6 B 2326/09, UA, p. 5; VG Frankfurt a. M., Beschl. v. 7.5.2009 – 7 L 676/09.F, Juris No. 16.

[192] See Sodan and Ziekow (2010), § 123 No. 11.

[193] See HessVGH, Beschl. v. 1.10.2008 – 6 B 1133/08; Beschl. v. 15.9.2009 – 6 B 2326/09; Beschl. v. 27.10.2010 – 6 B 1979/10, cited after BaFin; OVG Berlin-Brandenburg, Beschl. v. 6.5.2009 – OVG 12 S 29.09; VG Berlin, Beschl. v. 23.2.2009 – VG 2 A 116.08 Berlin; Beschl. v. 1.6.2011 – 20 L 151.11; VG Frankfurt a. M., Beschl. v. 7.5.2009 – 7 L 676/09.F.; Beschl. v. 10.7.2009 – 7 L 1556/09.F; Beschl. v. 10.7.2009 – 7 L 1560/09.F; Beschl. v. 28.7. 2009 – 7 L 1553/09.F.; Beschl. v. 30.8.2010 – 7 L 1957/10.F.

[194] See HessVGH, Beschl. v. 15.09.2009 – 6 B 2326/09, UA, p. 5.

10.2 Third-Party Remedies

According to Section 8 (2), sentence 3 IFG, third-party remedies follow a similar application of Section 9 (4) IFG. Third parties can also seek a court ruling in cases in which access has been granted.[195]

10.2.1 Administrative Remedies

Like claimants, third parties have to appeal to the public authority, Section 8 (2), sentence 3, and Section 9 (4), sentence 2 IFG. The appeal obstructs the claimant's access to the information even if the access has been granted, Section 80 and Section 80a (1) VwGO. The information may only be accessed when the decision is final and absolute in relation to the third party or if immediate enforcement has been ordered and a period of two weeks has elapsed since notifying the third party of the order, Section 8 (2), sentence 2 IFG.

10.2.2 Judicial Remedies

It is unclear which is the right judicial remedy[196] but most opinions[197] propose the action of annulment.

10.2.3 Interim Legal Protection

Normally, a third party does not need interim legal protection because the claimant can only access the information when the decision is final and absolute in relation to the third party, Section 8 (2), sentence 2 IFG. If immediate execution in accordance with Section 80 (2), sentence 1 No. 4 VwGO has been ordered, the third parties can request the court to alter or rescind these measures, Section 80a (3), Section 80 (5), sentence 1 VwGO. The whole issue mirrors the prohibition of the anticipation of the main proceedings; based on this the court denies access to the information.[198]

[195] See Fluck and Theuer (2010), § 9 No. 40.

[196] See Fluck and Theuer (2010), § 9 No. 50.

[197] See Adelt (2005); Jastrow and Schlatmann (2006), § 8 No. 24; Kiethe and Groeschke (2006); Leopold (2006); Mecklenburg and Pöppelmann (2007), § 8 No. 27, § 9 No. 21; Mensching (2006); Rossi (2006), § 8 No. 34; Steinbach and Hochheim (2006); Fluck and Theuer (2010), § 8 No. 39.

[198] See Fluck and Theuer (2010), § 9 No. 50.

10.2.4 The Federal Commissioner for Data Protection and Freedom of Information

The function of Federal Commissioner for Freedom of Information (BfDI) shall be performed by the Federal Commissioner for Data Protection, Section 12 (2) IFG. Experiences in other legal systems have shown that this arrangement balances both functions well.[199] The BfDI is an extra-judicial board of arbitration.[200] The appeal is free of expenses and fees.[201] The provisions of the BDSG on the monitoring tasks of the Federal Commissioner for Data Protection (Section 24 (1) and (3) to (5)), on complaints (Section 25 (1), sentence 1, Nos. 1 and 4, sentence 2 and subsections 2 and 3), and on further tasks pursuant to Section 26 (1) to (3) shall apply mutatis mutandis, Section 12 (3) IFG.

Anyone considering their right to access to information pursuant to this Act to have been violated may appeal to the BfDI, Section 12 (1) IFG. "Anyone" covers the claimant and the third party,[202] which can also appeal according to Section 21 BDSG if personal data is concerned.[203] "Violation of their right of access to information" is interpreted broadly and only excludes abstract legal questions and violations of other laws.[204] There is neither a form for the appeal nor a timeframe.[205] The public authority cannot appeal but ask the BfDI for advice if they have questions concerning the IFG, Section 12 (3) IFG and Section 26 (3) BDSG.

The BfDI has to examine the appeals and informs the claimants about the outcome.[206] They have no authority over the public authority and can only work towards a remedy.[207] The claimants and the third party do not need to appeal to the BfDI before they can seek judicial action,[208] but the BfDI has an interest in presenting their solution for the problem in front

[199] See Deutscher Bundestag (2004), p. 17.
[200] See Deutscher Bundestag (2004), p. 17; BfDI (2016).
[201] See BfDI (2016); BMI (2005); Fluck and Theuer (2010), § 10 IFG No. 20/21; Sauerwein (2009).
[202] See Deutscher Bundestag (2004), p. 17.
[203] See Schaar and Schultze (2009); Schoch (2009b), § 12 No. 21 f.
[204] See Schaar and Schultze (2009).
[205] See BfDI (2016); Schaar and Schultze (2009); Schoch (2009b), § 12 No. 30 ff.
[206] See BfDI (2016); Schaar and Schultze (2009).
[207] See BfDI (2016).
[208] See Deutscher Bundestag (2004), p. 17; BfDI (2016); BMI (2005); Schoch (2009b), § 12 No. 47 f.

of the court.[209] The BfDI contends that they are capable of influencing the public authority in favour of the claimant in most cases.[210]

It is unclear if the reference in Section 12 (3) IFG means that the BfDI can inspect every public authority bound by Section 2 (2) and (3), sentence 1 BDSG,[211] or just every public authority bound by the IFG.[212] It is also unclear if the BfDI can only inspect if the IFG is violated[213] or if they can also inspect if the UIG and other rights to freedom of information are violated.[214]

The BfDI counsels the Bundestag and the Bundesregierung as well as the public authorities bound by the IFG, and writes an activity report every two years.[215] It is unclear why they cannot cooperate with the public authorities of the Länder, Section 26 (4) BDSG[216] or why they are not independent, Section 22 (4), sentence 2 BDSG.[217] Everyone considers them independent and only bound by the law,[218] and they attend the bi-annual conference of the Commissioners for Freedom of Information.[219]

10.3 Empirical Evidence on Administrative and Judicial Remedies

From 2006 to 2011, several objections were lodged with the authorities due to rejected requests. Altogether, more than 611 objections were lodged.[220] Of these, 396 of them were unsuccessful at obtaining a reversal (64.8%).[221] Only 6.7% of the entered objections were fully successful.[222]

[209] See Schaar and Schultze (2009).
[210] See Fluck and Theuer (2010), § 9 No. 50.
[211] See Berger et al. (2006), § 12 No. 26; Mecklenburg and Pöppelmann (2007), § 12 No. 20.
[212] See Jastrow and Schlatmann (2006), § 12 No. 22; Fluck and Theuer (2010), § 12 IFG No. 100; Schoch (2009b), § 12 No. 67.
[213] See Fluck and Theuer (2010), § 12 No. 99.
[214] See Schoch (2009b), § 12 No. 70.
[215] See BfDI (2016).
[216] See Schoch (2009b), § 12 No. 88.
[217] See Fluck and Theuer (2010), § 9 No. 50.
[218] See Schaar and Schultze (2009); Schoch (2009b), § 12 No. 57 f.
[219] See Fluck and Theuer (2010), § 9 No. 50.
[220] All the statistical information provided in this section stem from Ziekow et al. (2012), p. 362.
[221] See Ziekow et al. (2012), p. 362.
[222] See Ziekow et al. (2012), p. 362.

About 11% of the objections were partly successful.[223] Overall, it seems that objections do not have much of a chance of being fully successful, which means that claimants must weigh their chances thoroughly before making the effort.

In order to give their objections more weight, claimants have the possibility of consulting the BfDI.[224] In some cases the BfDI may help resolve problems related to rejected requests before legal action is needed.[225] Usually this way is much faster than court proceedings,[226] not to mention much cheaper. However, it has to be borne in mind that the BfDI is not an advocate and they can only provide advice and their own assessments as a consultant.[227] The IFG evaluation found that from 2006 to 2011, the BfDI was consulted 837 times.[228] In 331 cases, the BfDI was asked to provide general advice and information on requesting information.[229] In 506 cases, they were called in for complaint procedures in accordance with Section 12 (1) IFG.[230] In general, consulting the BfDI had a positive effect on the requester receiving the demanded information.[231] Despite the positive effects of BfDI consultations, the number of consultations decreased consistently from 2006 to 2011.[232]

11 Fees and Expenses

According to Section 10 (1) IFG, fees and expenses shall be charged for individually attributable public services pursuant to this Act. This shall not apply to the furnishing of basic items of information. This means that the IFG provides claimants with access to government information without prerequisites but not free of charge.[233] Further, in Section 10 (2) IFG, it is stated that "with due regard to the administrative expenditure involved, the fees shall be calculated such as to ensure that access to information pursuant to Section 1 can be claimed effectively", which means that fees

[223] See Ziekow et al. (2012), p. 362.
[224] The information contained in this paragraph stem from Ziekow et al. (2012), pp. 353 f.
[225] See Ziekow et al. (2012), pp. 353 f.
[226] See Ziekow et al. (2012), pp. 353 f.
[227] See Ziekow et al. (2012), pp. 353 f.
[228] All the statistical information provided in this section stem from Ziekow et al. (2012), p. 399.
[229] See Ziekow et al. (2012), p. 399.
[230] See Ziekow et al. (2012), p. 399.
[231] See Ziekow et al. (2012), p. 399.
[232] See Ziekow et al. (2012), p. 399.
[233] See Schoch (2009b), § 10 No. 1.

are generally charged with regard to the administrative effort required for processing a request.[234] This does not necessarily mean, however, that the charged fees have to be cost-covering.[235]

The actual amount of fees and expenses charged for requests is regulated by a specific directive entitled "Informationsgebührenverordnung"[236] (IFGGebV). In the appendix of Section 1 (1) IFGGebV, the fees and expenses are presented. Part A of the appendix regulates the amount of fees charged for the disclosure of information, whether in oral or written form, as well as the direct provision of publications and/or other materials.[237] Part B of the appendix regulates the fees of arising from direct expenses such as copying, printing, packaging, and sending the information.

In 2016, the Federal Administrative Court ruled that the rules concerning the expenses are invalid because the original version of Section 10 (3) IFG, on which the IFGGebV was based, only foresaw fees but not expenses.[238] The original version of Section 10 (3) IFG did not specify the content, purpose, and scope conferred to the authority and thus violated Art. 80 (1), sentence 2 GG.

Since charging fees poses a barrier for claimants and may influence their decision on whether or not to submit a request, it is crucial for assessing the IFG's effectiveness to be aware of the extent to which authorities make use of fees. Fortunately, the BMI keeps statistics about the amount of fees charged for granting requests from 2006 to 2015. The distribution of the charged fees is presented in Fig. 6.6. In total, 89% of the requests fully or partially granted were free of charge, which means that only in 11% of the cases did claimants have to pay fees. In view of these numbers, fees do not seem to be charged excessively, and the statistics strongly support the perception that the great majority of claimants are not inordinately troubled with fees.

Slightly more detailed data on the fees charged—albeit for a shorter period—can be found in the IFG evaluation.[239] Figure 6.7 presents the distribution of the data. Similar to the data of the BMI, the IFG evaluation also found that the majority of requests were processed without charging

[234] See Ziekow et al. (2012), p. 240.

[235] See Ziekow et al. (2012), p. 240.

[236] Informationsgebührenverordnung in the version promulgated on 2 January 2006 (BGBl. I p. 6), as most recently amended by Article 2 Section 7 of the Act of 7 August 2013 (BGBl. I p. 3154).

[237] Fees are capped at 500 Euro per request.

[238] See BVerwG, Urt. v. 20. Oktober 2016 – 7 C 6.15 – Gründe, II. 2.

[239] See Ziekow et al. (2012), p. 247.

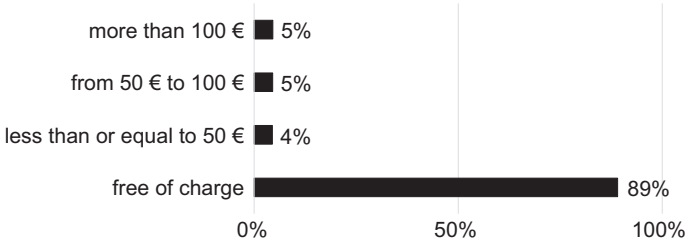

Fig. 6.6 Fees charged for requests (2006–2015). (Source: Own presentation based on official data from the Federal Ministry of the Interior (http://www.bmi.bund.de/DE/Themen/Moderne-Verwaltung/Open-Government/Informationsfreiheitsgesetz/informationsfreiheitsgesetz_node.html; last visited on 25 January 2017). Note: Basis of proportions is the total number of requests granted with full or partial access to information)

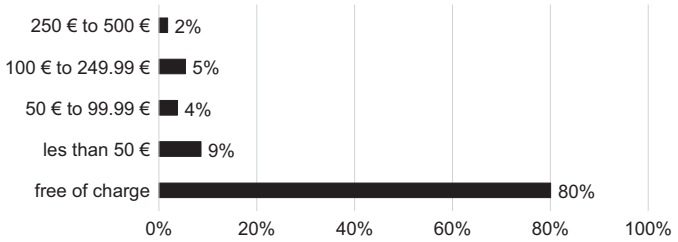

Fig. 6.7 Fees charged for requests (2006–2011 [first term]). (Source: Own presentation based on data from Ziekow et al. (2012))

fees. This finding reinforces the impression that fees do not present a serious barrier for the majority of claimants. On the contrary, the IFG evaluation concludes that the administration frequently does not charge fees because this would lead to even more administrative effort for providing access to information than is already the case.[240] Moreover, qualitative data from the evaluation revealed that the amount of effort required to process complex requests is not reflected in the fees charged.[241]

[240] See Ziekow et al. (2012), p. 436.
[241] See Ziekow et al. (2012), p. 436.

12 Special Regime for the Access of Mass Media

With regard to the IFG, there is no special regime for mass media access to information. According to Section 1 (1), sentence 1 IFG, everyone (including the media) is entitled to official information from the authorities. Moreover, the media has had the ability to request government information by means of the various press acts of the 16 Länder even before the IFG came into force in 2006.

13 Special Regime for Access to Environmental Information

The IFG does not provide for a special regime for access to environmental information. This is already done by the UIG, which predates the IFG. The UIG implements the Aarhus Convention and Directive 2003/4/EC. The UIG is the special law.[242] It regulates what constitutes environmental information,[243] which it defines very broadly.[244]

Besides the much more specific scope of application of the UIG, there are other differences between the IFG and the UIG. For example, the access to information is less broad in the IFG than in the UIG.[245] Formally counted, the IFG has 17 exceptions to the right to access to information while the UIG has only nine. Moreover, the IFG does not have any mechanism for weighing private interest to keep information secret against the public interest for revealing that information. Further, the UIG has no commissioner for data protection and freedom of information, whereas the IFG lacks a regulation comparable to Section 7 UIG, which obliges the public authorities to take measures to facilitate access to environmental information.

[242] See VG Köln, Urt. v. 23.10.2008 – 13 K 5055/06, Juris No. 27; Urt. v. 25.11.2008 – 13 K 4705/06, Juris No. 17.

[243] See Ziekow et al. (2012), p. 145.

[244] See BVerwG, Urt. v. 21.2.2008 – 4 C 13.07, BVerwGE 130, 223; OVG NW, Urt. v. 1.3.2011 – 8 A 3358/08, Juris No. 67.

[245] See Ziekow et al. (2012), p. 56.

14 Overall Assessment of the Effectiveness of the IFG

According to a statement of the BfDI in June 2016, they generally consider the IFG to be a success.[246] One of the main reasons for this statement is the fact that in the years 2014 and 2015, about 18,000 requests were submitted to the bound authorities, indicating a growing public demand for open government information. Indeed, according to the numbers presented in Fig. 6.1, the demand for information has increased considerably ever since 2010. Given the substantial and continuous increase of submitted requests within this period, we do not expect this number to drop in the coming years.

Yet despite this growing demand, we saw that several areas of conflict arose with regard to the implementation of the law,[247] ones which may reduce the overall effectiveness of the IFG. One of these conflicts, for example, concerns the scope of application and comprises potential problems with regard to the definition of terms such as "official information", the bodies which are bound by the law, or the relation between the IFG and more specific laws like the UIG.

Another area of conflict deals with the circumstances when citizens' interest in access to information stands in opposition to the interest of governmental bodies in efficient administrative action. From the perspective of the administration, this area of conflict encompasses issues such as the required amount of time for processing requests, the amount of work, and the consequences of the law for the structural and procedural organisation of the administration.

Moreover, a third area of conflict concerns cost issues. More specifically, the evaluation of the IFG revealed that government agencies usually did not demand fees for providing information and that the demanded fees, particularly with regard to complex requests, were not adequate in view of the required effort. Another potential area of conflict was identified with respect to exemptions of the IFG. However, the results of the evaluation indicated that the exemptions were unproblematic for the bodies bound by the IFG.

Finally, the proactive disclosure of information is another area of conflict. The IFG does not contain an obligation for proactive disclosure. However, the evaluation found that the majority of bodies bound by the law follow a strategy of proactive disclosure of information, for example

[246] See Müller-Neuhof (2016).
[247] The information in this paragraph stem from Ziekow et al. (2012).

on their websites, with brochures, or at informative meetings. This proactive disclosure of information may contribute to the prevention of conflicts. Some areas of conflict such as the protection of trade and business secrets of the BaFin or the question of whether the health insurances are authorities bound by the law seem to have been settled. In Juris one can find seven rulings concerning the BaFin in 2013 and nine in 2015, while there were only two in 2016. Accordingly, the courts had to decide over eight cases involving the health insurances in 2010 and over four in 2012, respectively. Yet there was only one decision in 2015 and 2016, respectively. These decreasing numbers indicate that conflicts indeed may have been prevented by proactively disclosing information. Based on these developments and the efforts of public authorities in proactive disclosure, we expect those numbers to drop further in the future. All told, it seems reasonable to consider the IFG as an important and necessary legal tool for establishing freedom of information at the federal level in Germany, even if the IFG does not contain an obligation for proactively disclosing information, which would increase the transparency of governmental and administrative action even more. If the Federal Government decided to strengthen transparency in Germany by establishing the obligation for proactively disclosing information, it could learn a lesson from several German Länder which already introduced transparency laws including such an obligation. Hamburg installed a transparency law in 2012,[248] which was evaluated in 2017.[249] Bremen[250] and Rhineland-Palatine[251] followed in 2015, Schleswig-Holstein[252] in 2017. On the federal level, however, there are currently no plans to install a transparency law.

[248] Hamburgisches Transparenzgesetz of 19 June 2012, (HmbGVBl. 2012), 271.

[249] See Herr et al. (2017).

[250] Gesetz über die Freiheit des Zugangs zu Informationen für das Land Bremen (Bremer Informationsfreiheits-gesetz – BremIFG) in the version of the promulgation of 26 May 2006 (Brem.GBl. 2006, p. 263), most recently amended by the Act of 28 April 2015 (Brem.GBl. p. 274).

[251] Landestransparenzgesetz (LTranspG) of 27 November 2015 (GVBl. 2015, p. 383).

[252] The amended version of the law wasn't yet promulgated in May 2017. The course of the legislation can be found here: http://lissh.lvn.parlanet.de/cgi-bin/starfinder/0?path=lisshfl.txt&id=fastlink&pass=&search=DID=K-105715&format=WEBVORGLFL1.

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CHAPTER 7

Transparency in Action in Italy: The Triple Right of Access and Its Complicated Life

Paola Savona and Anna Simonati

1 Introduction

The Italian journey towards administrative transparency has been long, at times incoherent, and is probably not yet complete.

The idea that public administration should be a "glass house" has been affirmed in Italy for a long time.[1] Nonetheless, until the end of the last century, administrative secrecy was the rule in Italy. There was no general statutory provision granting citizens the right of access to public records, with a limited right of access being recognized only through sectorial legislation.[2] Furthermore, civil servants were bound to official secrecy and

[1] Turati (1908), p. 22962.
[2] See Galetta (2014), p. 216.

Paragraphs 1–3 are written by Paola Savona, while paragraphs 4–7 are written by Anna Simonati.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_7

were not allowed to release information related to administrative acts or operations.[3]

Law 11 August 1990, No. 241, *New Rules Regarding Administrative Procedure and the Right of Access to Administrative Documents*, shifted the rule from secrecy to transparency,[4] granting the right of access to public documents to "anyone, who has an interest therein for the protection of legally relevant positions" (article 22.1).

The draft bill of the statute, which had been the result of a long work carried out by a Commission of academics,[5] was more ambitious: the right of access would have been granted to anyone, with no duty to state the grounds for the request. However, the Italian Parliament believed that public administration, not fully computerized at the time, was not ready to deal with the large amount of applications that the recognition of the freedom of information would have brought about and chose to limit the beneficiaries of access by requiring a qualified interest in order to access administrative documents.[6]

Although the right was expressly recognized with the purpose of ensuring transparency in administrative action (article 22.1), the requirement to show an interest in knowing the content of the requested document has maintained public administration under a veil of opacity and prevented democratic control over its action.[7]

Earlier interpretations argued that political rights too might have been included among the "legally relevant positions" required to access public documents, as the protection of these rights could have legitimated the right to access public records in order to monitor administrative performance.[8] However, a different interpretation soon prevailed in case law, requiring the applicant to demonstrate a personal, concrete and current existing interest, mainly related to the need to access the documents in

[3] Article 15 of the *Consolidated Law on Civil Servants*, enacted by Presidential Decree 10 January 1957 No. 3 of.

[4] See, among others, Arena (2006), p. 5948; Corso (2010), p. 278.

[5] The Commission was chaired by Professor Mario Nigro, who was at the time one of the most important administrative law scholars. On the elaboration of Italian Administrative Procedure Act, see Pastori (2010), p. 259.

[6] On the reasons which led the Parliament to change the draft proposal, see Arena (1991), p. 33.

[7] See critically Arena (2006), p. 5953.

[8] See Romano Tassone (1995), p. 321; Sorace (2007), p. 292.

order to bring a claim before a court.[9] With time, administrative courts stated that the right of access to public documents could not lead to a widespread and indiscriminate control over the work of public administration, a control which is not included as such within the goals of the laws.[10]

In 2005 a comprehensive reform of Law No. 241/1990 was enacted. Transparency was included in the general principles of administrative action laid down in article 1 of Law No. 241, but the right of access was not extended despite the passage of time from the earlier legislation as well as the increased availability of technologies for public administration. On the contrary, it was expressly provided that requests for access aimed at monitoring the activity of public authorities are not admissible.[11]

As has been noted,[12] in order to find some coherence in the reform of 2005, it is necessary to look at other pieces of legislation, mainly Legislative Decree No. 82, *Code of Digital Administration*, dated 7 March 2005. This Decree mandated the publication of a set of information in the official websites of public authorities, introducing a new model of transparency in the Italian legal system based on the proactive disclosure of public data via electronic means,[13] alternative and concurrent with the one grounded on access. From that moment onwards, the proactive disclosure of information on official websites of public authorities became the legislator's main choice for promoting transparency and accountability in public administration.[14]

Such a trend has been strengthened in recent years with the purpose of fighting corruption. Legislative Decree 14 March 2013, No. 33 on *Reorganization of the rules concerning duties of publicity, transparency and dissemination of information by public administration*, has significantly

[9] See, among others, Cons. St., VI, 7.12.1993, No. 966, IV, 10.06.1996, No. 1024. Cons. St. refers to *Consiglio di Stato*, the Italian supreme administrative court; TAR refers to *Tribunale Amministrativo Regionale* (Regional Administrative Court), which is the administrative court of first tier. Administrative courts' decisions are available at the official website of the Italian administrative courts: www.giustizia-amministrativa.it.

[10] Cons. St., VI, 23.11.2002, No. 5930; IV, 6.10.2002, No. 5818; IV, 15.11.2004, No. 7412.

[11] Article 24.3, Law No. 241/1990, as amended by Law 11 February 2005, No. 15.

[12] See Carloni (2009), p. 792.

[13] This model was further implemented by Legislative Decree No. 36 of 24 January 2006—*implementation of Directive 2003/98/CE on re-use of public sector information*, the starting point of open data policy in Italy. See Galetta (2014), p. 215.

[14] See Merloni (2013), p. 21.

increased the number of data that must be posted on official websites. It has also recognized a new right of access to data, documents and information subject to mandatory disclosure on institutional websites when public authorities have failed to publish them (so-called civic access).

The implementation of Decree No. 33 soon revealed the weakness of a system, which required total openness in relation to some information (including personal data relating to public officers as well as to addressees of administrative action), but still denied citizens a general right of access.[15] As a reaction to the widespread dissatisfaction surrounding the reform, the Parliament finally delegated the Italian Government with the task to emit a Legislative Decree in order to recognize the freedom of information.[16]

Legislative Decree 25 May 2016, No. 97, was enacted pursuant to this delegation, amending Decree No. 33/2013, which introduced in the Italian legal system a new right of access to data and documents held by public authorities (also named *civic access*) and was granted to anyone without the need to state the grounds of the request.[17]

This new right of access has not replaced the "traditional" right of access provided for by Law No. 241/1990 (which was not amended by Decree No. 97/2016). The right of civic access concerning data, documents and information that have to be published in official websites has been also kept.

The present chapter analyses these three different rights and their problematic coexistence, focusing on case law, on the decisions of the Commission for access to administrative documents (which has advisory and alternative dispute resolution functions with respect to the "traditional" right of access) and on the Guidelines of the National Anti-Corruption Authority concerning the implementation of the new rights of civic access.

In order to gain insight into the laws on transparency in action, we have also carried out interviews with practitioners (civil servants and administrative judges). Although the results of our survey (referred to in the fol-

[15] As has been noted, in such a system, some rooms of the "glass house" of public administration are too illuminated, with risks of "opacity for confusion", while others remain in the dark, with risks of maladministration (Carloni (2009), pp. 805–806). On the opacity resulting from too wide a number of disclosure's requirements, see also Galetta (2014), p. 235, and Manganaro (2014), p. 559.

[16] Article 7, let. h, Law 7 August 2015, No. 124.

[17] Article 5.2, Legislative Decree No. 33/2013 as amended by Legislative Decree No. 97/2016.

lowing pages) are interesting, it is difficult to know whether they reflect a general trend, since no aggregated or statistical data in relation to any of the three rights of access is available. Indeed, one may argue that so far there has not been much transparency even with regard to the implementation of the norms on transparency.[18]

2 The Right of Access to Public Documents Under Law No. 241/1990

2.1 Beneficiaries of Access to Public Documents and the Entities Bound by the Law

Access to administrative documents may be requested by "private parties, including stakeholders representing public or widespread interests, who have a direct, concrete and currently existing interest corresponding to a legally protected position linked to the requested document" (article 22.1, let. b, Law No. 241/1990, as amended by Law No. 15/2005).

According to case law, the interest required to support the request for access has to be "legally relevant, serious, real, not emulative, not related to a mere curiosity".[19] It may relate to "any relevant individual position, provided that it is not the generic and indistinct interest of every citizen to a good administration",[20] as the right of access "is not an *actio popularis*" and may not be exercised in order to monitor administrative action.[21]

The right of access is instrumental to the protection of the legal sphere of the person who makes the request, but not necessarily to his or her right to bring a claim before a court.[22] Access must be allowed if the applicant provides evidence that the documents he or she requests are linked to acts

[18] This scenario should change in the near future: after the 2015 reform a program has been started, which provides the creation of a register of the requests for civic access to be published in the official website of each authority and the publication of an annual general report of the aggregated data. A description of the program is available at http: opengov.it.

[19] Cons. St., V, 12.05.2016, No. 1876 (translation mine, as the others following).

[20] Cons. St., VI, 12.03.2012, No. 1403; IV, 6.08.2014, No. 4209.

[21] See Cons. St., Ad. Pl., 24.02.2012 No. 7, IV, 22.09.2014, No. 4748; IV, 20.05.2014, No. 2557; TAR Lazio, Rome, 3.03.2016, No. 2815. The inadmissibility of requests for access aimed at controlling administrative performance is expressly provided by article 24.4 of Law No. 241.

[22] Cons. St., III, 16.05.2016, No. 1978. See also Cons. St., V, 15.03.2016, No. 1026; VI, 18.03.2016, No. 3364.

that actually have, or might have, direct or indirect effects on his/her position.[23]

The right of access is also granted to NGOs and trade unions. However, these subjects too do not have the right to know all documents concerning the activity of a public authority or of a public service provider, but a more limited right to access documents related to acts affecting the interests they represent.[24] In other words, they are equally denied, under the current interpretation of Law No. 241, a general power of monitoring administrative performance. Following this principle, well established in case law, the *Consiglio di Stato* has recently deemed legitimate the refusal of *Expo 2015 Spa* to disclose consumer organization documents relating to tender procedures for the selection of partners and sponsors. These types of acts, in the opinion of the Court, do not have any effect, neither direct, nor indirect, on consumers.[25]

According to the practitioners interviewed, requests for access presented by NGOs are not frequent. In the large majority of cases, documents are requested by citizens and legal entities affected by an administrative decision. Requests for access seem to be particularly recurrent, for instance, in relation to documents concerning selection procedures, public tenders or the grant of public funds. Besides this kind of access aimed at controlling the lawfulness of an administrative action (often preliminary to an application for judicial review), access is requested in order to obtain documents to be used as evidence in criminal proceedings or in private litigations.

Not only administrative authorities but also public service providers and private bodies are bound by the laws on access in relation to their activities of public interest regulated by EU and national law (articles 22.1, let. e, and 23). The teleological aspect assumes thus a role of primacy, since the basic purpose is to implement accountability through transparency whenever the pursuance of tasks of general interest is concerned.[26]

Distinguishing between the activities of a private body that are of public interest and those that are not is not always an easy task. In this respect, it is interesting to look at the case law concerning *Poste Italiane Spa*, a private

[23] Cons. St., III, 16.05.2016, No. 1978; TAR Lazio, Rome, 3.03.2016, No. 2815; Cons. St., V, 30.08.2013, No. 4321; V, 30.11.2009, No. 7486.

[24] See, among many decisions, Cons. St., Ad. Pl., 24.03.2012, No. 7; VI, 21.01.2013, No. 314; TAR Lazio, Rome, 28.08.2013, No. 7991; Cons. St., IV, 6.10.2015, No. 4644.

[25] Cons. St., IV, 6.10.2015, No. 4644.

[26] Simonati (2013), p. 749 ff.

company controlled by the State and a provider of postal service. Administrative courts found, for instance, documents related to staff enrolment[27] or to work organization[28] to be accessible since they are instrumental to the provision of a public service. On the contrary, the refusal of access to documents related to deposit accounts held at *Poste Italiane Spa* has been considered legitimate, since banking activities are not part of the postal service.[29]

2.2 The Request for Access

The request for access must concern administrative documents, whereas information held by public administration that is not embodied in a pre-existing document is expressly excluded from access by article 22.4. This rule is strictly followed in practice: simple information, such as the name of the officer in charge of a procedure or the state of a proceeding, may not be requested.[30]

The definition of a document given by the legislation on access is quite broad: "every graphic, photographic or filmed, electromagnetic, or any other kind of representation of the content of acts, including internal acts and acts not related to a specific proceeding, held by public administration and concerning activities of public interest, regardless of whether the substantial law governing them is public law or private law" (article 22.1, let. d).

The right of access to documents relating to private law acts of public administration was not expressly provided for in the original text of Law No. 241. After several rulings denying the right of access to those documents,[31] the *Consiglio di Stato* stated in plenary assembly that, in order to promote transparency, any document had to be released regardless of the nature of the laws regulating administrative action.[32]

[27] Cons. St., VI, 5.03.2002, No. 1303.

[28] Cons. St., IV, 11.04.2014, No. 1768; TAR Lazio, Rome, 14.05.2014, No. 5080; TAR Emilia Romagna, 30.07.2014, No. 806.

[29] TAR Calabria, 11.02.2015, No. 144; TAR Sicilia, 26.02.2016, No. 597.

[30] See, for instance, Commission for access, decisions 28.04.2016, 29.02.2016, 7.04.2016. The decisions of the Commission for access are available at the official website of the authority: www.commissioneaccesso.it.

[31] Cons. St., IV, 5.06.1995, No. 412; V, 17.12.1996, No. 1559. See also TAR Marche, 5.12.1997, No. 1348; TAR Lazio, Latina, 27.12.1999, No. 70.

[32] Cons. St., Ad. Pl., 22.04.1999, No. 4 and No. 5.

According to case law, any internal document created or received by a public authority may be requested.[33] Legal advice is normally confidential, since it is protected by legal professional privilege, but can be released if given within a proceeding or if an administrative decision refers to it.[34] E-mails between officers and other persons working for public administration are considered private and may not be disclosed.[35]

The law does not exclude the right of access in relation to on-going proceedings. However, article 9.1 of the Regulation on access (Presidential Decree 12 April 2006 No. 184) provides that access may be postponed when knowledge of the document would undermine the decision-making process. In practice, the deferment of access in the case of a pending procedure is frequent.

The application for access, stating the reasons for the request, has to be made to the public authority that created the document or to the one that holds it permanently (article 25.2, Law No. 241/1990). If the application is wrongly addressed, the authority which received the request has to transmit it to the competent authority and inform the applicant thereof (article 6.2, Regulation on access). Therefore, the recipient of the request cannot oppose a refusal by simply stating that the document is not in its disposal and that it is held by a different body.[36]

According to case law, the request has to be addressed to the authority which actually holds the document, or which should hold it under the law.[37] Every authority has the duty to keep records of its activity in order to fulfil the requests for access. If the requested document relates to a procedure within an authority's competence, it cannot respond by saying that the document has not been found or that it no longer exists, as otherwise "the exercise of the right of access to administrative documents, granted by the legal system in order to promote citizen participation and to foster transparency and impartiality of public administration, would be easily frustrated".[38]

[33] Cons. St., IV, 14.05.2014, No. 2472; TAR Emilia Romagna, Parma, 13.03.2015, No. 84; TAR Abruzzo, L'Aquila, 14.10.2015, No. 698; Cons. St., IV, 31.03. 2016, No. 61.

[34] Cons. St., IV, 13.10.2003, No. 6200; V, 15.04.2004, No. 2163.

[35] TAR Sicilia, Catania, 10.07.2015, No. 1891.

[36] TAR Lazio, Rome, 24.03.2016, No. 3752; TAR Lazio, Rome, 9.05.2016, No. 5429.

[37] TAR Piemonte, Turin, 16.04.2015, No. 609.

[38] Cons. St., VI, 28.07.2015, No. 3743. See also Cons. St., IV, 9.05.2015, No. 2379 and TAR Lazio, Rome, 3.05.2016, No. 3752.

If the application for access is irregular or incomplete, the authority has to inform the applicant thereof, and the deadline upon which to reply to the request is suspended until the applicant completes the request (article 6.5, Regulation on access). As stressed by the Commission for access, this provision is the expression of the principles of fair cooperation, participation and good faith governing the relationship between public administration and citizens, which preclude a denial of access based on formalistic grounds.[39]

As seen above, the object of access may only be pre-existing documents. Pursuant to article 2.2 of the Regulation on access, an authority is not obliged to elaborate data in order to satisfy the request for access. This provision has several implications, according to case law, on the content of the request. The first obvious implication is that the request may only concern documents which already exist, as the authority does not have to create new documents. The second, less obvious, implication is that the applicant cannot request documents whose existence he or she just presumes.[40] Furthermore, the request must indicate with sufficient precision the documents it refers to: requests related to unspecified series of acts (so-called exploratory access) are not admissible.[41] Finally, the number of requested documents may not be so excessive in that the authority would have to carry on a too complex activity of research and release.[42] Requests for access must be "proportionated to the real interest of the applicant to know the document"[43]—vexatious requests are not admissible.[44]

With regard to repeated requests, a significant limit has been posed, although indirectly, by case law. If the applicant does not lodge a timely appeal against the refusal of access (including a tacit refusal) before the administrative courts, he or she may not challenge a new negative decision on the same request. In such a case, the legal remedy is precluded by the mandatory time limit to apply for judicial review, which would be circumvented by an appeal against an administrative decision, which merely confirms a previous unchallenged decision. The remedy is admissible only if the request for access, although referring to the same documents, contains

[39] See Commission for access, decision 29.02.2016.

[40] TAR Lazio, Rome, 24.04.2016, No. 4020.

[41] See, among many decisions, TAR Emilia Romagna, Bologna 4.04.2016, No. 2016.

[42] TAR Campania, Salerno, 16.03.2015 no. 624; TAR Lazio, Rome, 26.05.2015, No. 6177.

[43] Cons. St., IV, 11.06.2015, No. 2859.

[44] Cons. St., VI, 20.11.2013, No. 5511; TAR Marche, 19.11.2015, No. 830.

new elements because new facts are adduced or the reasons supporting the request are different.[45] This principle, well established in Italian jurisprudence, is problematic since it precludes the applicant the possibility of presenting again the same request for access also when the authority has not provided a decision, thus leaving him or her with no recourse against "silence" other than costly judicial remedies or at times ineffective administrative remedies.

2.3 Procedure and Decision

Under article 5.1 of the Regulation on access, the right of access to public documents may be exercised upon request in an informal way, including a verbal request, made to the competent authority (so-called informal access). In this case, the request is examined immediately, and, if approved, the document is disclosed with no formalities (see article 5. 3).

If it is not possible to fulfil the request immediately, or if there are doubts on the title of the applicant or his/her actual interest in the documents supplied, on the accessibility of the documents, or on the existence of other interested parties, the applicant must be invited to present a formal, written request (so-called formal access). A formal procedure is then commenced, which must come to an end with an administrative decision taken by a senior officer (*dirigente*) within 30 days from the date of the presentation of the request (see article 6, Regulation on access).

According to the interviewed officers, the informal access which pursuant to the Regulation should be the rule (at least in simple cases) is hardly used in practice. This fact is not only a sign of a diffuse bureaucratic mentality but would also suggest a persistent resistance, especially from lower officers, towards allowing citizen's control, often perceived with anxiety.

If there are third parties who have a counter-interest to access, that is, parties whose right to privacy would be undermined by the disclosure of the document, the authority has to inform them about the request for access, and they have ten days to raise their opposition (article 3, Regulation

[45] See Cons. St., Ad. Pl., 24.02.2006, No. 7; TAR Lazio, Latina, 15.10.2015, No. 667; TAR Sicilia, Catania, 11.02.2016, No. 396; TAR Lombardia, Milan, 10.03.2016, No. 494; TAR Lazio, Rome, 4.04.2016, no. 4022. The same rule applies in case of appeal before the Commission for access (see, for instance, decision 11.02.2016).

on access). Interestingly, in this case, the results of interviews reveal the existence of differentiated practices. While some offices always transmit the requests for access relating to documents containing data of third parties to the persons concerned, others do not communicate the request whenever the third party does not have an expectation of privacy pursuant to case law, as, for instance, in selection procedures.[46] The latter seems to be a good practice since it allows for a quicker decision on access without undermining the right of the third party, whose opposition would be in any event useless.

The authority has to give reasons when it decides to refuse, limit or postpone the access (article 25.3, Law No. 241/1990). However, pursuant to article 25.4 of the Law, if the time limit of 30 days expires and no decision has been taken, access is deemed refused. In other words, a public authority's silence has the same effect of a negative decision. According to the judges interviewed, silence was almost the rule soon after the enactment of Law No. 241, yet the situation has slowly but progressively changed. Nowadays the number of "tacit decisions" seems still to be relevant, but it concerns a minority of cases; the refusal of access is thus normally provided for expressly. The most frequent reasons for this seem to be the lack of a substantial interest of the applicant, followed by the protection of privacy, and, more rarely, the protection of a public secret.

If access is granted, the applicant may view and take copies of the requested documents. Article 25.1 of the Law provides that viewing is subject to no charge and that, "without prejudice to the provisions currently in force on stamp duties, as well on search and survey fees", the issuance of a copy shall be subject only to payment of the coping costs. Under a recent ruling,[47] in order to enable an effective exercise of the right of access, costs must be proportionated and must take in consideration the economic condition of the applicant. Provisions requiring fees have to be read in light of the proportionality principle: the authority cannot ask the payment of search fees for each single document requested but for the whole searching activity.

[46] An individual who takes part to a public selection has implicitly consented to the access to documents related to the proceeding, due to the fact that the comparative evaluation of the candidates is essential to these kinds of procedures. See TAR Lazio, Rome, 5.08.2013, No. 7831, and TAR Basilicata, Potenza, 8.06.2012, No. 260.

[47] TAR Lazio, Rome, 3.11.2015, No. 12383.

2.4 Exclusions and Limitations to the Right of Access

Article 24.1 of Law No. 241/1990 excludes the right of access in relation to (a) documents that have a State secret *status*[48] and document the disclosure of which is expressly prohibited by special pieces of legislation[49]; (b) documents related to tax proceedings, governed by the special rules provided for them; (c) preparatory documents relating to rule-making and planning procedures; (d) documents of selection procedures which contain psycho-aptitude information on third parties. Administrative courts favour a strict interpretation of these exclusions.[50] In relation to tax proceedings, for instance, it has been stated that the exclusion has to be considered limited to on-going proceedings since, under the rule of law, activities carried on by public administration to ascertain tax obligations cannot remain secret.[51] In any case, the refusal of access to documents should be the last resort[52]: access to administrative documents may not be denied whenever it is sufficient to postpone it (article 24.4).

The list of the documents excluded from access by Law No. 241 is not a *numerus clausus* since article 24.6 gives the Government the power to provide, via a regulation, other cases of exclusion in order to protect public interests (national security and defence, international relations, monetary and current policies, public order, prevention and repression of crime), as well as the private life and the privacy of individuals, entities, groups or undertakings (including professional, financial, commercial or industrial interests of those parties). The determination of most of the limits to the right of access to administrative documents is then left to the

[48] The State secret status is regulated by Law No. 124 of 3 August 2007, which reformed Italian secret services and State secret doctrine. Under article 39 of the abovementioned law, State secret status covers documents whose disclosure may harm the integrity of the State and its institutions, the State's independence in relation to other States and military defence. The Prime Minister is the only authority entitled to declare the status of a State secret and to remove the requirement of secrecy. The secret is temporary (maximum 30 years).

[49] For instance, the prohibition to disclose information related to criminal investigations provided for by art. 329 of the Criminal Proceedings Code. Also classified information (regulated by art. 42 of Law No. 124/2007) falls under this provision (see TAR Sicilia, Catania, 11.03.2015, No. 701). Nevertheless, courts may order public authorities to release documents that contain classified information if their disclosure is deemed to be necessary in order to exercise the right to judicial defence (see Cons. St., I, advice 1.07. 2014, No. 2226; TAR Lazio, Rome, 7.01.2016, No. 154).

[50] See, for instance, TAR Campania, Napoli, 7.05.2014, No. 2479.

[51] Cons. St., IV, 10.02.2014, No. 617; IV, 6.08.2014, No. 4209.

[52] See Galetta (2014), p. 229.

discretion of the Government,[53] which has delegated this task to the administrative authorities and to the other public and private bodies bounded by the laws on access.[54] Therefore the documents excluded from access vary according to the executive regulation of the authority concerned.

Under paragraph 7 of article 24, "applicants must nevertheless be guaranteed access to those administrative documents the knowledge of which is *necessary* for asserting or defending legal claims".

The scope of application of this provision has been highly discussed in case law. Until recently, the opinion prevailed in courts' rulings that the right of access to documents necessary to assert or defend a legal claim (so-called defensive access) would override the right to privacy but not public interests protected by the exclusions set forth in article 24.[55] Conversely, in recent case law, the norm has been deemed to be applicable also in other cases including in relation to requests concerning documents excluded from access by the regulation of the Minister of Interior in order to protect public order.[56] It has been held that, in case of *defensive access*, "the legislator directly made the balance between conflicting interests, stating the sacrifice of the secrecy requirement and the prevalence of the applicant's need to assert his/her claims, provided that the requested documents are necessary to this purpose".[57] The need for secrecy can be taken into consideration by public administration and by judges only in order to decide the ways in which the document has to be disclosed (by posing *omissis* or by allowing the viewing of the document without giving the right to make a copy of it).[58]

The narrow interpretation of article 24.7 is mainly due to the fact that the same provision further states that, "to documents containing sensitive or judicial data, access shall be permitted to the extent that it is strictly indispensable".[59]

[53] See the critique by D'Alberti (2000), p. 11.

[54] See article 8 of the regulation adopted by Presidential Decree 27 June 1992 No. 352.

[55] See, among others, Cons. St., 7.02.2014, No. 600.

[56] See TAR Campania, Napoli, 7.05.2014, No. 2479; Cons. St., IV, 3.09.2014, No. 4493; TAR Puglia 19.11.2015, No. 3355; Cons. St., 13.05.2016, No. 1435.

[57] Cons. St., No. 1435/2016, quoted.

[58] Cons. St., IV, No. 4493/2014, quoted.

[59] According to administrative courts, it would have been unreasonable to have a law protecting sensitive and judicial data more than important public interests. See Cons. St., 7.02.2014, No. 600.

Sensitive data is defined by article 4.1, let. d, of the *Personal Data Protection Code* (Legislative Decree 30 June 2003 No. 196) as personal data revealing racial or ethnic origin; religious, philosophical or other beliefs: political opinions; membership of political parties, of trade unions or of other organizations of the kind; as well as data revealing health conditions and sexual life. The Code grants a special protection to that data, reflected in the stricter conditions for access laid down in article 24.7 of Law No. 241 (the requested information must be not only *necessary* but *strictly indispensable* in order to defend a legal claim). As far as documents might reveal information on health conditions and sexual life, the Code further provides that access may be allowed if the right to be defended by means of the request for accessing administrative documents is at least equal in rank to the data subject's rights, that is, if it consists of a personal right or another fundamental, inviolable right or freedom.[60]

According to case law, the right to judicial defence does not always override the right to personal data protection, since public authorities have to balance the interests involved in the case at hand by making an accurate assessment, on a case-by-case basis, of the necessity to disclose the requested documents.[61] Indeed, article 24.7 of Law No. 241 requires a constitutional oriented interpretation, excluding the rigid prevail of defensive access over the right to private life and to personal data protection which would unreasonably sacrifice interests protected by the Constitution, and by EU law.[62]

2.5 Administrative and Judicial Remedies Against the Refusal of Access

Article 25 of Law No. 241/1990 provides special administrative remedies against the refusal of access, be it explicit or tacit.

When access is denied from local or regional authorities, the applicant may, within the time limit of 30 days, ask for the decision (express or tacit) to be reconsidered by the Ombudsman with competence in that territorial jurisdiction (or with competence for the higher territorial jurisdiction, if the Ombudsman has not been established in the "level" of the decision).

[60] Article 60, Legislative Decree No. 196/2003, to which article 24.7, Law No. 241/1990 refers. On the balancing between right of access and right to data protection, see, among others, Clarich (2004), p. 3885 ff. and Occhiena (2011), p. 155–160.

[61] TAR Lazio, Rome, 20.08.2014, No. 9195; TAR Lazio, Rome, 21.12.2015, No. 14356; TAR Lombardia, Milano, 11.12.2016, No. 34; Cons. St., III, 10.06.2016; No. 2500.

[62] Cons. St., VI, 18.06.2015, No. 3122.

Decisions of central or decentralized State authorities may instead be appealed, within the same time limit, before the Commission for access (which has to ask for the advice of the Data Protection Authority if the refusal of access concerns documents containing personal data relating to third parties).

The decisions by the Ombudsman and the Commission are not binding for the competent authority. If the Ombudsman (or the Commission) deems the refusal of access to be unlawful, it has to inform the competent authority, which may still confirm the denial with a motivated decision within the following 30 days. If it does not do so, then access is deemed granted. In such case the inertia of the competent authority is equivalent to a positive decision, which is quite atypical because a material action of the authority will be necessary in order to fulfil the request of the applicant. The Ombudsman and the Commission do not have any power of enforcement. Consequently, if the authority does not release the document, the only way to force the authority to act is to bring an action before the administrative courts.

It should be said that an appeal before the Ombudsman is not always possible, because at a local level this institution has been abolished in 2009[63] with the aim of reducing the costs of local administration. Moreover, there are a number of regions that do not have an Ombudsman presently. In this case, the refusal of access opposed by a local authority may be appealed before the Commission for access. Although not provided by the law, this possibility has been recognized by the Commission in order to avoid a gap in the (administrative) protection of the right of access.[64]

Notwithstanding the inadequate publicity given to the Commission for access and to the existence of the administrative remedy, the number of appeals brought before the Commission has progressively increased in recent years, due also to the fact that the remedy is cost-free.[65] Although

[63] By article 2.186, Law No. 191/2009.

[64] See the Annual Report 2015 of the Commission for access (*Relazione per l'anno 2015 sulla trasparenza dell'attività della pubblica amministrazione*, p. 50). In 2015 the Commission has decided upon 131 appeals brought against decisions of local authorities (*ivi*). The Report (in Italian language) is available at the official website of the Commission (www.commissioneaccesso.it).

[65] The appeals were 125 in 2006, 361 in 2007, 426 in 2008, 479 in 2009, 603 in 2010, 701 in 2011, 1045 in 2012, 1095 in 2013, 1181 in 2014 and 1270 in 2015. Source: Report 2015, p. 36.

the number of appeals is still not high, data shows that the remedy may play a role in the reduction of litigation: only a very small percentage of the Commission's decisions are appealed before administrative courts.[66]

Pursuant to article 116 of the *Code of Administrative Judicial Review* (Legislative Decree 2 July 2010, No. 104), any decision concerning a request for access to administrative documents may be challenged before the *Tribunale Amministrativo Regionale* (administrative court of first tier) within a time limit of 30 days. The application for judicial review against the denial of access (express or tacit) must be notified not only to the administrative authority which rejected the request (or remained silent) but also to the third parties, mentioned in the requested documents, whose right to privacy might be harmed by the disclosure.

The judicial review of administrative decisions relating to access follows a special and prompt procedure, in which all time limits are halved in the first and second instance courts. The hearing is not public, but counsel for defence may be heard upon their request. If the Court recognizes the right of the applicant to access the requested documents, it orders the administrative authority to release them by stating, if necessary, the way of disclosure. First-tier decisions may be appealed before the *Consiglio di Stato*.

3 Special Regimes

A special right of access concerning environmental information has been introduced in the Italian legal system by Law 8 July 1986 No. 349 on *Creation of the Ministry of Environment*, an advanced and innovative piece of legislation for the time, which also provided for the proactive disclosure of data and information concerning the state of the environment by the public administration. Nowadays public access to environmental information is regulated by Legislative Decree 19 August 2005 No. 195 on *Implementation of Directive 2003/4/EC*, which grants the right to any applicant at his/her request, without his/her having to state an interest (article 3.1). The interest in knowing environmental information, as one may read in several rulings, is *in re ipsa* for any human being or organization representing him.[67]

[66] Only 1.26% of Commission's decisions in 2015, 1.80% of the 7.286 decisions emitted by the Commission since the establishment of the remedy (*ivi*, p. 275).

[67] Cons. St., V, 16.02.2011 No. 996; TAR Calabria, Catanzaro, 19.09.2011, No. 1231.

The right to environmental information is, according to the *Consiglio di Stato*, "an atypical right to a widespread control on the state of environment".[68] Anybody may have access to information relating to the state of elements of the environment or factors and measures which might affect it (article 1, par. 1, let. a, b, c), provided that the request is not "manifestly unreasonable" or "formulated in too general a manner" (article 5, par. 1, let. b and c). Although the Decree does not require a statement of reasons in order to access such information, the applicant has to state, under a recent ruling, that he or she has "an environmental interest" on the information required, since "the legal system cannot allow that a right, born with a specific purpose, is exercised in order to satisfy a different interest of economic kind".[69]

Another special regime of access is provided for by article 43 of *Consolidated Law on Municipalities* (Legislative Decree 18 August 2000, No. 267), granting the members of local councils the right of knowledge of documents and information held by local authorities useful for carrying out their tasks. This right is extremely broad since, pursuant to case law, any kind of documents (including the ones containing confidential information, public or private) has to be disclosed with no need to state the reasons of the request,[70] in order to allow for an effective control upon public administration by representative of local communities.

No special right of access is instead conferred to members of the national Parliament. Until the 2015 reform, this lacuna had been particularly problematic given also that the right to access to administrative documents under Law No. 241/1990 is precluded to members of Parliament due to the lack of specific substantial interest required by the statute. Such an interest, according to the Commission for access, is not implicit in the Parliamentary mandate and in the duties related to it.[71]

The media too has no special regime of transparency, and in such cases the possibility to access public documents under Law No. 241 has also been disputed. While in some early rulings, the "traditional" right of access to documents had been recognized to journalists, as instrumental to the freedom of information granted to the press by the Constitution,[72] nowadays a

[68] Cons. St., VI, 21.06.2016, No. 2714.

[69] Cons. St., III, 5.10.2015, No. 4636.

[70] See Cons. St., V, 5.09.2014, No. 1425; TAR Sicilia, Catania, 11.06.2015, No. 1654; TAR Marche, Ancona, 18.09.2015, No. 668, TAR Toscana, Firenze, 30.03.2016, No. 563.

[71] Commission for access, decisions 17.09.2015, 8.10.2015, 15.03.2016, 19.05.2016.

[72] Cons. St., IV, 6.05.1996, No. 570. See also Cons. St., IV, 20.05.1996, No. 665.

different interpretation seems to prevail, denying a specific substantial interest to members of the media.[73] Accordingly, an administrative court has recently held lawful the refusal to disclose to a journalist certain documents related to investments by the Government on the derivatives market, on the grounds that granting a member of the press the right to access documents in order to perform a journalistic inquiry would mean the introduction in the Italian legal system of an inadmissible *actio popularis* over transparency in administrative action, not provided for by Law No. 241.[74]

The introduction of the right of civic access provides both members of Parliament and the media with a new important tool to enhance transparency in administrative action, although this is still limited in scope as illustrated in the following pages.

4 The Legislative Decree No. 33/2013 and the Introduction of Civic Access

In general terms, transparency traditionally[75] compels administrative action to be comprehensible during the procedure and checkable in its final results.[76] This notion has always been concretely accepted by the legislator (even if never expressed in statutes); moreover, it has always been considered as the conceptual basis of the right of access to administrative documents, ruled in Law No. 241/1990. Considering the recent reforms, however, things have partially changed. According to the original formulation of art. 1 of Legislative Decree No. 33/2013 (which has been reformed in 2016), transparency was intended as total accessibility of information about organization and action of public authorities (and of private subjects involved in the fulfilment of public interest), in order to encourage a widespread control on the pursuit of the institutional duties and on the use of public resources.

In practice, the duty to publish documents and data was not as wide as it may seem.

[73] See also Cons. St. IV, 22.09.2014, No. 4748, and Commission for access, decisions 29.02.2016 and 19.05.2016, considering "generic" a request of access referring to the freedom of the press and to the need to know public documents in order to write an article.

[74] TAR Lazio, Rome, 24.11.2015, No. 13250.

[75] Turati (1908), p. 22962, who uses the traditional image of the "glass house" of administration. See also Chardon (1908), p. VI.

[76] See Abbamonte (1989), p. 13.

This "new" principle of transparency, in fact, essentially worked only through publication in the institutional websites of specific groups of documents, information and data. Everyone had (and still has) a right to directly and immediately access the websites, without any authentication and identification. If the duty of compulsory publication is not respected, anyone may obtain the so-called civic access to elements that are legally compulsory to be published (art. 5).

Each authority also had a discretionary power to publish on-line other documents or information not containing personal data, but this power was in practice never used, because of the constant expense clause in the Decree.[77] Finally, it was erased in 2016, when the legislator introduced a new kind of civic access (the so-called "generalized" civic access), which allows private parties to obtain disclosure beyond the borders of compulsory publication (see 6.).

As it was clearly indicated by the most careful scholars,[78] the 2013 reform did not introduce in Italy a Freedom of Information Act,[79] like it happened in other legal systems.[80] According to the FOIA system, in fact, free access to documents and data held by administration corresponds to a general principle that is always binding, even if it is not provided for in a legislative source. On the contrary, exceptions are the object of specific rules (aiming at protecting basic public interests or the stronger expressions of the individual right of privacy), which must be strictly interpreted.[81] The Italian right of civic access, introduced by Legislative Decree No. 33/2013, instead, was just the other side of the legislative duty of on-line publication of specific documents and data. Such a duty—which still binds public authorities—corresponds to an individual right that each person may exercise before an administrative court. Nonetheless, the link with the Constitutional right of citizens to be informed is substantially

[77] About this topic, see, for example, Savino (2013).

[78] See Gardini (2014), p. 875; Spasiano (2015), p. 63; Contieri (2014), p. 563; Esposito et al. (2013).

[79] See Torano (2013), p. 789; Fiengo (2012), p. 235; Spasiano (2005), p. 129. A part of the case law, on the contrary, has recently held that in reality, in light of the general rules contained at the beginning of Decree No. 33/2013, administrative documents should be, in principle, accessible with some specific exceptions: see, for instance, TAR Lombardia, Brescia, I, 04.03.2015, No. 360. According to this orientation, of course, there would be a greater similarity with the FOIA systems.

[80] See Savino (2010); Taylor and Burt (2010), p. 119; Torano (2013), p. 789; Fiengo (2012), p. 235.

[81] See especially Torano (2013), pp. 789 ff.

weak: civic access is fully satisfied when *ex lege* public documents, information and data are published in the institutional website and nothing else (for instance, their real comprehensibility) matters. In other words, the right of the private parties regards just the introduction in the institutional websites of legally public documents and data, which are exhaustively listed by the legislator; it is not, instead, a general right to information suffering only exhaustive exceptions.

5 The 2013 Civic Access and the "Traditional" Right of Access to Administrative Documents

5.1 Preliminary Remarks

The coexistence of Law No. 241/1990 and Legislative Decree No. 33/2013 has immediately produced some problems, especially in their implementation.[82]

In theory, the original content of Legislative Decree No. 33/2013, which aimed at posing specific duties on on-line publication of documents, information and data, seemed to save from the risk of overlapping with the "traditional" right of access. In fact, there are various differences between the right of access to administrative documents and civic access.

First, anyone may ask for civic access, without being compelled to give reasons with reference to the need for protection of a substantial interest, linked with the knowledge of the requested act. It so happens, instead, to exercise the "traditional" right of access.

Second, the objective borderlines of civic access are different than the ones of the "traditional" access to documents. In fact, civic access regards documents (which only may be the object of a request for "traditional" access, according to art. 22.1, let. d, Law No. 241/1990), data and information (that, considering the digital science, is the product of elaboration of data) held by the administration. There is however an important restrictive pre-requisite: the compulsory publication of such elements.

Third, the purpose of the various kinds of access is not the same, because (as already pointed out) civic access is essentially a tool to allow a general control on administrative action, while the "traditional" right

[82] See Binda (2014), p. 47; Marsocci (2013), p. 687.

of access is essentially linked with the protection of individual legal positions.

From this point of view, it is also interesting to note that the legal duty of publication by authorities corresponds to a right in the strict sense of private parties, who, in case of inaction of administration, may ask for—and in principle immediately obtain—the desired result. Therefore, no discretionary power is involved.

However, according to art. 6 of Legislative Decree No. 33, the data which is published on-line should fulfil a number of parameters: integrity, updating, completeness, comprehensibility and easy access. The rule requires the respect for such binding qualitative criteria, in order to make communication of administrative action effective. Of course, their implementation depends on a series of choices by the competent authority, whose content is strictly connected with the characteristics of the case. Consequently, the choice of the concrete activities to be held, to respond to the citizens' legitimate expectation of clearness of public communication, is, at least partially, discretionary. Nonetheless, art. 51 of Decree No. 33 imposes a rule of financial stability, which makes the implementation of measures for effectiveness of administrative transparency very complicated (if not impossible). Besides, no penalties are laid down in case of breach of art. 6.

5.2 The 2013 Reform in Action: The Administrative Case Law

Considering the recent introduction in the legal system of the 2013 reform, there is no settled data about its implementation in administrative action. Nonetheless, interesting inputs may be grasped in the administrative case law.

The role of administrative courts is in this field peculiar, because, according to the Code of Administrative Judicial Review (Legislative Decree 2 July 2010, No. 104), the same judicial remedy works with reference to the breach of the duties of on-line publication and to overcome an administrative denial of "traditional" access to documents (art. 5.5, Legislative Decree No. 33/2013 in its original formulation; after the reform in 2016, the same rule is contained in art. 5.7 of the Decree.). In fact, the courts may order documents to be exhibited to the applicant (in the latter case) or to be published (in the former case), also indicating how concretely to do that (art. 116.4, Legislative Decree No. 104/2010).

In the case law,[83] the distinction between the two kinds of right of access is in principle rather clear.[84]

Actually, some doubts regard the effectiveness of the list of data and documents compulsorily to be published as indicated in Decree No. 33/2013. The less recent case law follows a restrictive interpretation of the rules[85]; in some more recent decisions, instead, the courts held that accessibility is a general principle, which suffers just specific and limited exceptions.[86] Moreover, according to a part of the administrative case law, the rules of Decree No. 33 containing duties of publication may not be extensively interpreted and implemented.[87]

More generally speaking, some courts indicated a strict relationship between the two kinds of access, and they hold that the introduction of civic access has substantially strengthened the "traditional" one.[88]

Furthermore, a sort of osmotic relationship between "traditional" and civic access was sometimes indicated. In such cases, when there was a pertinent rule in Decree No. 33/2013, the courts ordered administration to publish the document on-line in the website, even if the applicant had asked for "traditional" access on it.[89]

This is not a good idea, in my opinion.

First, in fact, the result obtained by the applicant is different from the one that he/she aimed to achieve. Second, from the point of view of the principles of judicial review, there is no correspondence between what was

[83] See, for example, Cons. St., VI, 20.11.2013, No. 5515, TAR Lombardia, Milan, IV, 30.10.2014, No. 2587; TAR Lombardia, Milan, IV, 11.12.2014, No. 3027; TAR Campania, Naples, VI, 3.3.2016, No. 1165; TAR Abruzzo, L'Aquila, I, 30.7.2015, No. 597 (all in https://www.giustizia-amministrativa.it). See also Toschei (2013), 9.

[84] In fact, according to the most correct line, the application that does not make clear what kind of access it refers to should be considered (both by administration and, later, by the courts) not admissible. See so, for instance, TAR Lazio, Latina, I, 9.12.2014, No. 1046; Cons. St., V, 12.5.2016, No. 1876, Cons. St., V, 12.5.2016, No. 1877, Cons. St., V, 12.5.2016, No. 1878, Cons. St., V, 12.5.2016, No. 1881, Cons. St., V, 12.5.2016, No. 1891, all in https://www.giustizia-amministrativa.it.

[85] See TAR Emilia Romagna, Parma, I, 23.102014, No. 377, and TAR Puglia, Bari, III, 16.9.2016, No. 1253.

[86] See TAR Lombardia, Brescia, I, 4.3.2015, No. 360.

[87] See for instance TAR Emilia Romagna, Parma, I, 23.10.2014, No. 377.

[88] See so, for instance, TAR Piedmont, Turin, I, 8.1.2014, No. 9. See also TAR Umbria, I, 16.2.2015, No. 69 and TAR Abruzzo, I, 16.4.2015, No. 288; TAR Lombardia, Brescia, I, 4.3.2015, No. 360, and TAR Abruzzo, I, 16.4.2015, No. 288.

[89] See so, for instance, Cons. St., VI, 24.02.2014, No. 865 and Idem, V, 11.2.2014, No. 64.

asked for and the answer given by the court in the decision. Third, when the compulsory on-line publication of data is not complete, such a decision may be not totally satisfactory for the applicant, who aimed at knowing (through the "traditional" access) the whole content of the document.

Another important problem regards the possible right of citizens to demand, at the same time and with reference to the same documents, "traditional" and civic access. The rules in force suggest the negative answer, when the compulsory on-line publication regards the whole content of the act. In fact, according to art. 26.3 of Law No. 241/1990, if a document has been completely published, the right of access of citizens is fully satisfied, and it cannot be asked for again.[90] The case law is now instead oriented to the positive answer, whenever the applicant owns a relevant legal interest in light of both the 1990 Law and the 2013 Decree.[91]

This solution seems to be the most favourable to full transparency, at least as a transitory choice, because it helps in overcoming the problems connected with the implementation of the *digital first* principle that may result as counterproductive in systems like the Italian one, where the general level of digital literacy is still low.[92]

From other points of view, by the way, the idea of the possible coexistence of civic access and the "traditional" right of access may be concretely dangerous. In practice, in fact, it brings some courts to apply Law No. 241 also to civic access, with serious restrictive effects on the efficacy of the principles of transparency and openness. For example, sometimes in the case law, the applicant for civic access was requested to show the ownership of a specific substantial interest, to be defended thanks to the knowledge of the document or data. But this is a pre-requisite only for the "traditional" right of access. Besides, some courts[93] allowed the lawyer of the interested subject to make the application for civic access only if he/she

[90] In the administrative case law, this rule is constantly implemented. See, for instance, Cons. St., IV, 10.1.2012, No. 25; Idem, VI, 16.12.1998, No. 1683; TAR Puglia, Lecce, II, 17.09.2009, No. 2121; TAR Basilicata, Potenza, I, 25.6.2008, No. 315; TAR Liguria, Genova, I, 14.12.2007, No. 2063; TAR Lazio, Rome, I, 08.2.1996, No. 177.

[91] See so, for instance, TAR Campania, Naples, VI, 5.11.2014, No. 5671.

[92] From this point of view, the case law, according to which it is a duty of the private party to prove that the digital link, indicated by the authority to reach the desired information, at that moment did not work (which is often very hard), is certainly not "citizen-friendly". See so, for instance, TAR Sardinia, II, 23 April 2015, No. 719.

[93] See so, for instance, TAR Sardinia, II, 12.6.2015, No. 860.

had a special power of attorney, which is as well requested by Law No. 241 for the exercise of the "traditional" right of access, not by Legislative Decree No. 33.

Finally, a weakness of the administrative case law on implementation of civic access regards penalties for breaches of the duty of on-line publication. In fact, no economic compensation is imposed for the damage, caused to private parties because of late on-line publication of data.[94]

6 The Further Reform in Legislative Decree No. 97/2016

6.1 The Rules About the "New" Civic Access

After the 2013 reform, the normative scenario has furtherly changed. In fact, Law No. 124/2015 delegated the Italian Government to emit a Legislative Decree, in order to implement transparency and to introduce a real Freedom of Information Act. The reform has brought to the emission of Legislative Decree 25 May 2016, No. 97 (in force since 23 June 2016).

The overall layout and many specific elements of the previous system have been substantially confirmed. However, the aim at providing for a general right of access to administrative data, with just specific limitations defending strong public and private interests, has produced some important changes. At the same time, there is an effort to correct some weaknesses of the rules contained in the original version of Decree No. 33/2013.

The first change has to do with the number of subjects that are nowadays bound by Legislative Decree No. 33/2013. According to art. 2 bis, they are at present indicated as all the public authorities, the great majority of public companies and the (formally) private bodies with economic dimension larger than a minimum size, whose action is financed or controlled by public authorities or whose action is connected with the pursuit of public (national or EU) interest. In the perspective of practical implementation, it is interesting to note that in the 2016 reform the importance of the concrete characteristics of the different kinds of public subjects was carefully taken into account. The consequence of such a sensitivity is particularly evident for local entities (primarily the numerous Italian small

[94] See, for instance, TAR Sardinia, II, 14.5.2015, No. 773.

municipalities), which often own weak financial and structural resources. Hence, on-line disclosure works for them in a simplified way (art. 3.1 *ter*, Legislative Decree No. 33/2013), and it is requested not immediately but within one year since the entrance into force of Decree No. 97/2016 (art. 42.2).

In a substantial perspective, another important change regards the definition of transparency that at present not only requires accessibility of public action but is also explicitly connected with the protection of the rights of individuals and with the promotion of participation by private parties in the administrative procedures (art. 1, Legislative Decree No. 33/2013, as emended in 2016). In the draft version of the reform, the reference was to *fundamental* rights; the final version of the text is clearly more extensive.

The reference to the defence of rights may be somehow relevant in light of another basic change: the introduction of a new kind of civic access, "covering" documents and data that are not compulsorily public. It is known as generalized access.

According to the most recent rules (mainly contained in art. 5 and art. 5 bis of Legislative Decree No. 33, in its current formulation), besides the *ex lege* publication of documents, data and information, there is a right of anyone to know the administrative documents and data (without being compelled to give reasons for the request of this "new" civic access), with the exception of those containing secrets to be kept in the public interest or private strongly confidential data.

Hence, at present, there are two kinds of civic access. The one introduced in 2013 in correspondence with the compulsory publication of documents, information and data has survived. Besides, anyone (without showing the ownership of a substantial legal interest) may ask for the "new" civic access, which (according to the formulation of art. 5.2 of Legislative Decree No. 33/2013) seems to regard only documents and data. Consequently, information (that is "elaborated" data) seems not to be comprised in the implementation area of the new civic access, which makes administrative action in principle simpler to be managed. But the same art. 5 goes on, explaining that all the kinds of civic access may be requested with reference to documents, data or information. In my opinion, this rule does not make legally binding the narrower formulation of the definition indicated immediately before; therefore, in practice also information could be the object of a request for the "generalized" civic access.

The application for the "new" civic access can be addressed either to the authority holder of the document or data or to another responsible authority, and it has to make clear what the needed data or documents are.

The exercise of access is free of charge, with the exception of costs concretely incurred by administration (art. 5.1–5, Legislative Decree No. 33/2013, as reformed in 2016). This can of course be a disincentive for possible applicants, but civic access may not be free of charge, in light of the clause of financial stability imposed in art. 51 of Legislative Decree No. 33/2013 and in art. 1.1 of Law No. 124/2015. However, perhaps more efficiently, the applicant could have been compelled to pay only within a sum or, on the contrary, only for particularly expensive access, like it happens in other legal systems.[95]

Such a choice could have been useful also to solve in advance (at least partially) another problem, which is potentially severe in implementation: dealing with vexatious requests. In other legal systems, expressed rules allow administration not to answer to vexatious requests.[96] The Italian legislator has decided not to follow this example, which has probably been a wise idea. In fact, in light of the general principles, while deciding not to answer to repeated demands, administration should—at least, the first time—give reasons and show the obsessive nature of the application; therefore, it would have been necessary to activate a strong discretionary power. However, perhaps a good alternative solution may be found in the case law about the "traditional" right of access to documents, because, according to the administrative courts, demands related to the same documents may be repeated only if containing new elements.[97] The tendency in the administrative case law to focus the similarities among the various kinds of access will probably lead to interesting results from this point of view.

The "new" civic access may be denied—from a side—to avoid concrete damages to some strong public interests (such as national security, contrast of criminality, international relationships, national economic and financial stability) and, from the other side, to protect personal data (according to the statutes in force), freedom and secrecy

[95] For an example that is particularly interesting, see, in the UK legal system, *Sections* 9, 12 and 13 of the 2000 *Freedom of Information Act*.

[96] For instance, in the UK legal system, see *Section* 14 of the 2000 *Freedom of Information Act*.

[97] See Cons. St., ad. plen., 20.4.2006, No. 7.

of correspondence, economic and commercial private interests (art. 5 bis 1–2., Legislative Decree No. 33/2013, as reformed in 2016).

In the perspective of implementation, some problems will probably arise. In fact, the protection of the individual right of privacy is not mentioned. At the same time, art. 7 bis of Decree No. 33 refers to art. 24 of Law No. 241/1990 containing the list of limits to the "traditional" right of access to administrative documents and so on, and the individual right of privacy is there indicated. Hence, it is easy to imagine that, while answering to the requests for the "new" civic access, administration will wholly take into account the right of privacy of possible counter-interested parties. This is true at least with reference to the defence of confidential information of individuals, who are also strongly protected by specific rules in case of personal data processing. Boards and associative entities, instead, are not comprised among the subjects protected by the Personal Data Protection Code (Legislative Decree 30 June 2003, No. 196), which makes their legal position a little weaker.

Anyway, denial must be avoided if postposing the exercise of civic access is enough to protect the opposite interests (art. 5 bis 5, Legislative Decree No. 33/2013, as reformed in 2016, which is clearly very similar to art. 24.4 of Law No. 241/1990).

Besides, the Transparency Officer in each authority should watch over administrative action to make transparency effective and efficient (art. 5.6–7, Legislative Decree No. 33/2013, as reformed in 2016).

Some important rules regard the procedure to answer to a request for civic access.

The private parties, owners of confidential data, must be involved, and they may oppose within a brief term. The administrative decision must be expressed and it must give reasons. If civic access is allowed, the document or data are published or communicated to the applicant; such an action is normally not immediate when a private party has opposed (art. 5.5–6, Legislative Decree No. 33/2013, as reformed in 2016).

This is quite interesting, because it shows a deeper attention than in the past for the reasons of the owners of confidential data, who, according to the recent reform, in front of a measure allowing civic access, can more properly defend their position. In fact, these parties may use ADR tools, like the applicant can do. According to art. 5.7–8 of Legislative Decree No. 33/2013 (as reformed in 2016), before making an application for administrative judicial review, both the applicant (in case of totally or partially negative answer) and the owner of the confidential data (if civic

access has been allowed) may apply to the Anti-Corruption and Transparency Officer inside the competent authority. If the competent authority is a territorial entity, they may apply to the local Ombudsperson, who decides within 30 days; the competent authority can confirm the denial, but, if it does not, access is allowed within the following 30 days. Whenever personal confidential data is concerned, also the national Data Protection Authority must be involved in the procedure.

This innovation is very positive in multiple perspectives. First, the reform has strengthened the area of remedies, which so far is particularly weak. Second, the Italian legislator has finally taken into account the interest of the owners of the right to privacy, who are clearly the most vulnerable parties in all the cases about access to documents and administrative information, because an illegal breach of their interest is in practice irremediable. Third, in a more general perspective, the possible involvement of ADR procedures is probably useful to the private parties to obtain quicker and cheaper decisions on single cases; it may be useful in the public interest as well, to avoid an excessive and disproportionate involvement of the administrative courts.

6.2 Towards Implementation: The Open Issues and the Suggestions in the Administrative Guidelines

The 2016 reform is still too recent to offer settled data about implementation.

A preliminary monitor by the national Department of Public Function takes the first three months of implementation of the "generalized" civic access by the Ministries (http://www.funzionepubblica.gov.it/sites/funzionepubblica.gov.it/files/RegistroAccessiFOIA.pdf). The demands considered had been made since December 2016 until March 2017, and they are 34. The object of the various demands is very different: some of them regard general content acts, and some others regard individual measures or the result of specific administrative procedures. The great majority of the facts seems to be simple, as in just two cases counter-interested parties were present. About two thirds of the requests were totally accepted. In three cases, the demand was just partially accepted: once, the data was already partially available in the institutional website; once, the data was not totally owned by the competent authority; and once, the request, which was originally expressed in very wide terms, after a telephonic conversation with the competent employee, was more precisely formulated by the applicant. When generalized access was refused, normally the reason

was either the protection of privacy and secrecy, or the non-existence of information. In four cases, the decision was challenged with an administrative appeal, but the appeal was always rejected and the previous decision confirmed; the second administrative decision was not challenged before a court.

Regardless of this very partial monitoring, it is not difficult to grasp some open issues, which are the result of the coexistence of different notions of administrative transparency and of different kinds of right of access.

In the legislator's view, a relevant contribution in order to solve the main practical problems should be given by the joint action of the Data Protection Authority and the National Anti-Corruption Authority. In fact, they are requested to indicate, after a participatory procedure, the groups of information which must be just partially published, compatibly with the principles of proportionality and simplification (art. 3, Legislative Decree No. 33/2013, as reformed in 2016). The same authorities must emit Guidelines, to make clear the borders of the limitations to civic access (art. 5 bis 6, Legislative Decree No. 33/2013, as reformed in 2016).

The Guidelines were produced with act No. 1309 of 28.12.2016.[98] In the Guidelines, the complication of the legal scenario corresponds to the use of a complex terminology: the "traditional" right of access ruled in Law No. 241/1990 is called "documental access", access to compulsorily public documents provided for since 2013 is called "civic access", while the "new" civic access introduced by Legislative Decree No. 97/2016 is referred to as "generalized access".

Of course, the most important doubts regard how the rules about the "generalized access" should concretely work.

Notwithstanding no reason is required for the demand, the applicant has to indicate the needed document or data: which, from the point of view of rational implementation, is maybe excessive, because the interested subject has not normally all the necessary information yet. As it was put in evidence by the Data Protection Authority in its advice during the legislative process for the emission of Legislative Decree No. 97/2016,[99] the job of the recipient of the demand is made more difficult because the

[98] The Guidelines are published (unfortunately, in Italian), in http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2016/1309/del.1309.2016.det.LNfoia.pdf.

[99] See Opinion 3.3.2016, No. 92, in http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/4772830.

application must not indicate a legal interest to be protected using the requested data; this is quite paradoxical whenever such interest (which is probably unknown to the competent administration) must be harmonized with one or more listed limits to disclosure.

Besides, it is not still clear what happens if the request for the "new" civic access is accepted.

Considering the text of art. 3, Legislative Decree No. 33/2013 (as emended in 2016), one could infer that, in the case, the knowledge of the document or information must be open to anyone. According to the rule, in fact, all the documents and data which are the object of civic access are public (which means: must be made public), here comprised the ones which are compulsorily to be published. Moreover, art. 7 of the 2013 Decree holds that all the documents, information and data which have been the object of civic access (in both its forms, one could consider the text in force) must be published on-line in open access and can be re-used with no broader limitations than the duty to mention their source and to use them properly. These rules, that seem to be very auspicious for a widespread implementation of administrative transparency, on the contrary will perhaps induce the authorities to be severely restrictive in allowing the "new" civic access or at least to limit it to only the applicant.

In the recent Guidelines emitted by the Anti-Corruption Authority together with the Data Protection Authority, there are no specific solutions to these problems. However, a general assumption could be practically useful. In fact, it is made clear that administration may always protect the (public) interest to economy of its action, in accordance with the relevant EU case law.[100] This means that the competent authorities are allowed to choose the best solution in light of the characteristics of the single case, in order to implement as widely as possible the principle of administrative transparency.

Of course, the most important open issue regards the extension of the limits to the "new" civic access.

From this point of view, the Guidelines do not contain specific indications. They just offer some useful explanations.

[100] In fact, in the Guidelines, Court of first instance, First chamber, extended composition, Judgment of 13 April 2005, Verein für Konsumenteninformation/Commission is mentioned (see 4.2.).

In particular, they distinguish between absolute and relative exceptions to the "generalized" civic access. The former work when a rule of law strictly prohibits access to protect fundamental public interests (such as state secrets and other secrets, provided for in specific pieces of legislation) or private rights (such as the right to privacy of sensitive data). The latter work when a specific evaluation by administration, in light of the characteristics of the single case, shows that disclosure of documents, data or information could be concretely harmful to fundamental public interests (public security and defence, international relations, monetary and current policies, public order, prevention and repression of crime) or private interests (protection of personal data, freedom and secrecy of correspondence and protection of economic and commercial interests).

The expressed legislative reference to a *concrete* damage is important, because it requires administration to choose a proportionate solution, which also means that postposed or partial disclosure must be normally preferred than total denial. Especially partial disclosure may be the proper solution whenever personal confidential (but not sensitive) data is concerned.

In this regard, it is also useful to point out that, according to the Guidelines, there are important differences between groups of counter-interested parties. Individuals are tendentially wholly protected, in light both of the rules about personal data processing and of the rules about the defence of the right of privacy. As it was already pointed out, the rules contained in Legislative Decree No. 196/2003 about personal data processing do not concern, instead, subjects other than individuals. Therefore, bodies and associative entities are surely protected only in relation to their right to freedom and secrecy of correspondence and in relation to their economic and commercial interests.

Finally, another useful advice, contained in the Guidelines, has to do with a possible contradiction in the rules in force. The administrative decision about the demand must be expressed and it must give reasons. This may be clearly dangerous and counterproductive, whenever access is denied, in order to prevent the disclosure of secret or confidential data, especially when even their existence is unknown to the public. Therefore, there is an important exception to the administrative duty to give reasons for the decision, whenever giving reasons would reveal confidential information on public action or on the counter-interested parties.

6.3 Towards Implementation: The Rights of Civic Access in Action and the Opinion of Practitioners

The rights of civic access introduced with the 2013 and the 2016 reforms should work both as transparency legal tools and as mechanisms to contrast administrative corruption, by allowing a widespread control on the pursuit of the public interest. As it was already pointed out, it is too early to express an opinion on their efficiency. For the same reason, no statistical data is at present available about the practical implementation of the civic accesses. However, some *preliminary conclusions* may be expressed, considering the results of a questionnaire that was filled out by some public servants (who are directly engaged in the implementation of Legislative Decree No. 33/2013), by a local ombudsperson and by some administrative judges.

First, it is necessary to admit that the contribution by the judges in this field is so far almost irrelevant, because—save the case law on the implementation of the civic access introduced in 2013, which has been indicated in the previous paragraphs—the administrative courts have not been consistently involved as of yet in implementation of the reforms.

Also the other respondents to the questionnaire underline that they have not enough elements to answer exhaustively.

Meanwhile, they substantially agree in expressing a pessimistic view of the impact of the recent rules on prevention and fight against corruption.

They note that there is not at present a clear perception in the citizens of the possible virtuous effect of the "new" instruments.

Last but not least, they also agree upon a paradoxical effect of the 2016 reform, which has actually complicated administrative action in practice. The most important element, that is indicated, has to do with the low level of comprehensibility of the rules in Decree No. 33/2013. Especially, the relationship between the two kinds of civic access is not clear at all. Consequently, the requests by private parties often do not indicate whether they aim at obtaining an access to documents or a civic access (and, in such case, which one); some other times, the indication contained in the demand is wrong, and the recipient concretely tries to understand, in light of the facts, how the case should be managed. Therefore, some respondents focus on the negative impact of the introduction of the "new" civic access on the management of the "traditional" procedures of access to administrative documents.

Considering these remarks, one could infer that the recent reforms (especially the 2016 one) have produced confusion in the citizens, who don't know what is the "right" legal tool to use in the various cases and sometimes are authors of "mixed" demands (partially for access to documents, partially for civic access). Hence, the respondents frequently express strong concerns about the possibility to treat the requests in light not of their formal definition by their author (access to documents, civic access, generalized civic access) but in light of their substantial characteristics.

Anyway, the requests for civic access seem to be normally made in order to protect an individual interest of the applicant. Only seldom the reason is indicated in the aim at a widespread control on the pursuit of the general interest at lawfulness of administrative action.

Some respondents note that the applicants for generalized access are often citizens who in the past were authors of numerous (and sometimes almost vexatious) demands for access to documents, which is of course considered as a worrying sign of possible inefficiency of the "new" tool.

The need for coordination inside each authority by a "central" bureau, competent for transparency in general, is felt with great strength. Meanwhile, the production of Guidelines at the national level by the Anti-Corruption Authority and the Data Protection Authority is frequently perceived as a source of further complication. Therefore, all the respondents hope that a legislative simplification is imminent.

In general, one may infer that there is a strong effort by the most virtuous authorities—especially at the local level—to adjust their institutional websites, in compliance with the rules contained in Decree No. 33/2013. As it is quite evident through a simple sample survey, really municipal, provincial and regional entities are more diligent than the central authorities in publishing on-line documents and data.

Coherently, some public officers are trying to implement transparency through disclosure also beyond the borders of the rules in force, which means that some aggregated data could be in the next future published on-line, even if it is not legally compulsory. Such "proactive" behavior is very interesting, because it shows a will to limit as much as possible the duty to take discretionary decisions on single demands for generalized civic access. In other words, proactive disclosure of aggregated data is considered as a sort of "lesser evil", in order to prevent the production of complicated and "expensive" individual requests for generalized access.

On the opposite side, some respondents focus that especially the smallest municipal entities are often reluctant to allow civic access, particularly when information on urbanization abuses and selection of personnel is concerned. This is quite interesting as well, because it shows that such authorities (or, maybe better, some local public officers) detect some fields of action as particularly "sensitive" and they still try to limit disclosure in those fields, probably in order to reduce administrative appeals and applications for judicial review.

From a different point of view, another relevant element regards participation in the procedure for "generalized" civic access of the counter-interested subjects, who are the owners of confidential or sensitive data which are the object of the request. Even if numbers are not so relevant yet, the trend shows their will to be involved in the procedure, normally by opposition to the demand for civic access. This is of course a direct consequence of the rules in force, but at the same time, it is perceived by practitioners as a source of complication in administrative action.

Finally, a weakness of the system is sometimes indicated in the low legal strength of ADR procedures, whose result, being not binding, is considered concretely almost useless for the interested parties.

7 Final Remarks

The Italian legal system has tried to face the severe challenges for effective transparency through a multiplication of rules and tools.

At present, there are three general kinds[101] of administrative right of access: the "traditional" right of access to administrative documents (ruled in Law No. 241/1990: the so-called documental access); the right of civic access to documents, data and information which are legally public and must be published in the institutional websites (ruled in Legislative Decree No. 33 since 2013: the so-called civic access); and the "new" right of civic access (ruled in the same Legislative Decree No. 33, after the 2016 reform: the so-called generalized access).

The purpose of the progressive legislative intervention was clearly to strengthen transparency, but the result is an evident complication, that will probably make much more difficult for administration to efficiently manage its informative relationship vis-a-vis the citizens.

[101] As it was already pointed out, other kinds of access to administrative documents are described in sectorial rules: especially the ones about access to environmental information and the ones about access to information in local entities (see *supra*, 1.2., note 9).

The recent Guidelines have tried to indicate some criteria of distinction that should facilitate concrete administrative action. It is made clear that "civic access" has a narrower object than "generalized access", while "documental access" has the narrowest object but allows a deeper knowledge of the content of the documents. Nonetheless, the exam of the case law shows that the courts, in the latest years, have not felt completely comfortable with the distinction between "traditional" and civic access. It is easy to imagine that, from this point of view, things will not improve after the introduction of the "new" kind of civic access. Consequently, the suggestion contained in the Guidelines, which invite the single authorities to emit specific regulations to explain the rules in force and indicate best practices, may be particularly useful.

It is still early to understand if the "Italian style" FOIA will be a success and will be able to lead to a broader and deeper administrative transparency. There are some important open issues, and statistic information about the implementation of the rules produced (first) in 2013 and (then) in 2016 is not yet available.[102] Some problems are anyway already evident. Their practical importance may be easily grasped, considering the answers to the questionnaire about the civic accesses in action, given by the administrative judges and officers.

The recent reforms have introduced a general principle of administrative openness, with listed (but very broad) exemptions. Consequently, authorities will probably have to face relevant difficulties, not only in taking proper decisions in front of a request for "generalized" civic access but also in making their answer transparent by giving reasons, because the conceptual and legal references are extremely wide.

In the joint Guidelines by the national Data Protection Authority and the Anti-Corruption Authority, the absolute and the relative limits indicated in Legislative Decree No. 97/2016 are considered separately. For the latter, in fact, a careful evaluation is necessary by the competent authority in light of the specificities of the single case, which seems to be concretely very similar to the exercise of discretionary power. In particular, when private confidential data is concerned, probably "generalized access" should be forbidden when the data is sensitive or regards fundamental rights of individuals (such as genetic data or deep patrimonial information).

[102] As it is pointed out in the Guidelines produced by Data Protection Authority and the National Anti-Corruption Authority, in fact, the concrete implementation by administration of the "new" generalized access had formally started on 23 December 2016.

According to the Guidelines, important indications may be grasped in the case law of the Court of justice and in the Italian administrative case law. This is very interesting, because it shows that, in the general opinion, even if the right of access has nowadays become a "plural" legal tool, at least a number of general rules can be considered common to the various kinds, in light of the settled best practice.

Another problem regards the relationship between administrative transparency and publication of data by open access. Open access may be concretely disproportionate and dangerous, when confidential personal information is concerned. This issue is connected with the implementation of the *digital first* principle, which (as already noted) in Italy is fairly complicated. So perhaps establishing a sort of *roadmap* in order to manage the gradual entry into force of the reform could have been a good idea.[103]

In light of its present physiognomy, it is in my opinion hard to recognize in Legislative Decree No. 33/2013—as emended in 2016—a FOIA in the strict sense. The link with the Constitutional right to be informed is not strict enough yet, because it is not clear how deeply the right of "generalized" civic access will be concretely limited. Moreover, the administrative discretionary power seems to be extremely strong in the implementation step.

In practice, it is quite probable that the administrative case law will be the primary source of best practice, because the Guidelines of December 2016 are too general as to really solve the basic open problems in day-by-day administrative action. Nonetheless, the possible contribution of case law must be carefully monitored, because it could also become counterproductive. If the courts insist in looking at the various kinds of access as if they were a whole, there is a strong risk that the "traditional" one, ruled in Law No. 241/1990, becomes a sort of *ultima ratio*. This could be paradoxical, because that kind of access, which still requires the demand to be founded upon a qualified interest in the applicant's sphere, is actually from the legal point of view the strongest one, as the recent Guidelines as well admit.

By the way, one must realize that, after the latest reforms,[104] in Italy it is necessary to talk not of the right of administrative access but of the

[103] As it is well known, this solution was used in the UK, where the FOIA was emitted in 2000, but its entry into force was postposed until 2005.

[104] In the same direction, among the Italian scholars, see, for example, Occhiena (2005), p. 145, and Police (2005), p. 110.

rights of administrative access. If the starting point of the legislative evolution was the purpose of granting a weapon to private parties in order to efficiently protect their position "against" maladministration, later on the aim has turned into allowing—compatibly with the respect for the principle of good administration—also a general control by the citizens upon public action.

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CHAPTER 8

Slovenia on the Path to Proactive Transparency

Polonca Kovač

1 Introduction

Transparency is a key principle of good governance in terms of the efficient and democratic exercise of public authority and services in both Slovenia and worldwide.[1] In order to minimise the possible misuse of

[1] Access to or the right to information is a fundamental principle in a democratic society, as stipulated also in § 41 and § 42 of the EU Charter of Fundamental Rights, Official Journal of the European Communities, C 364/18. It is seen as one of the most important principles of contemporary legal and administrative relations (Hofmann et al. (2014); Galetta et al. (2015)). § 41 provides, *inter alia*, the right to have access to one's file. In addition, § 42 stipulates the right of access to documents. A similar duality may also be found in the European Convention on Human Rights and the European Code of Good Administrative Behaviour and in Slovenia (Statskontoret (2005), pp. 38–43; more in Kovač (2014)). However, by § 39 the Slovene Constitution offers an even higher standard than the European Charter of Human Rights (Teršek 2007, p. 5). For instance, already in 1993, in Decision U-I-146/93, the Slovene Constitutional Court's position was that the unavailability of public information may not be a consequence of hiding information but only of technical limitations to their disclosure.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_8

power by public bodies and maladministration and to allow citizens to have a say in administrative relations, classic administrative theory grants parties participatory rights. One such right is the right to information (RTI). Respective rights have become essential in authoritative relations as they allow and stimulate citizens' involvement as a dimension of good public governance, enhance the legitimacy of public authority, reduce corruption, provide a solution for the possible democratic deficit in governance, and promote proactive public participation and accountability. Transparency is a twofold principle, with other principles of good administration being its objective and simultaneously its prerequisite.[2]

Slovenia is a parliamentary democratic republic with a population of approx. two million. It has been independent since 1991 (since the break-up of former Yugoslavia) and a member of the EU since 2004, of the United Nations since 1992, of the Council of Europe since 1994, and of the OECD since 2010. Slovenia has been often considered, especially prior to the global economic crisis, one of the most successful post-socialist or Central and Eastern European states. In addition to the socialist legacy, the Slovene culture and its social, political, and legal systems are closely related to the German and Austrian continental circle that Slovenia had been a part of before 1930 and has been pursuing in its guidelines since 1991. Therefore, Slovenia can well be considered a part of the legislature-centred *Rechtsstaat* circle, which is relevant also for transparency and the context of good administration.[3] A combination of the rule of law and socialism-driven legacies still influences the functioning of public administration (PA) and the reform thereof, anticipating a state that dominates society with PA being understood primarily through government policies and public (formal) law.

Slovenia has been pursuing freedom of information, including access and the RTI, at the constitutional level (§ 39) ever since gaining independence in 1991. The constitutional grounds are important, especially in

[2] See Banisar (2006), pp. 6ff; Savino (2010), pp. 21–30; Kovač et al. (2012), pp. 26–61; Kovač (2015), p. 189; Galetta et al. (2015), p. 20. Administrative transparency enhances the legitimacy of PA and democratic governance. On the relation between transparency and participation, see also Brandsma et al. (2010), p. 15. As also emphasised by the OECD (2014), p. 58: "Accountability has a broader scope, which includes the organization of the administration, openness and transparency, internal and external accountability, and oversight institutions." There are other functions of transparency, such as regulatory quality, equal access to the market, and so on.

[3] See Statskontoret (2005), p. 74; Vintar et al. (2013), p. 153.

formally oriented environments such as Central Europe and Slovenia, even though some countries exercise a high level of transparency without such a basis.[4] However, the Constitution is too abstract and requires a further, more specific law to implement the mentioned right.[5] Slovenia adopted its Freedom of Information Act in 2003.[6] The FOIA served as the basis for establishing the Information Commissioner (IC; first called the Commissioner for Access to Information of a Public Nature) in the same year. Subsequently, the FOIA was amended several times, particularly in 2005 and 2014, in order to enhance systemic transparency and proactivity, for example, by introducing the transparency of public expenditure, the overriding public interest, the public nature of public contracts, extending the scope to encompass state companies, and so on. In sum, the Slovene FOIA is one of the most ambitious laws of its kind in the world. Slovenia has been among the top five countries in the world in this regard recently, ranking second in Europe after Serbia in 2017.[7] Slovenia was awarded 129 out of 150 points regarding the following seven criteria: right of access (three out of six), scope (30 out of 30), application procedures (26 out of 30), exceptions (25 out of 30), appeals (28 out of 30), sanctions (four out of eight), and promotional measures (13 out of 16).

Besides the FOIA, there are other relevant regulations that should be mentioned regarding the RTI. The Information Commissioner Act (ICA) was adopted in 2005.[8] The IC assumed the protection of personal and classified data, after merging with the former State Inspectorate for Data Protection, which had been operating as an agency within the Ministry of Justice. Based on the FOIA, several subsidiary pieces of legislation were adopted. These are the Decree on Communication and the Re-use of Public Information[9] and various rules, for example, on the public nature of contracts in the field of public procurement and concessions. The RTI

[4] Cf. Salha (2014).

[5] Čebulj and Žurej (2005), p. 92.

[6] FOIA, *Zakon o dostopu do informacij javnega značaja*, *ZDIJZ*, Official Gazette of RS, Nos. 24/03, 61/05-ZDIJZ-A, ZDavP-1-109/05, ZInfP-113/05, 28/06-ZDIJZ-B, ZDavP-2-117/06, 23/14-ZDIJZ-C, 50/14-ZDIJZ-D, 19/15, 102/15-ZDIJZ-E; and partially annulled (Constitutional Court Decisions U-I-201/14 and U-I-202/14, 19 February 2015, on information regarding so-called bad bank files).

[7] See GRIR (2017).

[8] *Zakon o informacijskem pooblaščencu (ZInfP)*, Official Gazette of RS, Nos. 113/05 and 51/07.

[9] *Uredba o posredovanju in ponovni uporabi informacij javnega značaja*, Official Gazette of RS, No. 24/16, replacing prior similar acts adopted in 2003 and 2005.

regulatory framework is further elaborated by the General Administrative Procedure Act (GAPA), which determines, with subsidiary use of the FOIA, the procedural regulation and an additional general right to inspect one's own file (§ 82 of the GAPA). Although these various legal grounds provide stronger support to transparency, they simultaneously present, in practice, a problem for both beneficiaries and authorities as to which rule to follow and when (not) to report annual data on FOIA-related requests.[10] Both rights are asserted only upon request. Although the right under the GAPA is procedural and that under the FOIA a substantive right, they can overlap, yet each of them is autonomous and non-exclusive.[11] The RTI under the GAPA is therefore more than a procedural sub-right, as the court raised this procedural right to the level of judicial protection under substantive law since even a procedural decision can interfere with a human right or fundamental freedom. Both (groups of) rights are fundamental human rights that are judicially protected and considered positive rights. Hence, they are *ex officio* and proactively guaranteed by the state.[12]

In Slovenia, the FOIA was not directly a requirement of or subject to Europeanisation, but rather a result of domestic needs and the endeavours of national experts, as opposed to most other PA-related legislative reforms.[13] Consequently, over time transparency has become rather highly acknowledged in Slovenia, at both the regulatory level and in practice, yet there are certain national characteristics that lead to an implementation

[10] According to the GAPA, in the Slovene *Zakon o splošnem upravnem postopku (ZUP),* Official Gazette of RS, No. 80/99 and amendments (the most recent in 2013). See also the GAPA's secondary act, which provides for the detailed application of some RTI (Decree on Administrative Operations (DAO), in Slovene the *Uredba o upravnem poslovanju (UUP),* Official Gazette of RS, No. 20/05 and amendments. For more, see Kovač (2015); see also Salha (2014). For a comparative perspective, see Savino (2010), pp. 7ff; Rose-Ackerman and Lindseth (2010), p. 342; and Kovač (2015), Table 1. Regarding the problems of differentiation between the rights under the FOIA and the GAPA, see, for example, the annual report of the Ministry of Public Administration for 2014, which indicates that the Surveying and Mapping Authority reported approx. 68,000 FOIA requests, while the remaining (around 400) authorities reported approx. 7000 in total. In addition, data gathering has become clearer and a distinction is made between the regular provision of information and "real" FOIA activities. See Schmidt-Assmann in Barnes (2008), p. 52; according to a judgment of the German Federal Administrative Court of 2003, a constitutional RTI is guaranteed for any potential participant in the procedure, independent of their formal position and standing. For Slovenia, see also Kovač et al. (2012), p. 165; TIS (2015), p. 16.

[11] As explicitly ruled by the Constitutional Court in Decision U-I-16/10, Up-103/10, 20 October 2011.

[12] See Kovač et al. (2012), p. 42; Kovač (2015), p. 202.

[13] Kovač et al. (2011), pp. 229ff; OECD (2014); Prešern & Lainšček (2017).

gap. In general, the problem of the (non)implementation of open democracy is particularly topical in Eastern European countries with no true participation and that are burdened by economic transition.[14] Therefore, the introduction thereof in the Constitution in 1991 did not lead to its immediate realisation: "Basically, at that time in 1991, most Slovenes were not aware what it meant. The same Article also defines freedom of expression and, to a certain extent, that was more important than access to public information. In my opinion, it took a decade or so for most Slovenes to accept access to information as a democratic right and start exercising it."[15] This is shown, for instance, in the fact that almost 40% of all appeals filed with the IC were due to administrative silence (that is, nearly 200 out of approx. 500 in 2016). Slovenia also adopted several official documents, but some with only a rather declaratory sense. Hence, it signed, for instance, the Council of Europe Convention on Access to Official Documents in 2009, but has failed to ratify it over the subsequent nine years. Also rather declaratory is the PA Strategy until 2020. The latter pursues transparency especially in terms of anticorruption (integrity) and accountability, by putting forward three measures to increase transparency: (1) public consultation in regulatory processes, (2) in public expenditure, and (3) by an open data portal. Transparency is thus "addressed as a self-cleaning tool."[16] Nevertheless, the culture of transparency in Slovenia has been evolving over time.

To sum up, Slovenia is internationally recognised as a country that has adopted one of the best laws regarding the RTI.[17] Yet the analysis of administrative practice and case law reveals several deficiencies. This study therefore provides an analysis of the individual elements of the RTI as stipulated by the FOIA. These elements are, *inter alia*, the following:

(a) the goals and principles in theory, the FOIA, and the relevant case law;
(b) the participants in RTI procedures, that is, the bodies bound by law to disclose public information and eligible beneficiaries;
(c) the RTI procedure from the initial (oral or written) request for access and the fees to be paid for RTI disclosure and/or the issuance of an individual administrative act refusing disclosure;

[14] Bugarič (2012), p. 495.
[15] See Knez (2016), p. 3.
[16] Prešern & Lainšček (2017). Cf. Pirc Musar in Kovač et al. (2011), p. 230; Kovač (2015), p. 186.
[17] See GRIR (2017); Kovač (2015), p. 190.

(d) the type of information to be disclosed and the type of information to be protected as an exception to the RTI;
(e) the time frame; and
(f) the administrative and judicial remedies to be sought before the national IC and national courts (especially the Administrative Court (AC), the Supreme Court (SC), and the Constitutional Court (CC)).

Finally, the regulation and case law are critically assessed, together with first-level administrative practice, based on selected cases, which enables an overall evaluation of transparency in Slovenia. Specific elements are evaluated by various methods, from historical, normative, and dogmatic analyses, to the examination of annual reports by the IC and the secondary analysis of statistical data from administrative and court practice, as study cases. The study examines the key factors for the implementation of the prescribed RTI and emphasises which aspects thereof can be regarded as problematic considering the international model regulation and the implementation thereof.

2 Beneficiaries of Access to Information and Entities Bound by the FOIA

2.1 Beneficiaries

The provision of 39§ 2 of the Slovene Constitution reads: "Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well-founded legal interest under law." The FOIA regulates the RTI under substantive law, meaning that anyone, even without legal interest in the matter, can act as applicant, while the entities bound by law to disclose public information include any entity performing public tasks. The FOIA defines beneficiaries or "applicants" as any legal entity or natural person claiming such right under the principle of free access. Article 5 of the FOIA reads: "(1) Legal entities or natural persons (hereinafter referred to as 'applicants') have free access to public information. (2) Each applicant shall exercise, upon request, the right by acquiring such information from the entity to consult it on the spot, or by acquiring a transcript, a copy, or an electronic record of such information. (3) Every applicant has the right, under the same conditions as any other

person, to acquire the right to re-use information for commercial or non-commercial purposes." As put forward by policy makers: "Given the ultimate purpose of the FOIA, which is to ensure openness and accountability and thus prevent misuse of authority (maladministration), the applicant is not required to demonstrate legal interest."[18] This means that the law in Slovenia is broader than stipulated by the Constitution.[19] The procedural prerequisite is therefore not given through *locus standi* but merely based on a definition of the requested (public) information. A prerequisite for the beneficiary is, as a general rule, also its legal personality. If an applicant does not have a legal personality, such as the deputy group of a political party in the legislature, which the AC considered in I U127/2010-23, 12 May 2010, to only constitute a group of several natural persons, they are not deemed to be a beneficiary.

Transparency is defined as the basis of scrutiny and a tool for carrying out scrutiny, however, there are limits to what extent the FOIA itself or the implementation thereof can guarantee the "right" context for transparency. Consequently, in Slovene practice, approaches can be detected which, due to the absence of the legal interest required of a beneficiary, seem like some kind of over-interpretation or even possible misuse of the law. One of the several examples thereof is where a journalist frequently uses the FOIA as a regular means to perform his or her profession even though it is primarily intended to serve non-professionals and does not provide a basis for authorities to disclose information that journalists request.[20] Moreover, there are frequently cases when a competitor asserts the RTI against another entrepreneur in order to obtain business information (e.g., in IC Decision 21-83/2007, 1 February 2008, and AC Judgment, U 284/2008-35, 22 June 2009). Then, this competitor further interferes with the selection of the best provider within a public procurement procedure. Furthermore, there is a case that illustrates the risk of misuse of this right and the clear need for a balance between transparency and internal secrecy. This is a problem especially when the beneficiary is a party subject to authoritative control and tries to exercise this right to force the disclosure of the authority's strategy by challenging internal

[18] Interview, Prešern & Lainšček (2017).

[19] As is often the case also comparatively; see Statskontoret (2005), p. 41; Mendel (2008), p. 103; Savino (2010), p. 7; Salha (2014); more for Slovenia Čebulj and Žurej (2005), p. 130; Teršek (2007); Šturm et al. (2011), p. 590.

[20] See Kovač (2015), p. 196; Knez (2016), pp. 4, 8, 10.

information as an exception.[21] However, sector-specific law prescribes this final measure as a prerequisite for further *ex officio* proceedings. This means that the exception to reveal the internal strategy of the body must be reasoned despite the finality of the first measure. On the other hand, "such practices cannot offer a basis to limit access to information but have to be balanced through legal procedures."[22]

Furthermore, it is necessary to highlight among the beneficiaries under the FOIA also the persons to whom the information refers (third parties in accordance with §§ 44, 142, and 143 of the GAPA, see AC, U 1943/2007, 19 March 2008, compare with CJEU, C-201/14, 1 October 2015). In fact, in a procedure initiated by an applicant, any person to whom the requested information refers has the right to participate and enjoys the same procedural status. Such person acts as an accessory participant under the provisions of § 44 and § 142 of the GAPA and other articles related thereto. In practice, only approx. 10% of procedures require the involvement of third parties. This is the case since even in the countries where accessory participants are understood broadly (following the German tradition), their participation may be unnecessary if the law provides for the absolute public nature of the requested information. For instance, since in Slovenia the salaries of civil servants are public (with some minor exceptions), calling upon civil servants to participate would be contrary to the purpose of the institution. Participation in the proceeding is guaranteed to persons to defend their legal status and thus actually influence the public body's decision, which would not be the case in this context (SC Judgment X Ips 252/2009, 8 September 2009). Another example of a limited right to participate is provided by the AC based on the GAPA. Namely, the right to have access to project documentation in the procedure for issuing a building permit is granted to the architect so that he or she may protect his or her moral copyright. Yet the architect cannot acquire the status of an accessory participant, which is reserved only for the owners of the real estate affected by the building (AC Judgment I U 347/2012, 15 March 2012).

[21] See IC Decision 090-181/2016, 6 October 2016, with the national representative of authors' intellectual property rights (*SAZAS*) being a party to a procedure conducted by the Slovene Intellectual Property Office as an entity bound by the law to disclose public information.

[22] Prelesnik & Kotnik Šumah (2017).

Another interesting issue is the legally recognised abuse of the RTI, which is not infrequently argued by authorities (as entities bound by law to disclose public information at the first instance) but which is usually overruled by the IC (as the appeal body). When an applicant, by the manner in which it files its requests for information, evidently exceeds the given right and tries to impose excessive work on the public body while affecting the dignity of such public body and its officials, this right is not recognised, although such cases should be interpreted restrictively (IC Decision 090-157/2015, 15 July 2015). This applies when it is not possible to exercise the democratic supervisory function of the FOIA and the GAPA. On the contrary, the applicant hinders the effective work of the public body, for example, in one case when a party filed 69 requests for information with an inspection body within five months that included severe insults (IC Decision 090/117/20212/3, 20 June 2012). Other grounds do not suffice to be deemed RTI abuse, especially not "arguments" such as that there would be an excessive administrative burden (see the AC Judgment U 92/2006-8, 8 November 2007). For example, in 2006 the IC refused an applicant's request for approx. 30,000 documents, saying that this would impose an excessive administrative workload on the respective public body (the Slovene Maritime Administration) and that in weighing interests both the substantive and the technical aspects matter. Subsequently, the AC decided in Judgment U 92/2006-8, 8 November 2007, referring also to the CJEU, case T-2/03, that an "unreasonable workload" is not a justified exception under the FOIA. Therefore, the body must allow access even if it has to first redact personal data from a large number of documents. In another case, the IC decided to broadly grant an attorney's request to obtain documentation to defend his client since representation, even if for the purpose of representation before other bodies, since such standing does not entail an abuse of this right (Decision 090-199/2015, 7 October 2015).

2.2 Entities Bound by Law to Disclose Public Information

Pursuant to § 1 and 1a of the FOIA, the bodies bound by law to disclose public information are state bodies, local government bodies, public agencies, public funds, and other entities of public law, bearers of public powers, public service contractors, and certain companies that possess information defined by § 4 of the FOIA. Hence, all three branches of power: the legislative, executive, and judicial, are bound by law to disclose public information, as are selected business entities.

The structure of the bodies bound by the FOIA to disclose public information is very broadly defined but still reflects a rather strong centralisation, the division of powers, and a duality between state and local self-government, with a rather low level of authority delegated to autonomous agencies. There are state bodies, that is, the legislature, the Government, the courts, and *sui generis* bodies, such as the Court of Audit, the anticorruption commission, and so on. PA is defined mainly functionally, hence including state and municipal levels: not only public but also private performers of public tasks. Especially the latter require special scrutiny by the public.[23] Public authoritative tasks and public services are provided by 11 ministries and their executive agencies (approx. 40), government offices, 58 administrative units, 212 municipalities, and a few hundred public institutes (social institutes, schools, hospitals, etc.), agencies, funds, and private concessioners, totalling approx. 160,000 employees and almost 6000 bodies subject to the FOIA. Since 2004, the body responsible for coordinating and supervising the PA and the RTI has been the Ministry of Public Administration (MPA), with some other agencies supporting individual tasks.

Moreover, since the 2014 amendment to the FOIA, the abovementioned bodies also include companies or business entities that are predominantly state owned or regarding which entities of public law have a dominant influence thereon (e.g., banks), altogether approx. 600 entities. Regarding the latter, it needs to be emphasised that the Slovene FOIA is one of the broadest in the world, although the grounds for this amendment are partially political, namely, to determine the political and macroeconomic accountability for unpaid loans approved by the banks during the financial crisis. Considering the purpose of defining "new bodies" is irrelevant whether entities of public law actually exercise a dominant influence. What matters is that given their majority share, they could in fact exercise such influence, albeit they are subject to additional exceptions provided by § 6a of the FOIA (see several AC judgments, e.g., I U 390/2015, 22 April 2015, and I U 932/2015, 10 December 2015). In relation thereto, the CC partially annulled the FOIA after its amendment in 2014. This occurred in the part relating to loan evaders whose loans have not been transferred to the Bank Asset Management Company (Decisions U-I-201/14-14, U-I-202/14-13, 19 February 2015). Nevertheless, the court confirmed that the FOIA is consistent with the

[23] Čebulj and Žurej (2005), p. 94.

Constitution as regards the information requested from these entities in the public interest, despite a possibly decreased competitiveness on the market (Decision U-I-52/16, 12 January 2017). If the information requested originates from the period before the entity was defined as bound by the FOIA, but ownership or prevailing influence is proven, it still has to be disclosed, as put forward by the IP in Decision 0902-9/2014, 5 August 2014.

Most often, the case law in Slovenia supports a broad interpretation that defines the bodies bound by the FOIA regardless of their status and rather than according to the functional criterion of carrying out public tasks, which is in line with the CJEU in judgment C-279/12, 19 December 2013. Hence, the definition is interpreted extensively and includes entities, such as the Slovene Motorway Company, which carry out public tasks or provide public services and are financed from public funds, as ruled by the AC Judgment U 284/2008-35, 22 June 2009. The AC also recognised such status to companies involved in public procurement in Judgment U 2409/2005-20, 30 March 2007. These cases reveal yet another problem: competitors make recourse to the FOIA and act as applicants for information in order to refute the selection of the supplier.[24] Furthermore, another problem is inconsistent case law.[25]

An important step toward transparency was the foundation of a public register run by the Agency for Public Legal Records following the amendment to the FOIA in 2014.[26] This register is not binding but offers information so that beneficiaries may assert their rights more easily and directly since anyone can verify if a certain body is bound by the law to disclose public information, what the legal grounds are, and hence the scope of the RTI. The register contains 5733 entities as of January 2017. These are approx. 420 state administration and local self-government bodies, 25 courts, 14 public prosecutors, 70 notaries, 32 enforcement entities, 17 public agencies, nine chambers, 11 nationality associations, several schools, four student organisations, health institutions (approx. 770 doctors, pharmacies, etc., in addition to 1444 public institutes and associations thereof), approx. 1150 private corporations and entrepreneurs, 221 private institutes as concessionaries, and so on.

[24] Pličanič et al. (2005), p. 20.

[25] As in other countries, for example, through positive enumeration, Banisar (2006), p. 20; Mendel (2008), p. 103.

[26] See http://www.ajpes.si/Registri/Drugi_registri/Zavezanci_za_informacije_javnega_znacaja/Splosno.

Each of these entities appoints one or more information officials competent for the implementation of the FOIA (§ 9 or the head of the body serves this function under the Act). The information official needs to pass an exam on the GAPA since most of the workload is based on written requests that require an administrative procedure. The MPA and the IC hold regular training programmes for these officials, especially following the amendment of the FOIA, on average two to four times per year. Other regular events also take place, such as training programmes for drafters of laws and information officials organised annually by the IC.

Key to the enforcement of the RTI is not only the legal regulation but also the tradition of ensuring an open public administration and the legal culture in the given country.[27] A culture of secrecy is usually reflected in the generally strong legal obligation of civil servants to maintain confidentiality, in a broad interpretation of the provisions on exceptions, the failure to use all of the envisaged forms of the RTI, and quite often frequent inaction or delays in processing requests for access to information. The latter was a significant problem in Slovenia in the first years following the entry into force of the FOIA, taking into account that up to 2011 approx. 67% of appeals to the IC were due to the administrative silence of first-instance authorities, according to the IC annual reports. This is additionally confirmed by a web-based survey conducted among the heads of selected Slovene authorities in 2015 in relation to the anticipated implementation gap between the prescribed rules and the actual practice regarding good administration principles, transparency included.[28] The respondents initially confirmed that the management of administrative units was fully or highly aware of the importance of the mentioned principles. Yet, when asked about more tangible elements of good and open administration, the results proved to be rather abstract since they responded that legality and formal rules should be prioritised over proactive transparency. Such a response is contradictory since the RTI has been formally regulated in Slovenia for many years now. At the same time, it is important to point out that especially the core PA, that is, ministries and similar bodies, respond

[27] For more in general and for Slovenia and the region, see Mendel (2008), pp. 101ff; Savino (2010), p. 12; Brandsma et al. (2010), p. 8; Pirc Musar in Kovač et al. (2011), p. 232; Bugarič (2012), p. 488; Kovač (2014), p. 43. Namely, there are common problems in this region, such as a strongly legally oriented PA with a low capacity, rather formal participation, transparency, accountability, and similar (Kovač et al. (2017); Vintar et al. (2013)). In this respect, it is worth mentioning that openness and transparency have been developed parallel to judicial control and opposite to Weber's theory and are hence still externalised especially in prevailingly legally oriented systems, such as Slovenia's.

[28] More in Aristovnik et al. (2016), pp. 66–73.

rather promptly since they have developed adequate methods and have qualified human resources.[29]

It is thus not surprising that following the gradual development of transparency in Slovenia the question of the bodies bound by the law to disclose public information is an outstanding issue in the practice of the public sector at large, accounting for nearly half of all cases since 2009, according to the IC annual reports. The bodies are most often questioned when it comes to public agencies or institutes, that is, nearly 30% of all disputes.[30] Another special category is the courts. For instance, the AC ruled that the district court was obliged to disclose a document from a final criminal procedure under the FOIA in judgment I U 658/2009-10, 27 October 2010. However, the AC stated that access was granted only under a sector-specific law since only a procedural law for a specific court procedure derogates the FOIA as *lex generalis* (judgments I U 150/2009-10, 8 December 2010, and I U 542/2013, 11 September 2013).

Also important in the context of the reluctance of entities to disclose public information is the specifics of the Slovene system compared to many other countries. In Slovenia, both the applicant and the body can seek legal protection against IC decisions before the court, although the latter only performs public tasks rather than pursuing a subjective right in an administrative dispute. Yet, following the principle of the dynamic method of interpretation of an administrative dispute under § 157 of the Constitution, the AC stated: ". . . the only purpose of an administrative dispute is not merely the judicial protection of the rights of entities under private law, but also the assessment of the legality of the decisions of public authorities in concrete (administrative) procedures, as deriving from the wording of 157§1 of the Constitution."[31] Case law reveals that bodies act

[29] Prešern & Lainšček (2017).

[30] For example, cases involving public notaries or the national film agency. See SC judgments, I Up 122/2006, 25 April 2007, and X Ips 96/2011, 4 July 2012.

[31] Judgments U 1676/2003-31 and U 965/2004-19 of March 2005, concerning the appeals by the Securities Market Agency against a second-instance decision by the IC. The AC points out that it recognises active legitimacy particularly due to the protection of the constitutionally affected right of the party under the second paragraph of § 39 of the Constitution, since the IC is a second-instance body, as opposed to the Agency, which is a first-instance body and an instance only in procedural rather than structural or hierarchical terms. The IC is in fact an autonomous *sui generis* body, independent of any (non-)political authority; it is only a procedural body competent for conducting an administrative appeal procedure. This is very important since individuals cannot really be said to have a right but merely a right to have their requests considered unless there is an independent body to ensure their realisation (Mendel (2008), p. 38; Čebulj and Žurej (2005), p. 292).

Table 8.1 Participants in FOIA procedures

Type and instance of procedure (obligatory prior phases to reach two to five)	*Applicants/parties*	*Deciding authority*
1. First instance (administrative, more formal in the case of a written request or refusal, procedure)	Any public or private legal entity or natural person as a beneficiary (journalists, NGOs, or businesses included)	Entities bound by the law to disclose public information (approx. 5733 registered, approx. 420 state bodies and municipalities, approx. 600 companies, and many other public organisations and private concessioners)
2. Appeal administrative procedure	Beneficiary appealing against a body bound by the law to disclose public information	The Information Commissioner as an autonomous state body
3–4. Administrative dispute at two instances—judicial review	Beneficiary or body bound by the law to disclose public information	The Administrative and Supreme Courts
5. Constitutional complaint—judicial review	Beneficiary or bound by the law to disclose public information	The Constitutional Court

Source: Own

as complainants/defendants in as many as 47% of the cases before the SC, with 14 out of 30 cases between 2003 and 2015. To summarise, Table 8.1 outlines the phases and the participants in a procedure initiated upon request.

In practice, appeals to the IC are lodged mainly within the group of state bodies, that is, in 2015 in 156 out of 309 cases, of which 111 cases referred to ministries and other state administrative bodies and 24 within the system of justice. Similarly in 2016, out of 312 cases, 106 were lodged against state authorities and 22 against courts and other similar bodies. The latter figures (24 out of 309 or 22 out of 312) might seem low; even so, it needs to be emphasised that due to courts normally being reviewers of the lawful conduct of the PA, the issue of who controls the controllers arises.[32] That means that approx. 40% of appeals were lodged against state bodies in recent years. In last years, approx. one third of the appeals were lodged against bearers of public authority or providers of public services

[32] *Quis custodiet custodes*; see Pirc Musar in Kovač et al. (2011), p. 241.

(105 out of 309 cases in 2015 and 115 out of 312 cases in 2016) and approx. 15% against municipalities (32 in 2015 and 47 in 2016). The municipalities in Slovenia have in fact acquired the necessary knowledge about the FOIA and comply with any appeal decision issued, albeit they often lack sufficient specialised staff. In conclusion, Slovenia, as stated by the Slovene IC, no longer systematically suffers due to the phenomenon of so-called local sheriffs. Even more surprisingly, only 6% of the cases in 2015 (15) and 2016 (22) were appeals against the "new" bodies following the 2014 FOIA amendment (private corporations owned by the state or under its predominate influence), even though in these cases the parties often pursued the matter before the courts.[33] However, the AC confirmed, as in the case I U 764/2015-27, 24 August 2016, the IC's message that information on public funds absolutely prevails over business secrecy, whereby the definition of public funds extends to the sale of state assets, including by the Slovene State Holding company.

3 The Information to Be Accessed

3.1 Forms of Transparency

In Slovenia, the regulation of transparency-related rights is rather complex, even at the level of general laws. The relevant regulations, particularly the FOIA, need to be evaluated within the scope of the freedom of information determined by § 39 of the Constitution. In both theory and practice, this implies the enforcement of the positive rights of the beneficiaries, yet at the same time also, or even primarily, the publication of specific public information as a proactive form of transparency, the re-use of information, and public participation in public governance.[34] The FOIA thus provides for both the proactive publication of information (§ 10) and for disclosure based on individual applications and the re-use of information. In all cases, it is important that the information exists regardless of whether materialised as a document or otherwise.

3.1.1 Access upon Request

Public information under § 4 of the FOIA is explicitly defined. It is about the information originating from the field of work of the body and occur-

[33] See the IC Annual Report for 2015.
[34] Šturm et al. (2011), p. 589.

ring in the form of a document, a case, a dossier, a register, a record, or other documentary materials (hereinafter referred to as "the document") drawn up by the body and by the body in cooperation with another body, or acquired from other persons. The definition of public information thus contains three basic elements:

1. the information has originated in relation to the performance of public tasks that fall within the competence and activity of the public body;
2. the public body must possess the information, regardless of whether it has created it or obtained it from other persons;
3. the information must be available in a materialised form—as a printed, typed, drawn, distributed, photographed, photocopied, or phonographed document, or a magnetically, optically, electronically, or otherwise materialised record, so-called flowing or fluid documents included.

Following the Slovene FOIA, the entities bound by the FOIA must allow access only to already existing information and are not obliged to create a new document, collect information, carry out research, analyse data, answer questions, or provide additional explanations to satisfy the request of the applicant (see AC Judgment II U 417/2015, 12 April 2016). Moreover, the procedure provided by the FOIA only serves to determine whether a public body possesses the requested documents or not, and not to determine why the public body does not possess such or whether it should possess it (AC Judgment I U 15551/2012, 3 July 2013).

In Slovenia, the RTI applies to any kind of information, even if most regulations only refer to documents or files. These expressions in fact entail merely materialised existing information, whereas the rights based on case law apply to the entire content of such acts or registers.[35] For instance, materialisation also includes databases, information systems, and transcriptions (of governmental sessions, etc.). To illustrate, the AC often states that recalling information from a computer database does not mean creating a new document in the sense of the FOIA; therefore the body is obliged to provide such information, for example, access to final examination results (see AC Judgment I U 1167/2014, 27 May 2015).

[35] Pličanič et al. (2005), pp. 82–83.

In practice, there are no joined statistics available for all entities that are bound by the FOIA except for the annual reports prepared for state authorities and municipalities. These represent only 7% of all entities bound by the law to disclose public information under the FOIA or 419 out of 5840 in 2015. On the other hand, when data is compared to all appeals lodged with the IC, it can be deduced that the mentioned bodies cover a huge proportion of all requests filed. The annual workload in this sphere is around 6000–8000 requests; approx. 8% of them are refused and it is expected that the parties pursue the matter further before the IC, with slightly over 300 appeals in the last three years (see Table 8.4). Hence, the share covered by this group is approx. a half, not only 7%. This is evidenced also when comparing appeals against IC decisions, with 133 out of 288 in 2014 and similarly in other years, representing almost half of all cases. The proportion covered by state bodies compared to municipalities is usually 4:1. Namely, in 2016, there were 1216 requests filed with municipalities and 5776 on the state level. In addition, one has to bear in mind that especially ministries and central agencies are usually more interesting to a broader circle of addressees due to their policy-making role, which makes this group particularly important (Table 8.2).

As shown by the table above, the bodies usually disclose all information requested, which was the case in recent years with 73% or approximately 4500–5000 fully granted applications. In addition, 14% or approximately 900 applications were partially granted and only 9% fully refused. The bodies that received over 100 requests in recent few years were the following: the Environment Agency, the Ministry of Defence, the legislature, the Commission for the Prevention of Corruption, the Inspectorate for the

Table 8.2 Requests for access submitted to state bodies and municipalities

Year	*No. of requests for access and trends*	*Fully granted*	*Partially granted*	*Fully refused*[a]
2011	8737	7236 (83%)	485 (6%)	466 (5%)
2012	5821 ↓	4605 (79%) ↓	569 (10%) ↑	534 (9%) ↑
2013	5932 ↑	4417 (74%) ↓	802 (14%) ↑	505 (9%) ↓
2014	6071 ↑	4407 (73%) ↓	872 (14%) ↑	565 (9%) ↑
2015	6611 ↑	4793 (73%) ↑	922 (14%) ↑	609 (9%) ↑
2016	6992 ↑	5018 (72%)	967 (14%) ↑	689 (10%) ↑

Source: Information based on the MPA

[a]Other requests (on average 2–3%) were dismissed on formal grounds or transferred to other authorities

Environment, the Ljubljana Local Court, and two district administrative units (Maribor and Kranj). It is evident that environmental and construction matters predominated.

Where requests were partially refused, that is, in approx. 75% of the cases in the last three years, personal data was protected; in approx. 20% no information was available; 5% concerned business secrecy protection, and 3% were refused on the basis of internal reasons. The reasons for fully refused requests included the unavailability of the information, as mentioned above, approx. 75%, and personal data protection, around 5 to 6%. According to the annual report of the department for administrative inspection, in 36% of the cases in 2015 the entities bound by law to disclose public information did not disclose public information at all, meaning that sanctions were imposed in misdemeanour procedures, with the possibility of the beneficiaries lodging an appeal before the IC.

3.1.2 Re-use of Information

As a general rule, based on the amendments to the FOIA and a special decree, Slovenia also allows the free re-use of public information to enable the upgrading thereof by the applicants, whereby such must satisfy the economic function of the right of access to public information. The main guideline in the re-use of public information is based on the premise that public sector information is created with public, budgetary funds and can therefore not be considered to be the property of the public sector (IC Decision 090-252/2014/7, 11 February 2015). Traditionally (see Table 8.3), there were rather few applications, namely, fewer than 200 annually before 2013, yet as many as 930 in 2014 and over a thousand in

Table 8.3 Re-use in state bodies and municipalities

Year	*No. of requests for the re-use of info and trends*	*Fully granted*	*Partially granted*	*Refused*[a]
2011	195	142 (73%)	16	23
2012	190 ↓	176 (93%) ↑	5 ↓	2 ↓
2013	167 ↓	147 (88%) ↓	8 ↑	9 ↑
2014	930 ↑↑	911 (98%) ↑	7	9
2015	1223 ↑	1200 (98%) ↑	10	3 ↓
2016	1495 ↑	1474 (99%) ↑	16	11 ↑

Source: Based on the MPA

[a]Other requests (approx. 2%) were dismissed on formal grounds or transferred to other authorities

2015 and 2016, approx. 85% of which at the state level and the rest in municipalities. As in the case of requests for access to information, the environment and agriculture are the most common topics, even though beneficiaries need to pay a fee (§ 34a of the FOIA). The latter is not required if beneficiaries prove that they need the information for non-commercial purpose, such as freedom of expression, culture, art, and media coverage (§ 17, see also IP Decision 090-38/2014/4, 21 May 2014). Mostly, requests are granted on average in 98% of cases in the previous three years.

An even lower share is apparent concerning appeals in such regard in IC practice, that is, only six in 2013, eight in 2015, and 16 in 2016. Hence, it is estimated that in Slovenia this institution has not come fully to life yet, but changes are expected due to the amendment adopted in 2014, following the amendment of Directive 2013/37/EU, expanding the range of entities bound by law to disclose public information to include museums, libraries, and so on.[36]

3.1.3 Proactive Disclosure

In accordance with the value of open government underlying the FOIA, officials must actively communicate with the parties if the democratic function of authority is to be accomplished. A merely passive response to individual requirements under the FOIA or the GAPA does not suffice. This manner indeed broadens the scope of understanding of transparency itself, nowadays often taken more or less as merely access to information. Therefore, the Slovene law and the competent bodies, such as the MPA, the IC, and NGOs, in particular Transparency International Slovenia, still strive for enhanced proactive disclosure by public entities. The mature stage of FOIA implementation, in fact, requires proactivity instead of a mere response to an individual request. This has served as a guide also for the Slovene legislature regarding the FOIA, since the Act and its amendments pursue several systemic proactive measures.

§ 8 of the FOIA provides that each public body is obliged to continuously maintain and make public in an appropriate manner (by means of the official bulletin of the public body, the internet, etc.), in addition to providing such to an applicant for consultation on the spot, the catalogue of public information partitioned into content blocks held thereby. The MPA is obliged to regularly maintain and publish on the internet the state

[36] See the IC Annual Report for 2015.

catalogue of public information encompassing the information from the catalogues of individual public bodies. § 10 of the FOIA provides that each body is obliged to transmit via the internet specific public information. Specific pieces of information are listed to be published proactively, such as the consolidated texts of regulations relating to the field of work of the public body, and all public information requested by applicants at least three times. In practice, this obligation is rarely breached and, if it is, usually only outside the state administration in atypical bodies, as revealed by an MPA inspection in two systemic reviews.

Special efforts have also been made in Slovenia regarding public procurement transparency and the struggle against corruption by sector-specific law, with a new law to be adopted in 2017, the FOIA, and secondary legislation. As stipulated by § 10a of the FOIA, all authorities involved in public procurement must, since October 2014, publish on a special web portal all the signed contracts and their annexes within public procurement procedures, concessions, and public-private partnerships. The MPA prepares annual reports thereon that reveal that 4390 procurements with a value of approx. EUR 514 million were published in 2015, with a further approx. 1000 infringements. Due to the evidence suggesting that some entities, such as the largest hospitals, do not comply therewith, new measures and sanctions are envisaged.[37]

The FOIA provisions stipulate that information is to be published in a manner so as to be clearly and immediately available to the interested parties, without them having to browse through the subsites of the body's website. This was also noted by Transparency International Slovenia, who called for greater transparency with the proactive publication of information, the simple, transparent, and systematic publication of information on applications received, procedures initiated, and measures taken in concrete inspection matters. However, proportionality is to be taken into account—for instance, pending the finality of an inspection decision, information is withheld so as not to cause damage to certain businesses. In this sense, there are some good practices in Slovenia, such as the disclosure of public funds to any recipient through the web portal *Supervizor*, now *Erar*.[38]

[37] See the portal at http://www.enarocanje.si/, established in May 2015. On the new measures envisaged, see the statements of Prešern & Lainšček (2017).

[38] See http://erar.si/. Regarding this initiative, taken by the Commission for the Prevention of Corruption, there have been many debates and disputes since 2015 as to whether such a basis is lawful in terms of personal data protection. Thus far, the IP and the courts have ruled on the legality of individual appeals based on the FOIA's explicit provision

For instance, the Slovene Financial Administration complies with § 20 of the Tax Procedure Act (TPA) by revealing tax debtors, after the finality of the debt thereof, among entrepreneurs and individual parties. This provision was challenged by the IC before the CC on grounds of personal data protection, but the court ruled, Decision U-I-122/13, 10 March 2016, that the TPA was consistent with the Constitution. Although two CC judges issued a dissenting opinion, the majority reasoned that the legislature opted for proportionality in order to follow the constitutionally allowed goals in the public interest, that is, ensuring the lawful fulfilment of tax obligations and public scrutiny over debtors. When issuing this judgment, the CC did not ground its decision on the data that should have been available due to the implementation of § 20 of the TPA two years earlier; namely, how many of the disclosed debtors already paid their taxes and in what proportion. One further example to be noted is the Financial Administration opting in 2016 for the proactive publication of 100 major debtors, who owed from EUR 300,000 to EUR 7.49 million. Due to tax secrecy, these decisions were anonymised, but journalists managed to disclose the identities from indirectly published data,[39] leading to the tax administration later withdrawing the already published documents. To conclude, there have been several attempts to establish proactivity, often with side effects characteristic of a non-mature proactivity on the part of both the bodies and the public or NGOs.

3.2 Exceptions Regarding Information of Public Nature

3.2.1 Scope of Exceptions and Exclusions

The Slovene FOIA contains a rather exhaustive list of information subject to exception, which are regarded as (a) exclusions based on *lex specialis* (such as the Public Procurement Act) and (b) absolute and relative exceptions (§ 6 of the FOIA). Additionally, there are some other umbrella laws that limit the RTI within the scope of the privacy principle (§ 38 of the Constitution):

regarding the public nature of public expenditure, regardless of the recipients. Nevertheless, it is important to distinguish whether a public institution carried out a job paid with public money within the provision of a public service, or directly on the market (such as tailor-made trainings or legal opinions; see AC Judgment I U 1421/2015/18, 26 May 2016).

[39] See the web portal "Under the Line," Pod črto, https://podcrto.si, 2 February 2017.

- the Personal Data Protection Act, PDPA, *Zakon o varstvu osebnih podatkov*, *ZVOP-1*, Official Gazette of RS, No. 86/04, based on the Act as of 1999 and amendments up to 2007;
- the Classified Information Act, CIA, *Zakon o tajnih podatkih*, *ZTP*, Official Gazette of RS, No. 87/01 and amendments, unchanged since 2011;
- the Tax Procedure Act, TPA, *Zakon o davčnem postopku*, *ZDavP-2*, Official Gazette of RS, No. 35/01 and amendments, with the latest in October 2016.

Restrictions are, in addition, provided already by the GAPA regarding classified information and pending proceedings (paragraphs one and six of § 82). All categories are quite likely to apply in administrative practice. This is why it is important that § 7 of the FOIA also provides for partial access.

There are approx. ten exceptions provided by § 6 and § 6a of the FOIA. The legislature tried to define them rather narrowly, yet still comparatively in an abstract way, in order to pursue transparency, prevent disputes, and enhance legal certainty in practice as much as possible.[40] They may be grouped as follows:

- business secrecy in accordance with the law regulating business entities;
- information whose disclosure would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the act governing government statistical activities;
- information on natural or cultural values, which, in accordance with sector-specific legislation, is not accessible to the public in order to protect such values;
- information acquired or drawn up for the purposes of criminal prosecution or in relation to administrative, misdemeanours, or court procedures and whose disclosure would prejudice the course of such procedure;
- information from a document that is in the process of being drawn up and is still subject to consultation by a public body, and whose disclosure would lead to a misunderstanding of its contents, or information from a document drawn up in connection with the

[40] Kotnik Šumah (2010), p. 13; Prešern & Lainšček (2017).

internal operations or activities of public bodies whose disclosure would cause disturbances in the operations or activities of the public body;
– information concerning business entities, either state owned or under the predominant influence thereof.

Separately, § 6a of the FOIA defines exceptions regarding the re-use of information (e.g., the protection of intellectual property rights) and a special regime for business entities owned or under predominant public influence. Nevertheless, the provisions on exceptions themselves quite often contain provisions on exceptions to exceptions. These are absolute transparent information. In this group we find the disclosure of tax secrets following the finality of debt above a certain amount under § 20 of the TPA, data on the use of public funds, data related to the performance of public functions or the employment of civil servants, and data as referred to in § 110 of the Environmental Protection Act.

Likewise, the Slovene FOIA does not provide for absolute exceptions in the field of defence or international relations but does apply them for specific private entities in the case of information whose disclosure could seriously harm their competitive position in the market.[41] On the other hand, in this part the FOIA is retroactive, which means that it applies to public information created at any moment during the period in which the entity bound by law to disclose public information was under the dominant influence of entities of public law, that is, even before the entry into force of the FOIA amendment. Systemic and sector-specific laws, such as the CIA and the TPA, provide additional absolute exceptions to the FOIA.

The CIA provides such for the highest two classes of classified information, while the TPA provides absolute exceptions for nearly all tax-related information. Yet again, the latter provides a further exception: confidentiality does not apply in the case of a final debt with duration of over 90 days and above the amount of EUR 5000 or under the provisions on the disclosure of debtors by the *name and shame list*, based on § 20 of the TPA, which has been in force since 2012. Hence, despite the above exceptions, it may well be said that the principle of open access is indeed a primary principle in the entire Slovene legal system as opposed to the system in place before the adoption of the FOIA with its prevailing secrecy.[42]

[41] The same is argued by the AC, Judgment II U 317/2014, 18 August 2015.
[42] Pličanič et al. (2005), p. 37.

Nevertheless, the Slovene IC has the power (under the CIA) to cancel an unjustified designation of confidentiality.[43]

Considering the significance and purpose of the RTI, limitations need to be interpreted in a narrow sense. Thus, sector-specific regulations might restrict the procedural right to inspect documents only in the implementation part and not in the general part. Taking into account the intent of the legislature, as deriving from the (draft) FOIA, in the event of a collision, priority is to be given to the provisions of sector-specific laws.[44] The sector-specific law defines the beneficiaries of such right based on the substantive legitimacy of the rights, legal interests, and obligations asserted in administrative procedures. However, if the legal basis or the affectedness of the party is unequivocal, so is the coinciding right to inspect the documents in such matter. The FOIA does not *a priori* exclude any type of information, which means that neither a special law, for example, on public procurement, can serve as a basis for an absolute exclusion of the right of access. Instead, several interests need to be weighed. According to the CC, Decision Up-220/05, 29 March 2007, the right to be informed of, to consult, or to have access does have limitations, but such need to be understood restrictively. This is also argued by the ECtHR, in the sense of limiting only the manner of consultation rather than limiting the information on the relevant procedural documents or not allowing access to a minor part of information that does not affect the decision. Such interpretation is not the case if sector-specific law, for example, the Medicinal Products Act, explicitly considers business secrecy.[45]

According to the MPA report for the last three years, personal data protection was established in approx. 700 cases, followed by the non-existence of the information in approx. 600 cases by 2014, but only 159 in 2015 and 225 in 2016. Next, business secrecy is an exception to disclosure in approx. 60 cases annually, and the internal operations exception in approx. 45 cases out of approximately 7000 requests filed with state bodies and municipalities. In addition, personal data protection was claimed in 100 cases of appeals out of 309 in 2015 and in 84 cases in 2016. In 95 cases in 2015 and in 104 cases in 2016, the existence of the requested

[43] For example, see Decision 090-163/2015, 15 July 2015, regarding the disclosure of public expenditure at the Paris embassy.

[44] *Lex specialis*, for example, the Civil Procedure Act, as stated by Prepeluh (2005), p. 150. See also Prepeluh in Šturm et al. (2011), p. 598.

[45] See IC Decision 090-65/2015, 26 June 2015.

information was in question, and in around 50 cases business secrecy, and in 25 to 39 cases internal operations exceptions.

With regard to personal data protection, given the very limited possibility to perform balancing tests, personal data nearly always prevails when first-instance bodies decide on requests.[46] In order to effectively protect the right to information, it is of special significance that in 2003 Slovenia established the IC as a central, yet independent, non-governmental institution, which by itself resolves the collision of the RTI and (personal) data protection. Thus, decisions on disclosure and the public interest test are fully consistent.[47] Some argue that if the public nature of personal data is not proportionate, it can be called public voyeurism. On the other hand, some claim that RTI is endangered on the account of data protection, not only in individual appeals but also in the preparation of laws when the IC is asked for an opinion.[48]

In this context, neither business secrecy nor internal operations are usually successfully established grounds for a refusal, despite being frequently so argued by authorities or third parties. For instance, the ministry responsible for agriculture claimed that comments received during public consultation in the preparation of a law fell under this exception, which the IC overruled as ungrounded.[49] Regarding the potential exceptions of business secrecy, public expenditure is one of the key criteria of disclosure, based on the FOIA amendment of 2005. Thus, the RTI represents some kind of control over the accountability of functionaries and officials regarding their lawful and appropriate use of public funds. Referring to the use

[46] The search for a balance between transparency and privacy also dominates in the EU (Galetta et al. (2015), p. 21). However, the transparency regime is much lower for EU institutions than in many member states since the regulations on RTI and personal data protection are not harmonised (see Nos. 1049/2001 and 45/2002). In comparison to Slovenia, EU institutions mostly refuse access to information whenever the personal data of individuals, public officials included, are at issue. In accordance with the decision of the CJEU in Case T-115/13, 15 July 2015, for the condition of necessity to be fulfilled, it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective and that it is proportionate to that objective, which means that the applicant must submit express and legitimate reasons to that effect (more in Pirc Musar (2015)).

[47] And proven so comparatively, see Savino (2010); Salha (2014).

[48] See the warning against public voyeurism by Pirc Musar (2015); contrary TIS (2015), and Doria (2017).

[49] IP Decision 090-176/2015, 27 July 2015, as opposed to inter-ministerial coordination.

of public funds, the AC has ruled consistently. Namely, when an applicant requests information on the use of public funds, paragraph three of § 6 of the FOIA, which is an exception to the exception, provides a sufficient legal basis to allow the applicant to access the requested document (AC Judgment I U 188/2014, 9 July 2015). The same was decided by the IC in several cases on contractual payments to professors at public faculties despite contradicting court's decisions. The AC found more broadly than the IC that public service can be distinguished from non-public market operations.[50] By analogy, the minutes of a revision of the use of public funds at an embassy must be disclosed despite the internal character of oversight within the Ministry of Foreign Affairs (IC Decision 909/184/2015, 9 February 2016).

To sum up, the most frequent reason for an RTI refusal in Slovenia is personal data protection followed by a lack of information, while other exceptions emerge rather rarely. Protected exceptions are thus evaluated according to their actual content rather than just their formal characteristics. Although the bodies could act more proactively, at least by means of a short explanation published on the internet as instructed by the IC or TIS,[51] this is rare. Moreover, there are cases where a decision is questionable. For instance, in Judgment IV U 282/2013, 19 March 2014, AC confirmed municipality's and IP's refusal to provide a permit with a clause of finality since they supposedly did not have all the data to calculate it—even though they are obliged to do so under the GAPA.

3.2.2 Public Interest Tests and Partial Disclosure

In evaluating whether or not the requested information or documents are to be disclosed, it is necessary to carry out a public interest test, that is, an overriding public interest test and a harm test.[52] This is the case especially in the event of diverging interests, when the burden of proof is on the person opposing disclosure, known as the "reverse FOIA." Exceptions are therefore allowed, yet only according to a specific methodology and not in absolute terms. Public interest tests are applicable in Slovenia within the broader (constitutionally based) test of proportionality.

[50] See the IP Decisions 090-112/2015, and 090-137/2015AC, as opposed to the AC judgments I U 1421/2015-18, 26 May 2016, and I U 1473/2015-15, 22 December 2016.

[51] See Pirc Musar in Kovač et al. (2011), p. 239.

[52] More in Pličanič et al. (2005); Prepeluh (2005); Šturm et al. (2011); Pirc Musar (2015).

According to both the FOIA and *leges speciales*, exceptions are to be interpreted relatively. The overriding public interest test is the basis that allows the disclosure of public information irrespective of limitations or statutory exemptions that enable the refusal of access when it is assessed that the public interest or the need for disclosure overrides the possible harm caused by such disclosure. Public interest is established on a case-by-case basis, especially when the information requested relates to public expenditure, public safety, public health, and so on. In the event of competing interests, the burden of proof is on the person opposing disclosure.[53] Otherwise, it is impossible to achieve the purpose of the law on the RTI, that is, democratic scrutiny of the legitimate and reasonable conduct of (administrative) bodies. This was stated in IC Decision 090-190/2012/14, 30 October 2012, in relation to the purchase of radar speed guns in a municipality. Similarly decided the IC in Decision 07-00-02834/2011-03, 5 December 2011, when the tax administration had to disclose to the applicant data on 50 major tax debtors regarding employee social security contributions, and in Decision 090-161/2009/15, 22 January 2009, on the purchase of vaccines in Slovenia. Therefore, also the classification of schools according to the success of their pupils is considered public information despite a provision of the Grammar Schools Act opposing it, since the information exists and it is in the public interest that it be disclosed.[54]

A harm test is an evaluation carried out based on an assessment of whether the disclosure of confidential data or public information could cause harm or have harmful consequences for a certain right or a legally protected public or private legal interest, which is the reason why a certain piece of information is not disclosed. There is also a specific harm test, which serves particularly when weighing exceptions, such as internal information in order to reveal the internal "facts" but not the "opinions" and "strategies" of the bodies in relation to their parties that are required to protect the public interest. Even the AC, as in Judgment I U 1176/2010-13, 30 November 2011, argues that, in the event of an appeal following a refusal to disclose information due to alleged consequent disturbances in the work of the public body, the IC does not need to investigate such objection on its own initiative. On the contrary, with the

[53] See IC Decision 090-164/2014, 24 November 2014. More in Prepeluh (2005), p. 301.

[54] See IC Decision 090-188/2014, 21 November 2014, and AC Judgment I U 2052/2014-14, 6 January 2016.

restrictive concept of exceptions to the principle of free access, the legislature set up the standard of "beyond doubt." The same applies to the unjustified non-disclosure of experts in administrative procedures according to the IC (Decision 090-65/2015, 26 June 2015).

Carrying out the public interest test is a frequent practice in Slovenia at first and appeal instances, yet always on a case-by-case basis.[55] The aim is to disclose the requested information at least partially, balancing the principle of free access and protected exceptions as regulated by § 7 of the FOIA. The provision reads: "If a document or a part of a document contains only a part of the information referred to in the preceding Article, which may be excluded from the document without jeopardising its confidentiality, an authorised person of the body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the document to the applicant." In practice, up to 15% of applications before state bodies and municipalities are partially granted every year, that is, 872 out of 6071 first-instance decisions in 2014, and 103 out of 309 appeal decisions in 2015. Data on partially granted requests and appeals reveal that the respective regulation is regularly applied in Slovenia.

4 The Access to Information Procedure: From Request to Response

Only an *a priori* defined procedure gives a right substantive content; otherwise, it can be hollowed out or remains just a dead letter. Many authors in this respect even speak of "procedural transparency." In this sense, Slovenia would profit if the proposed regulation of the EU APA were to be adopted in the near future.[56] Procedural issues are in fact of paramount importance with a view to turning a theoretical entitlement to a measure into an actual right that may be effectively enforced.[57] In any case, the definition of procedural guarantees is thus an advantage, provided that the formality of the regulation is adjusted to the subject of the procedure. This

[55] Prelesnik & Kotnik Šumah (2017).

[56] See also Statskontoret (2005), pp. 35–43, 74; Schmidt-Assmann in Barnes (2008); Mendel (2008), p. 38; Savino (2010), pp. 7, 13; Rose-Ackerman et al. (2010), p. 342; OECD (2014), pp. 29, 60; Hofmann et al. (2014), and the European Parliament Resolution of 9 June 2016 for an Open, Efficient and Independent European Union Administration.

[57] Banisar (2006), p. 141; Pirc Musar in Kovač et al. (2011), p. 237; Kovač (2014), p. 34.

is the case not only in the FOIA (or sector-specific laws) but also through subordinate application of the GAPA. In Slovenia particularly, before the adoption of the FOIA, although regulated by several other laws, the RTI was not enforceable due to the lack of procedural regulation. The role of the GAPA is recognised as beneficial also by the MPA and the IC, in terms of the introduction of well-established procedural conduct and enabling legal protection. On the contrary, some formalities of the GAPA sometimes hinder FOIA implementation, as in the case of third-party protection or cost-related appeals.[58]

Based on the complementary use of the Slovene Constitution, the FOIA, and the GAPA, an interested party claims to have the right to access information, orally or in writing, directly to the (expected) holder of the information or document. This entity is obliged to conduct an administrative proceeding; in the event of the refusal of the request and if such is based on a written application, an individual administrative act (decision) must be issued in 20 days, or, exceptionally, based on a special conclusion, an additional 30 days. If not, the refusal may well be deemed as grounds for appeal. The party may further lodge an appeal with the IC. An action against IC decisions is possible before the Administrative Court when filed by a beneficiary or the entity bound by the law to disclose public information. Judgments of the Administrative Court can be challenged before the Supreme Court and, following a constitutional complaint, before the Constitutional Court (see Table 8.1). The latter also assesses the possible unconstitutionality of laws.

4.1 Request

The FOIA defines the procedure only minimally and rather focuses on the elimination of the formality or definition of specific rules compared to the GAPA. The applicant may file the request either orally or in writing (§ 14 and § 15). However, a formal (administrative) procedure and legal protection is guaranteed only in the case of a written request, even though the constitutional right to a defence is attributed to applicants also in orally initiated procedures by the *mutatis mutandis* application of the GAPA.[59] The mandatory content of the request is minimally defined (§ 17). It includes data on the body and the applicant, what information is requested,

[58] As reported by Prešern & Lainšček (2017).

[59] More in Kovač et al. (2012), p. 38; contrary in Pličanič et al. (2005), p. 179.

and the manner of acquiring such information. If the request is formally incomplete, the applicant is required to supplement it in no more than three working days or it is dismissed (§ 18). The applicant does not need to indicate any legal bases or reasons (nor demonstrate legal interest) but should determine the information requested as accurately as possible. If an applicant does not know which information is in the possession of an entity bound by law to disclose public information, all relevant documents relating to a specific question must be disclosed (IC Decision 090-91/2015, 24 April 2015). In practice, applications regarding the RTI are only seldom formally dismissed since free access to information applies and the restrictions are more an exception than a rule, and since there is no deadline and no legal interest needs to be demonstrated by the applicant and it is seldom *res iudicata*. Hence, dismissal is possible, for instance, when the applicant files the request with a body that is thought to possess the information but it does not, that is, in approx. only 2–3% of all requests filed. Further proceedings are conducted under the GAPA. The initial request may not be altered by the body itself since its content and type dictate which body is competent and which procedure is to be followed, as ruled by the AC (Judgment I U 388/2014-32, 23 June 2014).

4.2 Response and Time Frames

Some provisions of the FOIA are particularly important for the implementation of the RTI, the formalisation of the response and time limits being at the top of the due process doctrine and case law. When a procedure is initiated by an oral request, disclosure is not formalised, albeit the body is obliged to issue a written decision following the GAPA form in the event of full or partial refusal of a request. Based on a written request, the body must issue an explanatory decision indicating the remedies (as regulated by the GAPA), otherwise an official note suffices (§ 22 of the FOIA).

As regards the deadlines for decisions, the regulation in general is rather formalised, and practice has shown that setting a time limit is a basis for enforcing a right. For such reason, the Slovene law defines two deadlines, which is characteristic also comparatively.[60] § 23 of the FOIA reads: "The body shall decide on the applicant's request immediately, and at the latest within a time limit of 20 working days beginning from the day of receiving the complete request." There is also a possibility of

[60] See Savino (2010), p. 30; Mendel (2008), p. 127.

Table 8.4 No. of appeals and court disputes

Year	*No. of appeals and trends*	*Appeals based on administrative silence (of the total)*	*No. of IC decisions*	*Appeals fully or partially granted*
2011	857	549 (64%)	251 ↑	154 (51%)
2012	519 ↓	242 (47%) ↓	256 ↑	160 (63%) ↑
2013	610 ↑	339 (56%) ↑	258 ↑	142 (55%) ↓
2014	578 ↓	258 (45%) ↓	288 ↑	160 (55%) ↑
2015	623 ↑	314 (50%) ↑	309 ↑	181 (59%) ↑
2016	514 ↓	198 (39%) ↓	312 ↑	173 (54%) ↓

Source: Own, based on IC annual reports

prolongation as stipulated by § 24: if the body requires more time for the communication of the requested information due to the implementation of partial access or due to comprehensive documentation, an extension of up to 30 working days is allowed by an order that includes the reasoning of the grounds for such. In practice,[61] authorities respond in 51% of the cases in less than five days, and in 46% of the cases in 6–20 days. Timeliness depends on the complexity of the case. In the respective survey, with 54% state and 23% municipal administrations, a prompt response was possible since the bodies reported 81% cases including less than 20 A4 pages and no problematic legal issues. The information most often requested concerned public expenditure (106 cases) and the environment (104 cases).

According to the GAPA (§ 222), if the deadline is not met, the party has the right to appeal as if their request has been refused. Regarding administrative silence, for several years the share of appeals had been stable, around two thirds of all appeals, while the situation improved after 2012 to approx. half of all appeals (see Table 8.4). The first step of the IC in these cases is to urge first-instance bodies to reply, which is usually successful, as revealed also by a number of cases that the IC decided on the merits. Nevertheless, in certain years, such as in 2015 in comparison to 2014, silence slightly increased, which is rather problematic, even though the most recent figures show a further decline (see Table 8.4).

A further problem is when a reasonable time for decision-making at courts is exceeded, in terms of "information delayed meaning information refused"—especially since a lodged action has a suspensory effect in relation to an IC decision. Although the ICA explicitly stipulates the respective

[61] Reported by Prešern & Lainšček (2017); based on a 2012 survey of 172 entities.

procedures based on the FOIA as "urgent and prioritised" (§ 10, without an explicit deadline), it is quite common that proceedings take longer than usual practice or even regulations abroad.[62] In this sense, Transparency International Slovenia has attempted to raise awareness by issuing guidelines and supporting individual appeals, actions, and complaints as *amicus curiae*. For instance, there is a case involving a constitutional complaint (case Up-49/17), claiming the infringement of the constitutional guarantee that decisions will be made without undue delay (§ 23) on grounds of the case before the AC lasting for 16 months and a further 11 months (due to the so-called yo-yo effect). We can conclude that Slovene bodies still need scrutiny and control mechanisms to implement the FOIA in the set time frames.

4.3 Fees and Costs

The costs of information disclosure are determined by § 34 (access to information) and § 34a (commercial re-use of information) of the FOIA, based on the principle that the rights recognised under the FOIA and the GAPA may not be restricted beyond their purpose or disproportionally. Explicitly, direct consultation cannot be charged, while other costs could be charged until 2015 if the MPA confirmed a price list (as in 24 cases in 2014) and the body published it in its catalogue. As argued also by the AC in Judgment I U 236/2015, 6 May 2015, the clear and unambiguous wording of § 34 of the FOIA leaves no room for a different interpretation. This means that consultation on the spot is free of charge, while material costs may be charged (only) for the transmission of a transcript, copy, or electronic record.

Presently, based on the amendment of the FOIA in force since 2015, the costs for officials' work cannot be charged for. A Government decree was adopted in 2016 that defines uniform prices. If the costs are under EUR 20, they cannot be charged, while, for instance, an A4 page copy is charged at a rate of EUR 0.06 and an A3 page at a rate of EUR 0.13, a CD at EUR 2.09, and a DVD at EUR 2.92. This is important considering the growing number of appeals due to the high costs in practice according

[62] Ninety days in Croatia; see also the Case Magyar Helsinki Bizottsag v. Hungary, No. 18030, 3 November 2016, which states, *inter alia*, that the procedures for accessing information should be simple, rapid (*sic!*), and free or low cost.

to the IC annual reports, from zero in 2009 to 17 in 2015. Usually (e.g., in Decision 090-277/2014, 14 January 2015), the IC cancelled the costs charged for the work of civil servants. Even when requesting the re-use of information, the price may not exceed the costs of collecting, producing, reproducing, and disseminating, together with a reasonable return on investment. It may not be disproportionally high, as this would hollow out the RTI. The same was stated by the AC, which argued that, generally, these are the costs of the ordinary work of the administration (Judgment U 278/2008-23, 20 October 2009). In 2014, still, 49 requests for access were charged by state bodies and municipalities, altogether approx. EUR 11,000, which is more than twice the amount in 2013. Further on, 747 requests for the re-use of information were charged for, amounting to nearly EUR 300,000. In addition, the Surveying and Mapping Authority charged EUR 1272 for 27 requests for access and EUR 185,802 for 315 requests for the re-use of information.

4.4 Administrative Appeals to the IC

The FOIA provides for an administrative appeal before the IC. This body has a double role in Slovenia, that is, protecting freedom of expression and personal and other data, as stipulated by § 38 and § 39 of the Slovene Constitution and horizontal or sector-specific laws. The IC hence acts (1) as an appeal body under the FOIA and the Media Act and (2) as an inspection or protector of different types of protected data (i.e., personal, classified, and other data, such as health documentation and personal documents). Besides appeals, the IC also deals with general questions regarding the implementation of laws under its competence. In 2014, the IC received 297 questions with regard to the FOIA and 251 in 2015. Usually, the IC and the MPA prepare coordinated answers. In most cases, the questions arise based on the aftermath of the FOIA amendments. Every year in May, the IC issues a report for the preceding year that is to be presented in the legislature.

The IC is a functionary, elected by the legislature for five years, with the possibility of re-election. It runs an office with approx. 35 employees, ten of them dealing primarily with the FOIA, and has an annual budget of EUR 1.2 to 1.8 million (the highest in 2012 and approx. 1.3 million in 2016). The Information Commissioners elected thus far have all been lawyers and highly proactive:

- Igor Šoltes, 2003–2005, currently MEP, former president of the Slovene Court of Audit,
- Nataša Pirc Musar, 2005–2014, formerly a journalist, currently an attorney at law,
- Mojca Prelesnik, since 2014, former deputy IC and secretary general of the National Assembly (the legislature).

An appeal may be lodged before the IC for several reasons (§ 27 of the FOIA), for example, due to the refusal of a request, silence, incorrect or partial information, not following the form for requesting information, or excessive costs. The appeal procedure is similar to the one at the first instance, albeit inevitably initiated and concluded by a written act. Of special importance is also the practice of the IC to execute an *in camera* review of documents and information at the premises of the entity bound by the FOIA. Such reviews were conducted particularly when the entity claimed that there was no information available or in the event of secrecy-related exceptions, namely, in 59 out of 309 cases in 2015 and 76 out of 312 cases in 2016. There has been a rather constant share of appeals filed and decisions issued since 2009, after the first initial years when citizens became aware of their RTI. Since 2011, the IC has annually received approx. 500 to 600 appeals and issued approx. 260 to 310 decisions (see the IC annual reports, Table 8.4). Regarding administrative silence, entities bound by the law are first summoned to conduct a procedure on the merits and issue an act upon request. However, quite often further reluctance is present, and the beneficiaries need to address to the IC again (such as in cases 090-75/2014/8, 24 April 2014 (a municipality); 090-294/2014/7, 26 January 2015 (a ministry); 090-158/2014/2, 8 July 2014 (a municipality); 090-180/2012/2, 5 September 2012 (a hunting association)).

The data reveal that there is an increasing ongoing trend regarding the number of appeals and decisions issued at the level of the IC. This seems rather surprising since one would expect stability through consistent practice in the 14 years since the adoption of the FOIA in 2003 and its crucial amendments in 2005. Nonetheless, respective phenomenon is "understood as a reflection of the growing awareness and activism of the RTI among citizens in general, and journalists and NGOs (for example, in the field of the environment) in particular."[63] This is important in the light of

[63] As emphasised by Prelesnik & Kotnik Šumah (2017).

the share of granted appeals, which is increasing over time (often refused in the first years after FOIA adoption, but now steadily at 50 to 60%), revealing beneficiaries' knowledge and efforts.

4.5 Judicial Review

An appeal against second-instance decisions by the IC may be filed before the AC (§ 31), with remedies also possible before the SC and separately before the CC. The SC reviews administrative disputes at the appeal and revision levels in concrete cases, while the CC reviews concrete cases within constitutional appeal proceedings and deals with assessing the compliance of general legal acts with the Constitution and EU law. From a contextual aspect, the main issues addressed in practice by the IC and consequently by courts relate to (1) substantive law, (2) procedural dilemmas, and (3) establishing facts. However, the majority of the cases pertain to the latter sphere in connection with the interpretation of the FOIA. Regarding procedural issues as well as problems of a substantive character, in approx. one third of the cases since 2011 the status of the parties was questioned. It is therefore often disputable who the beneficiary or the body bound by law to disclose public information is. The most frequent issue addressed in court it is evident that the quantity of judicial disputes is whether there are exceptions to disclosing the information, namely, in approx. 70% of the cases. This was the case also at the highest judicial level, more precisely, in 14 out of 30 cases at the SC between 2003 and 2015. Four more cases addressed the relations between the RTI and the right to inspect one's own files under the GAPA. The courts in Slovenia rarely balance transparency-related principles, as we cannot find any such reasoning in their decisions and judgments. This seems to be a lost opportunity as regards the development of doctrine. In fact, the main problem in the country seems to be the over-formalised approach of not only administrative bodies but also often of the courts, which is best explained by cultural rather than legal reasoning.

Considering the workload of the courts, it is evident that the quantity of judicial disputes after the adoption of the FOIA first increased, while after the establishment of some case law the number of disputes fell significantly, particularly at the highest instances (see Table 8.5). The share of IC decisions challenged before the court is rather low, annually between 8% and 13%. In almost one third of the cases before the SC, the plaintiff is a journalist who requested the RTI in the first instance but his or her request

Table 8.5 Judicial review in RTI

Year	*No. of actions lodged with the AC and trends*	*No. of actions lodged before the SC (appeals and revisions)*	*No. of cases before the CC (complaints and constitutionality tests)*
2011	21	7	1
2012	24 ↑	3 ↓	1
2013	33 ↑	3	2
2014	16 ↓	1 ↓	1
2015	31 ↑	3 ↑	2
2016	43[a]	NA	NA

Source: Own, based on courts and IC reports

[a]The apparent increase is not that extreme since five actions address the same issue (the public nature of professors' salaries)

was refused. There are various entities among the bodies bound by law to disclose public information, such as the national TV stations, the national airport, public pharmacies, student organisations, and in almost one third of the cases, a court or similar entity. Most cases are disputed since the body claims an exception.

The AC usually refuses half of the cases (e.g., 11 out of 22 in 2016), while in other cases actions are most often partially granted. If further appeals or revisions are lodged, the SC confirms the AC judgments in almost all cases. In the whole period from 2003 up to 2015, only 24% of appeals and 23% of revisions were granted. For instance, the verdict differed at this instance regarding access to information on visitors to a public prosecution office through video surveillance (SC Judgment X Ips 1613/2011, 1 September 2011). In this case, the SC stated that exceptions should be interpreted more narrowly as seen by the AC.

Regarding CC decisions on the unconstitutionality of law in relation to the RTI, the laws most often disputed are systemic laws. They appear at least twice among the 16 cases between 2003 and 2015, for example, the Administrative Dispute Act regarding access to court, competence according to the ICA, or the relations between the FOIA and the CIA and PDPA. An interesting case is the Real-Estate Recording Act, which was challenged before the CC by the IC already in 2007, since the law disproportionately revealed data on the property rights of individual owners. This was confirmed as a misuse by Decision U-I-464/06-13, 5 July 2007. Regarding success, in approx. 22% of the cases, the CC has confirmed claims of unconstitutionality.

5 Special Regimes

5.1 Media

In addition to the FOIA, Slovenia adopted the Media Act in 2001.[64] This law regulates the rights of registered journalists and media channels to disclose information. There are, for instance, special provisions in the MA on a non-formalised procedure (a request can be filed by email, without e-signature). Furthermore, the MA determines significantly shorter deadlines (a negative response is required by the end of the following day and a positive reply within seven days or at most within an additional three days after the request is sent) and special judicial protection. The MA is a special law but directly relates to the FOIA if the bodies bound by law to disclose public information by the MA do not reply to a request satisfactorily, since it is then deemed that a negative administrative decision has been issued; hence, the IC is defined as an appeal and a misdemeanour body.

In practice, journalists often apply for information first based on the MA; if no satisfactory response is received, they directly file a request under the FOIA. The latter seems to be a more productive approach, as ascertained by the IC, to gain more information and, above all, the original documentation, the provision of which is not required under the MA.[65] Therefore, the FOIA is a more formal but faster and more efficient means for media purposes, in the end. The applicability of the FOIA among journalists is revealed also by the IC annual reports. There were 37 appeal cases out of 309 in 2015, and 38 out of 312 in 2016, initiated by journalists, in addition to the 202 lodged by other citizens. That represents a ratio of almost 5:1, other applicants were legal entities in 70 cases in 2015 and 98 cases in 2016.

5.2 Environmental Information

Slovenia signed the Aarhus Convention in 1998 and ratified it in 2004. The Environmental Protection Act[66] determines transparency as having

[64] MA, *Zakon o medijih, ZMed,* Official Gazette of RS, No. 35/01 and amendments, unchanged since 2006.

[65] Prelesnik & Kotnik Šumah (2017).

[66] EPA, *Zakon o varstvu okolja*, ZVO-1, Official Gazette of RS, No. 41/04 and amendments, incorporating all Directives of the EU. For the ratification of the Aarhus Convention, see Official Gazette of RS, No. 17/04. See explicitly § 13 and § 110 thereof.

priority over potential exceptions determined by the FOIA and public consultation. Hence, the EPA refers directly to the FOIA. § 6 of the FOIA stipulates that access is granted if the information requested concerns data that relates to environmental emissions, waste, dangerous substances in factories, or information contained in safety reports and other data as provided by the EPA. Nevertheless, the EPA enables access to environmental information not only in principle but also in specific cases, such as information on emissions and monitoring, environmental plans, environmental projects, environmental impact assessments, industrial pollution or industrial accidents, and so on. Apart from the environmental information, it can also be said that environmental information is part of public participation procedures, meaning that opening up different procedures to public participation enables access to environmental information.[67]

In practice, environmental information is requested in most cases based directly on the FOIA, also by NGOs, with altogether approx. 30 appeals lodged before the IC since 2005.[68] However, environmental information has gained increasing significance over time, as revealed by the statistics, with eight appeals to the IC in 2015 (as the TIS did in 2015 in a case involving the financing and emissions of the *TEŠ6* thermal power plant) and 16 in 2016, in comparison to none or only one or two in the previous years. Given the special significance of environmental information, the IC leans to stricter overriding public interest tests in the respective cases, since environmental information tackles larger issues and most often many stakeholders (according to the IC annual report for 2016). For instance, the IC stated in Decisions 090-103/2015, 16 June 2015, and 090-108/2015, 14 July 2015 (the latter on a zinc plant in Celje), that information defined as generally accessible under environmental legislation cannot be regarded as a business secret. This is so, even if the company designates them as such by an internal act (the subjective or objective criterion of business secrecy). On the other hand, there are good practices in

[67] Knez (2016), pp. 8–9; more in Prepeluh (2005).

[68] For example, the issues of whether radio stations for telecommunications have any health implications, the quality of drinking water, whether environmental permission for waste disposal has been awarded, emissions caused by certain factory plants, and so on. For practical insight, see Knez (2016), p. 12, who outlines: "To my knowledge, it is not difficult to obtain this information. It is more questionable how reliable it is. Especially in cases where there are ongoing proceedings (for instance, regarding the Lafarge cement factory, where, according to media info, the local inhabitants were unable to rely on the measurement of emissions)."

the field. In this sense, the Slovene Environment Agency is seen as an example of a proactive body.[69] In fact, in daily newspapers and on the internet the Agency regularly publishes data on current CO2 emissions, greenhouse gases, the quality of bathing waters, and so on.

6 Overall Assessment of the Effectiveness of the FOIA in Slovenia

There are several RTI in Slovenia provided by systemic laws unlimited in time and enhanced or limited by sector-specific legislation. Besides the FOIA as an independently enforceable basis, the RTI under the GAPA stipulates the rights to a defence. What matters here is that the fundamental nature of the right requires a strict interpretation of any limitation to the exercise of such rights and that public authorities need to subject any such limitation to a test of proportionality. The Slovene regulation on the RTI is fully compatible with international acts and the *acquis communautaire*. This is recognised also by international comparisons, particularly regarding the FOIA.[70] However,[71] there are many laws in Slovenia that highlight the openness of public administration, but the FOIA is the only one that generally concretises the enforcement of the RTI by defining the bodies, procedure, and legal protection. In Slovenia, three main phases of the development of transparency can be identified:

1. initiative (1991–2003), based on the adoption of the FOIA and the establishment of the IC;
2. intermediate (2003–2014), with the special significance of the FOIA amendments of 2005 regarding the introduction of the overriding public interest test or public expenditure as a criterion for disclosure;
3. the advanced or (regarding access to information explicitly requested) mature phase (2014 and on), with the amendments to the FOIA in 2014 reflecting the fine-tuning of the regulatory framework in pursuit of best practices. These steps result from a combination of political changes, EU support, and above all the IC's consistent efforts to achieve improvements.[72]

[69] By experts and NGOs; see Knez (2016), p. 13; Doria (2017).

[70] See Kovač (2014); GRIR (2017); OGP (2017).

[71] As noted by Pirc Musar in Kovač et al. (2011), p. 237; Pličanič et al. (2005), pp. 37, 46, 178; Prepeluh (2005), p. 145.

[72] See OGP (2017); Kotnik Šumah (2010); Doria (2017).

Regarding the initial research question as regards transparency and the RTI in Slovenia, the following conclusions can be drawn based on normative and empirical analyses. The level of transparency in Slovenia can generally be assessed as fairly high. Transparency is a primary principle in Slovenia, as it boasts one of the best FOIAs, comparatively speaking, and it has improved in practice over time, but there is evident resistance to (more) proactive actions. Despite a perhaps too formalised (implementation of) FOIA, which can lead or has led to a certain resistance in practice, the legislation clearly defines the exceptions and the related discretion of the bodies as to whether to disclose information. In practice, not that many appeals and disputes have occurred, but the ones that do so arise particularly regarding the definition of the bodies bound by the law to disclose public information and of the exceptions that justify a refusal to disclose information. Key to the enforcement of the RTI in Slovenia is a definition of the administrative procedure for ensuring RTI and the complementary legal protection, as well as the IC's role in enforcing the law in specific cases. Yet, both in terms of regulations and in terms of the IC and court practice, the exceptions are interpreted rather narrowly. The principle of free access is consistently pursued; even in the sense of refusing the argument that internal reasons and the unreasonable workload of the bodies involved are a sufficient basis for them not to disclose information.

Transparency is indeed a recognised principle in Slovenia, in both theory and the legal regulation, and above all considering the gradually developing case law relating to the enforcement of the RTI. On the other hand, four main deficiencies have been established in Slovene society. All such problems are based on a combination of grounds, such as the legalistically oriented tradition, the lack of coordination among the competent review institutions, the informal networks (of a small state), and so on. First of all, access to information is ensured mainly upon individual requests, while the concepts as to the re-use of information and proactive especially personal) disclosure are still rather underdeveloped. Second, there is an implementation gap in Slovenia, which is characteristic of Eastern Europe also in the field of the FOIA, even though this Act is among the most applicable of laws. However, when it comes to the RTI and the FOIA in particular, the gap in implementation is less pronounced than in comparable fields and seems to decrease with consistent MPA and IC measures and case law. This is important particularly in the

field of transparency, since the Slovene law is indeed comparatively ambitious. Third, there are *leges speciales* that blur or even decrease the standards set by the FOIA (e.g., by adding exceptions that are listed already in the FOIA). Moreover, some claim that, to a certain extent, proportionality tests in Slovenia are perhaps too favourable to rights contrary to the RTI, such as (especially personal) data protection. Finally, in Slovenia, there is very rarely a follow-up as regards accountability (political or legal), despite there being clear infringements revealed through the FOIA. Transparency and the RTI are therefore a norm even though not the aim *per se*. It should be seen as an instrument of public participation, with due account accorded to individuals and their human dignity and to generally responsive and accountable bodies. Consequently, so-called functional transparency should be discussed in the future. In this context, the beneficiaries gaining the information requested have the individual responsibility to present it in the context of their best practices, for example, in relation to the Panama Papers.

In sum, Slovenia is a country where the concept of transparency, in its full sense, is still in development, despite its relatively high level of maturity and very modern law, mainly due to conflictual principles and guarantees, such as the protection of personal and confidential data and the not very open administrative culture. It can thus be concluded that the effectiveness of the RTI depends on a series of factors, whereby the manner in which such right is regulated is not an exclusive but a significant factor. In order to further improve the situation, several steps are necessary: from the amendment of the legislation and the reorganisation of the administration, to raising the awareness of politicians and civil servants—as well as among the beneficiaries themselves. *De lege ferenda*, it would be reasonable to join the detailed and somewhat formalistically defined groups of rights (particularly the RTI under the FOIA and the right to access one's file in administrative procedures) into one fundamental principle of the right to know. This would represent a key building block enabling an understanding of good administration and democratic authority and public service. In addition, transparency should be pursued and measures taken in terms of enhancing systemic transparency and supporting open government, public participation, and accountability. However, open, yet not reliable, and qualitative data do not suffice to support the mentioned principles.

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CHAPTER 9

Croatia: The Transparency Landscape

Anamarija Musa

1 Introduction

Transparency, as the principle of the availability of information on the organisation, processes, and decision-making of public authorities, is becoming increasingly important in contemporary governance. It enables the functioning of democratic processes and the accountability mechanism, the exercise of individual rights, as well as the overall effectiveness of the public sector. Consequently, a satisfactory level of transparency and openness is beneficial for the functioning of democracy and public administration as well as for the individual and for community development.[1] However, the necessity to convert political and administrative principles into legal form has stimulated a trend of adopting legislations on the right of access to information (RTI). The first contemporary RTI Law was adopted in the United States in 1966 (Freedom of Information Act), while currently more than 100 countries grant their citizens the RTI. The process was induced by the spreading democratisation and anti-corruption processes as well as by the diffusion of the good governance concept, with

[1] For the justification and implications of transparency, see Hood and Heald (2006).

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_9

user-oriented public administration and an increased use of information technology (e-government). The content of the laws and the best examples of RTI provisions have been widely discussed and determined in various model laws.[2] The recognised RTI standards include, among others, the principle of maximum disclosure, a broad scope of application (public administration, judiciary, legislature, public sector), the definition of information (any written or recorded data), a limited list of exceptions that are subjected to the public interest test, the flexibility of the procedure, as well as the right to appeal and sanctioning by independent institutions.

In Croatia, a young parliamentary democracy that gained its independence in 1991 when it embarked on the path of transition and democratisation, the RTI regime, in the sense of the regulation and implementation of the material and procedural elements of the RTI Law as well as the institutional setting supporting its implementation, has been developing through three stages (see Table 9.1).[3] The development through three stages was driven by the process of Europeanization in the field of public administration, democratisation, the human rights development, and the fight against corruption,[4] as well as the introduction of e-government, with a significant role held by civil society.[5]

The nascent phase (2003–2010) began with the adoption of the first RTI Law in 2003, as an important step forward in the process of democratisation and the reform of public administration according to the European standards.[6] However, under the circumstances of an unreformed administrative procedure and justice system and suffering from significant shortcomings with regard to procedural and material elements and the absence of adequate institutional support for enforcement, the RTI Law has not led to significant improvement in the overall level of transparency. *The adolescent or intermediate phase* (2011–2013)

[2] See Article 19 (2001).

[3] See Musa (2016, 2017).

[4] Similar developments in the legal and institutional framework can also be noticed in the other legal regimes whose purpose is to ensure integrity, such as public procurement or conflict of interest. Moreover, the recent reforms in administrative procedure (2009), administrative justice (2010), and civil service legislation (from 2005 onwards) have also had a positive impact on the RTI.

[5] The 2013 RTI Law was adopted as a part of the Open Government Partnership efforts to improve the transparency of public administration. For the role of civil society in enhancing openness, see Vidačak and Škrabalo (2014).

[6] See Koprić et al. (2012).

Table 9.1 Developments of the RTI legal framework

	2003 RTI Law	*2011 RTI Law*	*2013/2015 RTI Law*
Beneficiaries	Any natural or legal person	Any natural or legal person	Any natural or legal person
Bodies bound by law/ way of determining the scope	Narrow definition List of public authorities published annually by the Government	Broader definition (incl. public companies, legal persons financed from the public budgets) On a case-by-case basis	Detailed legal definition Register of information officers/list of public authorities On a case-by-case basis
Public interest test	No	Yes Classified information—only public authority and the court	Yes At all levels
Appeal Judicial control	The head of public authority Administrative court Claimant: beneficiary	Agency for Personal Data Protection Administrative court Claimant: beneficiary Includes silence of administration	Information Commissioner High Administrative Court Claimant: beneficiary and public authority Includes silence of administration
Inspection control	Part of general administrative inspection (Ministry of Administration)	Part of general administrative inspection (Ministry of Administration)	Information Commissioner
Monitoring and reporting	Report to the Croatian Parliament by Ministry of Administration	Report to the Croatian Parliament by Agency for Personal Data Protection	Report to the Croatian Parliament by the Information Commissioner; other types of monitoring
Proactive disclosure	Yes Catalogue of Information	Yes Proactive publication on the website	Yes Proactive publication on the website
Public consultation	No	No	Yes
Publicity of sessions	Yes	Yes	Yes
Re-use of public sector information	No	No	Yes
Sanctions	Yes	Yes	Yes

Source: Author, adapted on the basis of Musa (2016, 2017)

began with the 2011 amendments of the RTI Law, following the introduction of the RTI in the Croatian Constitution in 2010. The new legislation had significantly improved the RTI regime by broadening the scope of the public bodies as well as the definition of information, by ensuring users' better procedural position, and by introducing the public interest test. But most importantly, like in the United Kingdom, Slovenia, and Hungary, for example, the appeal procedure was designated to an independent institution—the Agency for Personal Data Protection. The RTI's protection system was significantly improved and supported by several key decisions made by the Agency and thus opened the door for greater transparency in public administration. Finally, *the mature phase* began in 2013 when the new Law was adopted[7] (and amended in 2015), introducing the recent RTI legislation standards regarding the scope of public bodies covered by the Law, the list of exclusions and the public interest test, better procedural safeguards, as well as new instruments of transparency and openness such as public consultation and the re-use of public sector information.[8] Moreover, a new, specialised independent body for the protection, monitoring, and promotion of the RTI and the re-use of PSI was established, with broad formal powers, such as appellate procedure, investigation, and sanctioning. The purpose of this institutional change was to back up the new legislation with a strong institution that would be able to effectively protect and promote the RTI.

In line with the standards and comparative law and practice, the current Croatian RTI Law[9] has determined, as a rule, that information can be disclosed in two regular ways: through proactive publication on the official website of the public authority, prescribing the obligatory content, or through a request submitted by a beneficiary.[10] The information can be requested by anyone and can be delivered through any means. As noted in Articles 6 to 9a, the Law prescribes five key principles that are developed further through specific provisions. Under the terms of the Law, access to information is free to all beneficiaries, who are equal in the exercise of their rights and whose relationships with public authorities must be based on

[7] See Rajko (2014); Podolnjak and Gardašević (2013).

[8] The Directive on the Re-use of Public Sector Information (2003/98/EC, 2013/37/EU) is transposed by the RTI Law.

[9] Law on the Right of Access to Information, Official Gazette (OG) 25/2013, 85/2015.

[10] For the transparency models, see Piotrowski (2010).

mutual respect and cooperation.[11] Information must be disclosed without questioning the purpose of the request; it must be timely, complete, and accurate and can be used freely.

In the following chapters, the analysis of the Croatian RTI Law will be focused on the legal regulation, current practice, and references to case law for the period 2013–2016. Legal texts, the Information Commissioner's (IC) annual reports (ARs), as well as the IC's database[12] and the High Administrative Court's (HAC) decisions are used as primary sources, supplemented by the author's own insights and views on the implementation of the RTI Law in performing the function of the first Croatian IC from the end of 2013.

2 Beneficiaries of Access to Information

The beneficiary of the RTI is any natural or legal person, domestic or foreign (Article 5, item 1), meaning any person entitled to exercise rights or assume obligations in legal sense. In the absence of available statistical data on beneficiaries submitting requests, the indicator might be found in the appeal statistics available in the IC ARs.[13] In practice, besides citizens, beneficiaries are most often civil society organisations (CSOs), companies, journalists, political parties, and also local councillors or MPs. According to the data, citizens remain most active in the protection of their rights in appeal procedures, initiating approximately two thirds of all appeal procedures (62.46% in 2014; 66.90% in 2015; 67.96% in 2016). The rest of the appeals were lodged by natural persons as interested public, such as councillors or members of professional chambers (10.17% in 2015, 4.02% in 2016) and journalists (8.53% in 2014, 4.31% in 2015, 1.93% in 2016). Approximately one third of all appeals were submitted by legal persons, mostly NGOs and trade unions, followed by companies and political parties.[14] The slight increase in total share of appeals indicates that ordinary citizens are becoming more aware of their RTI, but it could also mean that public authorities are more inclined to act upon NGOs' or the media's

[11] The principle of mutual respect and cooperation (Article 9a) was introduced by the RTI Law amendments in 2015, as an effort to pressure both public authorities and beneficiaries to treat each other with dignity. It is also important in the assessment of the misuse of rights, as well as in the inspection procedure.

[12] Accessible at http://tom.pristupinfo.hr.

[13] IC AR (2013, 2014, 2015, 2016).

[14] Cf. IC AR (2016), p. 34; (2015), p. 69.

requests, concerned by the possibility of the publicity that their inactivity might cause. This argument is supported by the visible drop in the journalists' share in appeals—from every 12th appeal in 2014 to every 50th appeal in 2016 being lodged by a journalist.

The ARs also indicate that the RTI is often used by individuals or groups of citizens that are comparatively more skilled, aware of their rights, and subsequently experienced in using the appeal procedure. Similarly to NGOs (or connected to a particular NGO), they can be useful in promoting transparency and RTI by detecting key information that should be disclosed or public authorities that tend to hide information. Also, they could be bothersome citizens fighting their battles with a particular public authority, such as their political opponents or former employers. Half of all appeals in 2015 (310 or 49.68%) and one third in 2016 (196 or 30.87%) were submitted by 10 appellants with the highest number of submitted appeals (e.g., in 2015 individuals submitted 60, 34, 33, 29, and 22 appeals). Similarly, the ARs also show that a significant part of administrative disputes were initiated by the same or connected beneficiaries; in 2016 one third of all court complaints were submitted by two complainants, almost half of all complaints in 2015 by three complainants, while in 2014 42.50% of all disputes were initiated by the same complainant. The tendency of certain beneficiaries to submit numerous requests was identified by the Government as a misuse of their rights, which subsequently has led to amendments to the Law in 2015, which included the misuse of the RTI as a ground for refusal. According to Article 23§5/5, a public authority may refuse access to information if one or more mutually linked beneficiaries, via one or more functionally linked requests, are obviously misusing the right of access to information and particularly if the repeated requests for the same or similar information or if requests demanding a large amount of information lead to the burdening of the work and regular functioning of a public authority. So far, misuse as a ground for refusal has not been supported by the IC—in 39 appeals against decisions on refusal on the grounds of misuse lodged in 2016, the IC had not found any substantial evidence that the beneficiaries were misusing their right to information.

CSOs are less prominent than previously, which may be the result of the reorientation of their activities from transparency to other democracy development issues. In 2016, 107 or 17.26% of appeals were submitted by CSOs. In 2015, the most active anti-corruption CSOs (GONG and Transparency International Croatia) submitted four appeals, each with

seven appeals submitted by one environmental CSO. One CSO that predominantly deals with open data (HROpen) has developed a request submission portal[15] and submitted a few hundred requests and more than 60 appeals, but usually their members identify as citizens.[16] However, the role of CSOs and journalists remains strongly imprinted in the development of the Croatian RTI regime, given their advocacy activities directed at the improvement of legislation and the popularisation of important corruption cases. Compared to citizens, CSOs often have greater capacities in terms of skills, knowledge, awareness, and resources, sometimes backed up by projects focused on specific issues (health, environment, public procurement, sports) to initiate requests and use protection mechanisms before the IC or the HAC, as well as the Constitutional Court.[17]

3 Entities Which Are Bound by Law

Croatian RTI Law determines a rather broad set of types of public authorities that are obliged to implement the Law (Article 5, item 5), including state bodies (the Parliament, the Government, the Constitutional Court, judiciary, independent authorities, such as ombudsmen), state administration bodies (ministries, semi-autonomous organisations), local governments, legal persons and other bodies vested with public authority, legal persons established by the state or local government, legal persons performing public services, legal persons financed predominately or in total by state or local budget or by public resources, and public companies owned by the state or local governments. Thus, the RTI Law defines the groups of public authorities, without listing them precisely, compared to the 2003 RTI Law which had obliged the Government to issue a list of public authorities on an annual basis.[18]

[15] Imamo pravo znati (We have the right to know) is a request submission portal, accessible at https://imamopravoznati.org/. By the end of 2016, a total of 1985 requests was submitted, with 996 requests (50.18%) marked as successful and 664 requests still pending (33.45%).

[16] IC AR (2015), p. 70.

[17] Out of three cases brought before the Constitutional Court under the 2003 RTI Law, two were initiated by Gong, both successfully.

[18] According to the 2003 RTI Law, the list had to be published in the Official Gazette. The last list was published in 2010, prior to Law amendments in 2011. The lists were controversial, since they omitted some public authorities (undoubtedly), such as public broadcasting, Croatian Radio Television, or state-owned companies.

However, the unofficial list of public bodies is determined by the IC in part to serve as the register of information officers (Article 13§5) and in part for the practical purpose of ensuring the submission of annual reports by public authorities to the IC. The list currently includes 5873 public bodies.[19] In addition to the central administration and agencies (126), to judiciary (115), to state bodies (18), and to other authorities (42) and 575 local governments, the most populated group encompasses public services (more than 3300 public institutions in education, health, culture, and health sector), approximately 800 associations (charities, tourist communities, fire fighters, sports unions), and almost 900 public companies (state and local public enterprises). However, the list is not exhaustive; it is dynamic, and the IC determines on a case-by-case basis (upon appeal, petition, or ex officio) if the particular organisation is bounded by the RTI Law. While the applicability of the Law to core public bodies and administration is usually not disputable, public service organisations, such as associations or companies, sometimes try to escape from the application of the Law.[20] Public notaries and GPs are not considered as entities bound by law, since they are not legal persons, but rather natural persons performing functions or tasks.

Public authorities' legal obligations include appointing an information officer (Article 13), dealing with the requests for the access to information and for the re-use of information, keeping records on requests (Article 14), submitting annual reports on the implementation of the Law to the IC by 31 January each year for the previous year (Article 60), publishing information on the website (Article 10), submitting official documents to the Central Catalogue of Official Documents (Article 10a), conducting public consultations (Article 11), as well as enabling the publicity of sessions (Article 12).

Each public authority is obliged to appoint an information officer who is responsible for the implementation of the RTI Law in the public author-

[19] Accessed in February 2017. The list is accessible at http://tjv.pristupinfo.hr/ in the form of an application and as a re-usable dataset. It has been re-used by for the purpose of the request submission portal Imamo pravo znati.

[20] For example, the IC took the position that 51% of public ownership (majority of ownership) also includes ownership by the other state or local public companies which is considered as indirect ownership by the state or local government. The approximately 900 public companies include those owned directly by the state and/or local governments, but also companies owned by private owners insofar as they perform public functions (e.g., communal services).

ity (such as handling requests and issuing decisions, ensuring proactive disclosure on the website, preparing the annual report). According to the IC AR (2016), the list of public authorities included 5019 information officers which is more than in previous years (500 more than in 2015, 850 more than in 2014), indicating public authorities' greater fulfilment of this crucial obligation.

Despite the claims of information officers themselves, the position is not professional; rather, the tasks are assigned to the existing staff. In practice, the role of information officer is designated to the public servant in the public authority, mostly to servants working in legal services, cabinets, PR units, or the general administration, as in local government. The information officers' workload is often the main reason behind ineffective implementation and silence of the administration, while other reasons include unskilled officers, frequent changes of staff, or the designation of the role to newcomers or junior public servants (who are not in the position to argue with the heads of the authority).[21] The role of information officers has become more prominent recently; their tasks have been broadened (now including public consultations and the re-use of public sector information), and they bear greater responsibility for the implementation of the Law.[22]

The public authorities that are most frequently requested to disclose information are ministries and public agencies,[23] the Government (205 in 2015, 212 in 2016), and the City of Zagreb (173 in 2015, 210 in 2016). Apart from state institutions, the highest number of requests is submitted to the Croatian Parliament (89 in 2015 and 113 in 2016) and the Conflict of Interest Committee (90 in 2015, 140 in 2016). The highest number of appeals tends to be lodged against local governments (174 or 28.01% in 2016), central state administration (124 or 19.97%), public companies (85 or 13.69%), public institutions (69 or 11.11%), bodies vested with

[21] The IC conducts regular trainings for information officers. In the period between 2014 and 2016, more than 3400 officers and other persons participated in the 86 trainings. See IC AR (2014, 2015, 2016).

[22] Since the 2015 amendments to the RTI Law, the previously stated formal responsibility of the head of the public authority has been discarded and partially transferred to information officers, as responsible persons 'whose action or lack of action' may lead to a violation of the Law (Article 5/16).

[23] For example, Ministry of Interior (268 requests), Ministry of Environment (131), and Ministry of Finance (125), as well as the Agency for Agriculture (199) and Croatian Waters (640 in 2015, 909 in 2016).

public authority (62 or 9.98%), judiciary (40 or 6.44%), agencies (37 or 5.69%), and state bodies (28 or 4.51%).[24] With regard to the administrative disputes, the share of public authorities unsatisfied with the IC's decision is growing—from one quarter of administrative disputes initiated by public authorities in 2015 (8 out of 29 complaints or 27.59%) to almost one half of all complaints being lodged by authorities in 2016 (15 out of 34 or 44.18%).[25]

4 The Relation Between Documents and Information

The RTI Law contains a rather broad definition of information and excludes information that is not existent at the time of the submission, as well as the creation of new information. The Law does not explicitly accentuate the 'public' or 'official' character of information, but indirectly defines information as being related to the scope of affairs or organisation and work of the public authority. The definition of information (Article 5/3) requires that the eligible information fulfils

(a) formal requirements—it must be recorded (written, drawn, printed, etc.) whatever the form (document, record, register, dossier, etc.) and exist in such a form at the time of the submission of the request;
(b) material requirements—it must be in the public authority's possession and created within the scope of affairs or in connection with the organisation and work of the public authority.

Thus, information must have a public character.

Given the formal requirements, the replies or interpretations which are created as a response to users' questions or inquiries are not considered as information in the meaning of this definition. The 2015 amendments to RTI Law included the provision in Article 18§5 determining what is not considered to be information: (1) a request for insight into the entire case file,[26] (2) explanations or instructions concerning the exercise of a right or execution of an obligation as an assistance to the users, (3) conducting an

[24] Cf. IC AR (2016), p. 35.

[25] For example, ministries lodged four complaints in 2015 and only one in 2016, while the Constitutional Court initiated two disputes and the Croatian National Bank initiated one in 2016.

[26] In practice, the file is admissible under procedural laws (administrative, criminal, civil procedure) to persons who are parties or have to prove their legitimate interest (see Chap. 7.1.1.). In other cases, the information must be described or titled.

analysis or interpretation of a regulation, or (4) the creation of new information. The fact that there is no legal obligation to create new information does not preclude public authorities to formally create a new document or reply based on the information contained in existing documents, especially taking into consideration Article 17§1/2 which prescribes the manners of disclosing information (see Chapter 6.3.1) In practice, public authorities (at least those skilled in RTI Law) do not tend to interpret the Law in a very formal way and tend to disclose the requested information even if it is not required as a document.

5 Methods of Providing Public Information Ex Officio

5.1 Proactive Disclosure of Information on Websites

Croatian RTI Law prescribes the obligatory publication of 14 sets of information on the website by the public authority in an easily accessible way. The standard of accessibility is generally measured by a three-click rule, an informal web design rule. Since the 2015 amendments and the obligations arising from the PSI Directive, information has been required to be made public in a machine-readable format, as open data, whenever possible and suitable.[27]

According to the data from the list of public bodies (March 2017), almost one fifth of public authorities (16.93% or 995) has not set up a website, predominantly at the local level (local public companies, kindergartens and elderly care institutions, town museums and libraries, firefighting services, veterinary stations, etc.). However, the core public administration authorities usually have well-designed websites, with good examples of interactive and user-oriented information displays (e.g., ministries, agencies, local governments, etc.). Thus, the capacity of a fragmented local government and services seems to have a negative impact on proactive transparency.[28]

Proactive disclosure, as regulated in the Article 10§1 of the Law, includes several types of information, depending on their purpose, and insofar as the access to information is not restricted under the provisions of the RTI Law (Article 10§2).[29] The first group includes information on

[27] In the formats such as CSV, JSON, XML, or RDF.

[28] On Croatian local government and services, see Koprić et al. (2016).

[29] For the typology of information, see Musa et al. (2015).

regulation, decision-making, and participation, such as laws, general acts, sessions conclusions, meetings, and agendas of collegiate bodies; the second group includes information on the operation and work of public authorities, meaning information on rights, planning and reporting documents, competitions and public calls, and internal organisation and functioning; the third group includes financial documents, such as fiscal documents (budget and budget execution), information on donations and subsidies and on public procurement; the fourth group includes information on services, including databases and open data, information on RTI, and other informative materials (news, announcements, information for the users, FAQs, and similar).

Despite the clearly defined obligation to proactively publish information, public authorities still fail to implement the provision of Article 10. A research on the proactive transparency of the 16 largest Croatian cities (excluding the capital Zagreb)[30] has shown that cities publish only 69% of the required information, particularly failing to publish financial information and information related to decision-making and participation. Similarly, the IC's analyses indicate that proactive disclosure is below satisfactory; an analysis of 43 state-owned companies conducted in 2015 shows that 58% of companies are not sufficiently transparent, that none of the companies score in the top quarter of 75% published information, and that planning and reporting documents are most frequently missing from their websites. Similarly, only two thirds of public companies publish their annual financial accounts.

A periodical research on online (proactive) fiscal transparency conducted by the Institute of Public Finance from 2013 onwards showed that the average fiscal transparency level of local governments has grown from a 1.75 average score in 2015 to a 2.35 average score in 2016.[31] Counties score the highest (average of 4.3), cities follow with an average of 3.05, while municipalities' fiscal transparency is unsatisfactory (2.04 on average). The results are used for awarding the best local governments[32] in different categories, which works as a positive incentive,

[30] See Musa et al. (2015).

[31] With zero being the lowest score (no information) and five the highest (100% information available). See Ott et al. (2016).

[32] A similar award was established by Gong and the Association of Croatian Cities, based on the Lotus research of local government transparency for the period 2009–2014. In the 2014 analysis, a majority (74%) of local governments were assessed as non-transparent, while only 5% of them scored as being remarkably transparent. See http://www.lotus.gong.hr/.

boosting competition among local units or at least among those that are otherwise devoted to transparency.

In addition, the special obligation to submit certain documents to the Central Catalogue of Official Documents is imposed to a group of approximately 1300 public authorities (state bodies, judiciary, state administration, agencies, chambers, local governments; Article 10a).[33] The Catalogue is an electronic archive ensuring the permanent online availability of official documents, maintained by the Central State Office for the Development of Digital Society. The documents must be (electronically) submitted within five days of the issuing day (e.g., planning and reporting documents), while legislation is automatically retrieved from the national and local governments' official online journals. Still, public authorities frequently fail to implement this provision; for example, a quarter of ministries, three quarters of Government offices, and one sixth of counties failed to send their documents to the Catalogue.[34]

5.2 Other Channels of Proactive Communication and Information

In contrast to official websites, newsletters and bulletins are not obligatory elements of the proactive model of disclosure; however, in practice, many public authorities use them for the dissemination of information related to their work and services. This is especially the case with regulatory bodies and other public agencies, independent organisations, and chambers of professionals and regulated professions (lawyers, medical doctors, dentists, etc.), who have their special audiences that could be easily targeted (by membership, networks, or by subscriptions).

The use of social media has recently become increasingly important for communication and for informing citizens and users.[35] Social media, such as Twitter, Facebook, and Instagram, as well as podcasts or blogs are commonly used as channels of communication by the Government and ministries, agencies, and professional chambers, as well as by local governments.

[33] Accessible at https://rdd.gov.hr/sredisnji-katalog-137/137; see also the Rulebook on the Central Catalogue of Official Documents, OG 124/2015.

[34] IC AR (2015), p. 44.

[35] See Bonsona et al. (2012).

5.3 Publicity of Sessions

The RTI Law requires (Article 12) that public authorities ensure the transparency of their sessions, informing the public on the session's schedule, the agenda, and the manner of work, as well as the attendance possibilities. In addition, session documents, such as session conclusions and adopted documents, must be proactively published on the website according to Article 10§1/4.

This 'government on the sunshine provision',[36] which was recognised as early as in 2003 RTI Law with the purpose of strengthening the transparency and accountability of public authorities, is primarily related to official meetings and sessions of the political bodies of executive and legislative branches and representative bodies of local and regional governments. However, it also applies to other public authority collegiate bodies when holding sessions, since there are no exclusions. In practice, however, many public authorities often fail to implement this provision and to regulate the issue in their rules of procedure, which leads to many petitions by citizens to the IC. On the other hand, there are good examples of TV broadcasting or video or audio streaming of sessions on websites (the Parliament, the Government). Agendas (and accompanied documents) are frequently published on the websites of certain bodies, although publication timing remains an issue (too close to the meeting, as is the case with the Government). In addition, there are local governments which frequently fail to publish agendas or even provide local councillors with materials for the session.

5.4 Public Consultations on Draft Laws, By-Laws, and Planning Documents

In order to enhance public participation and the openness and transparency of public administration, the obligation to conduct public consultations on the draft laws, regulations, and planning documents affecting citizens' and legal persons' interests was introduced by the Article 11 of the 2013 RTI Law (with a subsequent revision in 2015). The obligation applies to state bodies, state administration bodies, local and regional governments, and legal persons vested with public authority. Online public

[36] The notion refers the US Government on the Sunshine Act of 1976 that obliges the federal government, Congress, federal commissions, and other legally constituted federal bodies to ensure the openness of their meetings.

consultations are obligatory (via e-consultations portal[37] for state administration bodies, via official website or the portal for other public authorities), with the possibility of use of other consultative instruments, such as public debates, e-mail distribution of draft regulation, working groups, and so on. Public authorities are obliged to publish (1) the annual public consultation plan, (2) draft laws and documents with a substantiation of the reasons and objectives to be achieved through their adoption, and (3) reports on public consultations.

In practice, despite the steady growth of the number of public consultations in the past years, especially at the central level, public consultation cannot be considered as a regular part of the regulatory process.[38] The implementation of public consultations at the local level is especially questionable, with only several local governments regularly conducting consultations.[39] Another challenge is the failure to conduct consultations for a duration of 30 days; consultations often last 15 days or even less, sometimes obviously contradicting the purpose of the consultations (such as weekend consultations, one week mid-summer consultations). However, one of the greatest challenges to the full implementation of this provision is the fact that many laws are adopted in extraordinary procedure, for various reasons. In the period 2011–2015, around 20% of all laws (658 out of 820) were adopted in extraordinary procedure,[40] meaning that the public did not get the chance to influence the majority of legislation. In addition, it must be mentioned that regulatory agencies have set the best practice in conducting public consultations properly, but their obligation is often regulated by specific laws transposing EU rules.

* * *

[37] Accessible at https://savjetovanja.gov.hr/.

[38] There was almost 30% more public consultations conducted in 2016 (2092) compared to 2015 (1454). Moreover, 81% of state administrations, 55% of agencies, and 32% of local governments made their annual consultations plan publicly available online in 2016, which is 10–15% more than in 2015. Cf IC AR (2016), pp. 58–60.

[39] In 2016 575 local governments conducted 604 public consultations, with one consultation per local government, which indicates a failure to apply the provision on public consultations, given their scope of affairs and many decisions affecting local communities. See IC AR (2016), pp. 58–61.

[40] Statistical data of the Croatian Parliament at http://edoc.sabor.hr/Statistika/ZakonodavnaAktivnost.aspx.

The oversight of the implementation of proactive disclosure is conducted by the IC upon petitions or ex officio. Methods include indirect and direct (in situ) investigations, as well as the monitoring of the publication of a certain type of information or a group of public authorities, followed by the presentation of the results of the analyses. The inspection resulted, among other things, in the determining of the measures that must be taken to correct the content of the website. According to the 2016 AR, citizens filed approximately 200 petitions concerning the absence of proactive disclosure, which predominantly ended with successful disclosure.

The failure to proactively publish legally prescribed information might lead to administrative sanctions. Prior to the RTI Law amendments in 2015, failures to comply with articles regulating proactive disclosure, public consultations, or publicity of work were explicitly stated as reasons for sanctioning the head of public authority. However, amendments introduced changes in the sanctioning system, and at present it is necessary for the IC to conduct a full investigation in order to be able to impose sanctions.

6 The Request for Access

The request for access to information initiates an administrative procedure with certain peculiarities and flexibility required for the purposes of speed, effectiveness, and efficiency. Unless otherwise provided in the RTI Law, the Law on General Administrative Procedure (LGAP) applies.[41]

6.1 Submission and Formalities

Although the RTI Law prescribes several formalities regarding the submission and the content of the request, in practice the submission requires minimum formalities that should grant the exercise of rights.

The request can be submitted by any regular means (Article 18§1 and 2): orally (in person, by telephone) or in written form (by physically submitting the request, by post, by e-mail). Electronically submitted requests include those sent directly by e-mail or those sent via application for submitting requests and other inquiries or via the RTI request submission portal (the correspondence is then visible on the portal). Requests submitted via social media are not considered to be requests for information.

[41] OG 47/2009.

The RTI Law minimally prescribes the content of the request: the name and the address of the public authority and of the beneficiary, as well as a description of the requested information. The template of the request is determined in the Rulebook on the Official Register[42] and must be published on the public authorities' websites, together with other information on the access to information procedure and on the information officer. Still, beneficiaries are not obliged to use the request template, but the request can follow any form that allows for the identification of the public authority, information, and (to some extent) beneficiary. In practice, public authorities often (but not always) proceed upon requests submitted via e-mail or the request submission portal without indication of the postal address of the beneficiary, as well as upon unsigned requests. Similarly, public authorities are not prevented from proceeding upon requests submitted anonymously. However, in both cases the exact name and the address are necessary if the public authority is about to issue a negative decision or conduct a public interest test. Consequently, the provision of Croatian Law is in line with the standard on the treatment of anonymous requests determined in the Council of Europe Convention on Access to Official Documents of 2008, which allows public authorities to decline proceeding upon request 'except when disclosure of identity is essential in order to process the request'.

The request does not have to be formally designated as a request for information, and the reason for requesting access to information does not need to be indicated by the applicant. However, the request should be clear and precise enough to enable the detection of the required information. In case of an incomplete or incomprehensible request, the public authority is required to invite the beneficiary, without delay, to make corrections within five days. If the beneficiary fails to do so, and it cannot be clearly ascertained which information is requested, the public authority rejects the request by issuing a decision (Article 20§2).

As shown in Table 9.2, in the period 2013–2016, beneficiaries submitted slightly more than 20,000 requests per year on average (2) to approximately 4218 public authorities that have submitted the report (1). The total number of requests (2) has been in decline, while the average number of requests per public authority (3) has almost halved. These changes can be attributed to the strengthening of proactive disclosure as well as to a more effective protection system. In addition, public authorities are

[42] OG 83/2014.

Table 9.2 RTI requests 2013–2016

Year	*Public authorities having submitted an annual report*		*Requests submitted*	*Requests per public authority*	*Forwarded requests*	
	1		2	3	4	
	No.	%	No.	No.	No.	%
2013	3.462	58.50	24.330	7.1	1.969	8.09
2014	4.058	71.27	21.078	5.2	1.238	5.87
2015	4.593	76.41	18.007	3.9	1.893	10.51
2016	4.759	81.03	17.059	3.6	1.217	7.13
Average	4.218	71.80	20.119	4.95	1.579	7.9

Source: Author, based on IC AR (2013, 2014, 2015, 2016)

better trained to distinguish between a request for access to information and other types of inquiries, which were often included in the data for 2011 and 2012 when they reported more than 50,000 requests. The highest number of requests is reported by the Government (200 per year), ministries, several agencies, and local governments, including the capital Zagreb.

If the request is submitted to an authority that does not possess the information, it must be forwarded to the competent authority without delay and no later than eight days from the reception of the request. In practice, public authorities frequently fail to proceed according to this provision, sending a notice to the beneficiary saying that the request cannot be processed and/or requiring that the beneficiary resubmit the request to a competent authority. By doing so, the public authorities aggravate the position of beneficiary and clearly contradict the general principle of the administrative procedure on the obligation to provide help to the beneficiary. The relatively high share of wrongly submitted requests (7.90%) indicates the lack of information on the work and jurisdiction of public authorities.

The requests and subsequent steps in the procedure, including the decision, must be registered in the official register of requests (Article 14) that is kept electronically by the information officer, regulated by a special rulebook, and maintained in line with the rules on records management.[43] There is no obligation to publish the register or the information disclosed on the website.[44]

[43] Decree on Office Management, OG 7/2009.

[44] The request submission portal Imamopravoznati.org published the requested information on the portal and allows for the tracking of the request.

6.2 Timeframes for Answering Requests

The deadline for a decision is 15 days from the date of submission of an orderly RTI request (Article 20§1). This period may be extended by additional 15 days in cases prescribed by the Law (Article 22§1) relating to practical reasons (a large amount of information, information needs to be collected in the branches, preparation of information) or the necessity to conduct a public interest test. By insisting on relatively short timeframes compared to other European countries, the Croatian RTI Law makes exercising the citizen's right a priority. In practice, however, the short timeframes lead to frequent extensions as well as to the expiration of deadlines and consequently to a large number of silence of administration appeals (see Table 9.3, column 6). In some cases, public authorities request permission from third parties (usually private sector providers of certain services) to disclose information, such as in cases of commercial secret, copyright, or personal data; but the procedure for third party consent is not regulated by RTI Law.

As shown in Table 9.3, in the period 2013–2016, public authorities reported that more than nine out of ten cases were decided within the prescribed deadlines (e.g., 95.25% in 2016). Still, the number of cases not closed within the deadline (2) remains high—1011.75 per year on average, with a significant drop in 2016 (795) compared to 2015 (1123). The result is a high share of silence of administration appeals (6)—on average, 62.49% of all appeals to the IC in the examined period are lodged on the grounds of silence of administration. However, as the data indicates (8), on average only 38.79% of all cases that qualify for a silence of administration appeal are actually challenged before the IC. The increase in 2016 (48.30% compared to 35.80% in 2015) could be attributed to beneficiaries' greater awareness of the legal protection of their right to information. This could also be the case for the similar share of 'regular' appeals on negative decisions (7), where the share of the appeals has constantly rose (from 37.40% in 2013 to 47.27% in 2016).

The share of silence of administration appeals in relation to the total number of appeals indicates that the failure to obey the legally prescribed timeframes for decisions constitutes one of the greatest problems in the application of the RTI Law and creates a work overload in the IC Office. It could be, in one part, attributed to information officers' excessive workload and lack of skills, especially in local governments, as well as to inefficient records management. Another issue is public authorities' reluctance to respond in time to requests regarding information that could throw them into the public spotlight or indicate maladministration.

Table 9.3 Timeframes and appeals 2013–2016

	First instance cases			*Second instance cases: appeals*					
	1 Share of cases closed within deadlines	2 No. of cases closed after expiration of a deadline	3 No. of negative decisions	4 Total no. of appeals (5+6)	5 No. of negative decisions appeals		6 No. of silence of administration (SoA) appeals		7 Share of appeals in relation to negative decisions (5/3*100)	8 Share of SoA in relation to cases closed after expiration of deadlines (6/2*100)
Year	%	No.	No.	No.	No.	%	No.	%	%	%
2013	96.64	815	492	515	184	35.73	331	64.27	37.40	40.61
2014	92.80	1.314	664	658	258	39.21	400	60.79	38.86	30.44
2015	93.55	1.123	506	624	222	35.58	402	64.42	43.88	35.80
2016	95.25	795	531	635	251	39.53	384	60.47	47.27	48.30
Average	94.56	1011.75	548.25	608	228.75	37.51	379.25	62.49	41.85	38.79

Source: Author, based on IC AR (2013, 2014, 2015, 2016)

6.3 The Response

6.3.1 Ways of Providing Information

Access to information upon request can be granted in various ways (Article 17§1/2): by providing information directly, by providing information in writing, by providing insight into documents and making copies of documents containing the requested information, by delivering copies of the documents, and in other adequate ways. If the beneficiary does not indicate the adequate way of obtaining the information, the public authority must either deliver the information in the same manner as the request was submitted or in the most economical manner (Article 17§2). What constitutes the most economical manner is to be decided by the public authority in each particular case.

6.3.2 Decision of Public Authority

Upon reception of the request, the procedure evolves through several steps. First, if the submission does not qualify as a request for information, the public authority issues a *notice* (Article 23§1/2–5,§2), instructing the other party how to proceed with the submission. This is the case if the information is excluded from the application of the RTI Law (see Chap. 7) as well as if the information has already been publicly disclosed, or has already been sent to the beneficiary within last 90 days, or if the submission is not deemed a request in the sense of Article 18§5. Second, if the formal requirements are not met, the public authority dismisses the request. This is also the case if the public authority is not in possession of the information or when it is not aware of where the information may be located (Article 23§4). The dismissal decision can be challenged before the IC.

Finally, and most importantly, upon the application of material law, the public authority issues a positive or a negative decision. As a rule, if the information is to be disclosed, *the (positive) formal decision is not issued* (Article 23§1/1). The positive decision however is issued in cases when the results of the public interest test lead to the conclusion that the information should be disclosed (Article 23§3). The public authority issues *a negative decision* (Article 23§5) if the public interest test leads to the conclusion that the excepted information should be protected, or if there is no basis for correcting or completing the disclosed information, or if the information sought is not considered information according to RTI Law (Article 5§1/3), or if the request implies a misuse of the right (see Chap. 2).

According to the ARs data on dealing with requests for 2013–2016, almost 90% of requests adopted annually result in a disclosure of information. In addition, around 2% of requests are partially adopted. The share of dismissed requests ranges between 1.30% and 1.75%, while negative decisions constitute around 3% of all cases (on average 548 per year, see Table 9.3). Approximately 9% of all cases end in the public authority issuing a notice.

In practice, public authorities often fail to issue a decision or a notice that contains the prescribed elements, most often an explanation and instructions on the legal remedy, especially when the request is submitted via e-mail. Similarly to the failure to respond within prescribed time limits, this omission strongly affects the protection of citizens' rights, since beneficiaries are not often aware that they are entitled to lodge an appeal against silence of administration to the IC. As shown in Table 9.3, the average ratio of silence of administration appeals and cases closed after the deadline (8) of 38.79% shows that in more than half of the cases the beneficiary does not activate the protection mechanism. Similarly, only 41.85% of negative decisions are challenged before the IC (7). One of the possible explanations related to the deficiency is the decisions themselves, when the public authority fails to indicate instructions for a legal remedy. An optimist would argue that the beneficiaries predominantly have confidence in the public authorities' reasoning and are left satisfied with their decisions. However, this belief is not justified, since only 20% of appeals are found legally grounded in the second instance procedure.[45]

6.3.3 Correcting and Supplementing the Disclosed Information

The beneficiary who considers the provided information to be inaccurate or incomplete may submit a request to the public authority to correct or supplement the information within 15 days from the date the information was received (Article 24). The public authority must respond within 15 days. According to the ARs for the period 2013–2016, beneficiaries submitted 370 requests for correcting and supplementing the disclosed information per year. Almost nine out of ten of such requests have been successful. A noticeable decline of 40% in the number of such requests (from 510 in 2013 to 310 in 2016) indicates public authorities' greater compliance with the legal principle of completeness and accuracy of information.

[45] Cf. AR (2016), pp. 32–33.

7 Excepted Information

Transparency is recognised as a core value of democratic societies. However, other values of protecting legitimate interests can come into the conflict with transparency. For that reason, the RTI Laws prescribe a certain scope of exceptions (exclusions or exemptions) that allow for the protection of information from public disclosure. Compared to the system of exclusions that completely excludes certain types of information from the application of the RTI Law, the system of exemptions is more suited to the purposes of transparency since it allows for the application of the public interest test on a case-by-case basis. The international standard requires that exceptions to access to information are set down precisely in law, are necessary in a democratic society, and are proportionate to the aim of protecting particular legitimate interests.[46] Interests include public and private interests.[47] The exceptions should be time-limited. Also, as a standard, the implementation of exceptions should be subjected to the review of an independent second instance authority and/or the court. The Croatian Constitution stipulates the same restrictions in the Article 38§4.

7.1 Scope of Exceptions

7.1.1 Exclusions

Exclusions, as information that is excluded from the scope of the RTI Law (Article 1§3–5), include the special position of the requestor, intelligence information, and international classified information.[48] In cases of exclusion, the public authority issues a notice informing the requestor that the information is excluded from the scope of the RTI Law and indicates alternative means for obtaining information. The special treatment of this kind of information is recognised in comparative law, but their position is different, either as exclusion or as an exemption.[49]

[46] Article 3 of the Council of Europe Convention on the Access to Official Documents.

[47] See OECD Sigma (2010).

[48] International classified information: classified information of international nature that is held by international organisations or other countries and classified information of public authority bodies, originating or exchanged within the framework of cooperation with international organisations or other countries (Article 1§5).

[49] Rajko (2014) warns of the essential difference between exclusions as a complete exclusion from the application of a regulation, and exemptions as access restrictions, and emphasises the importance of a control of the excluded information. Therefore, it is recommended to regulate additional protective instruments in relation to information security and intelligence system (p. 425). Currently, the security and intelligence legislation is under revision.

Citizens often use RTI requests when confronted with difficulties in obtaining information *in causa sua*, when they act as parties or have otherwise recognised legal interest for particular information, other than a public interest for public disclosure. Access to own file is also one of the rights granted by the Charter of Fundamental Rights of the EU (Article 41§2/b), along with the right to access documents (Article 22). In these cases, if a particular law allows the party (or the person with legal interest) access to files, then RTI does not apply. The exclusion is based on the reasoning that the party is granted a greater possibility of access to its own file (e.g., personal information on other parties) than the public when it comes to public information (e.g., personal information would be protected). Most often, cases are related to parties' access to files in administrative, criminal, or civil proceedings regulated by the respective procedural law. However, if under the special regimes access is to be restricted, the person could require access to the documents in its own file as any beneficiary of the RTI Law. According to the IC ARs,[50] around 8.40% and 12.20% of silence of administration appeals are dismissed annually due to inadmissibility, because the appellant was ensured access to the information as a party (34 cases in 2016, 44 in 2015, 38 in 2014).

7.1.2 Exemptions

The list of exemptions in the RTI Law generally adheres to international standards. It consists mainly of (a) law-based exemptions that aim to protect a certain type of information that itself is protected by a special law (such as personal data, commercial secret, tax secret) and of (b) procedure-based exemptions that aim to protect legal procedures and the functioning of institutions (such as administrative procedures, inspections, or court procedures). The RTI Law requires that the information is designated as protected information by the special law or procedural law. For example, the economy of the state, monetary and financial issues, as well as defence and national security, which are internationally recognised as protected interest, are not prescribed explicitly as exemptions, but must be designated as classified information in a formal procedure according to Law on Data Secrecy.[51]

[50] AR (2016), p. 33; (2015), p. 68; (2014), p. 69.

[51] An official or state secret, a general term that previously allowed any information to be withheld on the grounds of secrecy, has not constituted a legal institute since 2007 when the Law on Data Secrecy, according to NATO rules, introduced the new regime which requires that the confidential information be designated as such.

Among the exemptions regulated in Article 15 of the RTI Law, one can distinguish one case of mandatory exemption (criminal investigations procedure) and three types of relative exemptions concerning legally protected types of information (e.g., personal data, commercial secret), information relating to legally determined procedures (court proceedings, oversight procedures), and, as a third case, information that is not completed or is a part of the deliberation process. In comparison to mandatory exemptions, relative exemptions are subjected to the public interest test.

* * *

Data on the grounds for refusal and dismissal of the request or the issuing of a notice as reported by the public authorities and displayed in the ARs for the period 2013–2016 is presented in Table 9.4. The data on the number of appeals in the period 2014–2016 with regard to the grounds for the decision or a public authority's notice is presented in Table 9.5. The data indicates the frequency, the share, and the rank of the bases for refusal for each year.

As the data in Table 9.4 suggests, the most used exceptions prescribed in Article 15 are personal data protection (15%–24%), followed by criminal investigations (8%–14%), commercial secrets (5%–7%), professional secrets (3%–7.50%), classified information (8%–3%, decreasing), and other legally protected information (4%–6%, decreasing). On average, more than 100 requests are refused on the basis of the protection of personal data each year. However, looking at the total number of requests, a significant share continues to be not proceeded further, based on the fact that the requested document is not considered as information according to the RTI Law. These requests accounted for almost one third of cases up until 2015 (165% or 28.25%), but their number sharply dropped in 2016 to 51% or 9.88%, indicating that both beneficiaries and information officers have become increasingly aware and skilled at requesting and dealing with requests which represent other types of information (e.g., one's own records). Similarly, the data on appeals (Table 9.5) shows that refusals on the grounds of data protection constitute 15–20% of all appeals annually. However, they have been removed from the leading reason given the high number of refusal decisions on the grounds of misuse of the right to information. These constituted almost one quarter of all appeals in 2016, but none of them were upheld by the IC. Commercial secrets' share in the number of appeals ranges between 5% and 7%, while the number of appeals

Table 9.4 Reasons for public authorities' refusal of requests 2013–2016

Year	*2013*			*2014*			*2015*			*2016*		
Reasons for refusal/dismissal	No.	%	Rank	No.	%	Rank	No.	%	Rank	No.	%	Rank
Criminal investigation	50	10.53	3	96	14.06	3	47	8.05	3	41	7.95	4
Classified information	40	8.42	4	26	3.81	9	20	3.42	9	19	3.68	10
Commercial secret	29	6.11	7	50	7.32	5	45	7.71	4	28	5.43	6
Professional secret	22	4.63	8	51	7.47	4	21	3.6	8	16	3.1	12
Tax secret	6	1.26	12	9	1.32	10	12	2.05	12	24	4.65	9
Personal data	80	16.84	2	107	15.67	2	138	23.63	2	106	20.54	1
Copyright	12	2.53	10	1	0.15	12	11	1.88	13	7	1.36	13
International relations	8	1.68	11	1	0.15	12	1	0.17	15	2	0.39	15
Other legal basis	31	6.53	6	39	5.71	7	29	4.97	5	33	6.39	5
Proceedings (judicial, administrative)	40	8.42	4	41	6	6	24	4.11	7	28	5.43	6
Inspection, supervisory procedure	12	2.53	10	9	1.32	10	6	1.03	14	4	0.78	14
Preparatory information, deliberation	19	4	9	38	5.56	8	19	3.25	10	25	4.84	8
Misuse of the right (vexatious)	–	–	–	–	–	–	28	4.79	5	19	3.68	10
No basis for correction or completion	n/a	n/a	n/a	n/a	n/a	n/a	18	3.08	11	115	22.29	2
Not information	126	26.53	1	215	31.48	1	165	28.25	1	51	9.88	3
Total	**475**			**683**			**584**			**516**		

Source: Author, based on IC AR (2016), p. 26; (2015), p. 60; (2014), p. 57; (2013), p. 27

Table 9.5 Appeals according to reasons for request refusal 2014–2016

Year	*2014*			*2015*			*2016*		
Reasons for the refusal/ dismissal	No.	%	Rank	No.	%	Rank	No.	%	Rank
Criminal investigation	8	3.51	8	3	1.69	11	11	5	7
Classified information	10	4.39	7	7	3.95	7	3	1.36	13
Commercial or professional secret	56	24.56	1	12	6.78	4	24	10.91	3
Tax secret	4	1.75	10	6	3.39	8	6	2.73	11
Personal data	37	16.23	3	34	19.21	2	31	14.1	2
Copyright	3	1.32	11	0	0	0	7	3.18	10
International relations	1	0.44	13	0	0	0	1	0.45	15
Other legal basis	3	1.32	11	6	3.39	8	6	2.73	11
Proceedings (judicial, administrative)	13	5.7	6	9	5.08	6	11	5	7
Inspection, supervisory procedure	0	0	0	2	1.13	12	3	1.36	13
Preparatory information, deliberation	14	6.14	5	2	1.13	12	14	6.36	6
Misuse of the right (vexatious)	–	–	–	12	6.78	4	52	23.64	1
No basis for correction or completion	8	3.51	8	5	2.82	10	10	4.55	9
Does not hold the information	38	16.67	2	32	18.08	3	24	10.91	3
Not information	33	14.47	4	47	26.55	1	17	7.28	5
Total	**228**			**177**			**220**		

Source: Author, based on IC AR (2016), p. 39; (2015), p. 75; (2014), p. 73

against decisions refusing disclosure due to the classified nature of the information has significantly decreased in the period 2014–2016.

Mandatory (Absolute) Exemption: Criminal Investigations, for the Duration of Such Procedures (Article 15§1)

A pending criminal investigation is an absolute impediment to the disclosure of information, which does not allow for a public interest test. The reason for an exclusion is to ensure the efficiency of the procedure. However, upon finalisation of the procedure, the information is treated as any other information and can be subjected to a public interest test. Requests denied on the basis of the fact that a criminal investigation is pending constituted between 7.95% and 14.06% of all cases of denying

access in the period 2013–2016, with 47 and 41 cases in 2015 and 2016. This exception generated 5% of appeals in 2016, slightly more than previous years. Out of six closed cases in 2014, the IC upheld the decision of the public authority in three cases (50%), while in 2015 and 2016, out of three appeals on the same grounds, the IC found the refusal to be justified in two cases in 2015 (66%) and in one case in 2016 (33%).

Discretionary (Relative) Exemptions: Law Based (Article 15§2)

Personal Data Personal data protection constitutes the second most frequent exemption to access to information, with more than 100 refusals annually (107 in 2014, 138 in 2015, 106 in 2016) on the grounds of personal data protection (Table 9.4).[52] Moreover, if only looking at the exemptions defined in Article 15, this is the most frequent reason for refusal (one third of all cases in 2015 and 2016). Appeals against decisions on refusals on these grounds constitute between 15% and 20% of all appeals (Table 9.5). However, a decision on the refusal of access on the grounds of personal data protection was found to be unjustified in almost 50% of all cases in 2015 and in 75% of all cases in 2016, while the IC upheld the first instance decision in only 5 cases out of 17 in 2014 (29.42%).[53] In practice, the most obvious cases of misunderstanding the character of personal data are related to public authorities' refusal to disclose information on the salaries of public officials or public servants, on contracts for consultancy services, on employees, on members of working groups, and similar information that clearly is of public relevance and in public interest.[54]

Commercial or Professional Secret This exception pertains to the information which is designated as commercial secret or is considered a professional secret according to the Law on the Protection of Data Secrecy.[55] The information must be determined as commercial secret in line with the

[52] Law on Personal Data Protection, OG 106/2012. Personal data protection is also defined as a constitutional right in Article 37.

[53] Cf. IC AR (2016), p. 42; (2015), p. 77; (2014), p. 74.

[54] IC Case no. UP/II-008-07/14–01/74 Beneficiary vs. County Court in Osijek (personal information – professional qualifications); High Administrative Court, Judgement no. UsII-104/14–4, 5 February 2015, County Court in Osijek vs. Information Commissioner. IC Case no. UP/II-008-07/15–01/193 Beneficiary vs. Constitutional Court (personal information – work experience) and related judgement of High Administrative Court, no. UsII-121/16–9 Constitutional Court vs. Information Commissioner.

[55] OG 108/1996; Articles 19–26 (commercial secret) and 27 (professional secret) are still in force, while the rest of this Law was replaced by the 2007 Law on Data Secrecy.

Law and general acts of the public authority. According to the public authorities' reports (Table 9.4), the commercial secret was a reason for refusal in 5–8% of cases, with 29 cases in 2013 (4.63%), a rise in 2014 and 2015 (50 and 45 cases, around 7%), and a drop in 2016 (28 cases, 5.43%). Similarly, after an increase in 2014 when it was a reason for refusal in 51 cases (7.47%), the professional secret became less evoked in 2015 and 2016 (3.60% and 3.10%). Moreover, the number of appeals before the IC (Table 9.5) regarding the refusals on the grounds of commercial or professional secret sharply dropped from 56 in 2014 when it constituted almost a quarter of all appeals to only 12 appeals (6.78%) in 2015 and rose again in 2016 to 10.91%. The most important challenges in this respect pertain to the public authorities' inclination to define as a commercial secret any information that is connected to contractual relations and to disregard the legal definition of commercial secret. The most important examples of refusals that were found not justified by the IC and the court include salaries of board members in public companies and the contracts on the lease of premises that public authorities conclude with private firms.[56] The fact that the public authorities use commercial secret exemption as an exemption of last resort, trying to prevent the disclosure, is visible from the fact that out of 31 closed appeal cases in 2015, the IC upheld the first instance decision in only 3 cases (less than 10%), the same as in 2016 when this happened in 3 out of 26 cases (11.54%).

Classified Information This exception pertains to information which is classified according to the Law on Data Secrecy,[57] which defines authorities and the type of information that can be classified, as well as the levels of classification, and the procedure of declassification. In cases where the requested information is classified, prior to the implementation of the public interest test, the public authority which is the owner of the information must request the Office of the National Security Council's opinion. In practice, despite the public perception of the wide use of this

[56] IC Case no. UP/II-008-07/14–01/289—GONG vs. Ministry of Justice on the lease of premises; High Administrative Court, Judgement no. UsII-14/15–6, 22 May 2015, Ministry of Justice vs. Information Commissioner; IC Case no. UP/II-008-07/14–01/521 Orah vs. Ministry of Environment on the lease of premises; High Administrative Court, Judgement no. UsII-13/15–6, 5 June 2015, Ministry of Environment vs. Information Commissioner; IC Case no. UP/II-008-07/14–01/226 Beneficiary vs. Ministry of Economy; High Administrative Court, Judgement no. UsII-209/15–8, 27 January 2016, Ministry of Economy vs. Information Commissioner.

[57] OG 79/2007, 86/2012.

exemption, it does not bear a significant weight. According to public authorities' reports (Table 9.4), the refusal of a request on the basis of this exemption constituted around 3% of all refusals in the period 2014–2015, with decrease from 40 cases in 2013 to 19 cases in 2016. Similarly, the number of appeals (Table 9.5) dropped from ten to three, from 4.39 to 1.36%, which makes this exemption the least used in 2016. However, the IC upheld first instance decisions in only two out of six cases that were closed in 2015.[58] In 2014, the IC upheld first instance decisions in only one out of seven cases.[59] The decline in the number of requests refused on the grounds of classified information can be explained by the better enforcement of data secrecy legislation and the fact that public authorities not entitled to classify information (such as agencies, schools, or hospitals) have ceased to call upon this exemption, due to the more effective education of public authorities. An important point is the contradiction between the RTI Law and the Law on Data Secrecy, which was adopted six years before the RTI Law and is currently under revision. For example, the court overturned a recent IC decision which ordered the Government to declassify and to release data on the costs of legal advice in cases before the Hague Tribunal. The court found that the IC has wrongly applied material law and that the Law on Data Secrecy does not allow for the examination of the IC's reasons for classification.[60]

Tax Secret A tax secret is defined as an exception in the General Tax Law (Article 8),[61] applied as a rule by the Tax Administration, a semi-autonomous agency of the Ministry of Finance. The number of requests denied on that basis ranges from 6 in 2013 to 12 in 2015 and 2016, constituting between 1% and 5% of all refusals. Appeals on refusals on the grounds of being a tax secret constitute up to 3.39% of all appeals. In 2016, the IC upheld the refusal decision in two out of seven cases.

[58] Cf. IC AR (2015), p. 77.

[59] Cf. IC (AR 2014), p. 74.

[60] See IC Case no. UP/II-008-04/13–01/314 Gong vs. Government of the RC on the legal services contract (classified information); High Administrative Court, Judgement no. UsII-49/14–6, 15 November 2014, Government vs. Information Commissioner.

[61] OG 147/2008, 18/2011, 78/2012, 136/2012, 73/2013, 26/2015.

Other Legally Protected Information Other exemptions prescribed in Article 15§2 lead to less frequent refusals. Copyright[62] was evoked as a reason for refusal in less than 2% of cases in the past years (e.g., 11 cases in 2015, 13 in 2016), leading to seven appeals in 2016 (Table 9.5). In practice, copyright cases emerge most often when beneficiaries request expert reports or studies developed for public authorities by third parties on a contractual basis.[63] International information[64] constituted the basis for refusal in four cases in the period 2014–2016 (Table 9.4), followed by one appeal that led to the annulment of the decision.[65] Finally, Article 15§2(7) envisages that information can be protected by a special law.[66] This exemption was used in approximately 5% of cases (seven in 2015, five in 2016), leading to six appeals each year (around 3%).[67]

Discretionary (Relative) Exemptions: Efficiency of Procedures and Oversight (Article 15§3)

Legally regulated procedures are usually protected from the spotlight as long as they are pending. Thus, a public authority may, on the basis of public interest test, restrict access to information if there is a reasonable doubt that the disclosure might (1) prevent the efficient, independent, and unbiased unfolding of court, administrative or other legally regulated proceedings, or the execution of court orders or sentences or (2) prevent the work of the bodies conducting administrative supervision, inspections, or other legality supervision. According to public authorities' reports

[62] Law on Copyright and Related Rights OG 167/2003, 79/2007, 80/2011, 125/2011, 127/2014.

[63] IC Case no. UP/II-008-04/13–01/318—Beneficiary vs. Government of the RC on the opinion of the working group; High Administrative Court, Judgement no. UsII-60/2014–6, 21 August 2014, Government of the RC vs. Information Commissioner.

[64] The information restricted pursuant to international treaties or (2) information arising in procedures of concluding or acceding to international agreements or negotiations with other countries or international organisations, until the completion of such proceedings, or (3) information arising in the area of diplomatic relations.

[65] IC Case UP/II-008-07/15–01/234, Beneficiary vs. Ministry of Foreign and European Affairs (appointment of diplomats).

[66] For example, medical secret (Law on Medical Profession), banking secret (Law on Credit Institutions), and so on.

[67] IC Case UP/II-008-07/15–01/54, Beneficiary vs. State Electoral Commission (voting ballots).

(Table 9.4), the exemption was used in 5–10% of cases in the period 2014–2016, with a clear decline in number of refusals on these grounds (52 in 2014, 50 in 2015, 30 in 2015, and 19 in 2016), followed by 11 to 13 appeals. The cases most often pertained to requests to disclose inspection reports or information regarding court or administrative procedures. For example, in 2015 the IC upheld an appeal against the decision of the Ministry of Agriculture refusing access to the findings of a forest inspection on forest devastation.[68]

Discretionary (Relative) Exemptions: Documents in Preparation or Deliberation (Article 15§4)

The 2015 amendment to the RTI included the two special exemptions, in line with comparative examples and international standards, concerning information that is not finalised, as well as the exchange of views for the purpose of deliberation. In sum, exemptions pertain to information that is not completed (drafts or parts of a future document) or to information exchanged in the process of decision-making. A constitutive element for protection is the reasonable doubt that disclosure may damage the final outcome (in case of preparatory information), or could lead to incorrect interpretation, threaten the process of adoption of the regulation or act, or inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation. The public authority must conduct a public interest test. However, in contrast to other exemptions which are time-limited (the information is eligible for disclosure after the reason for exemption ceased to exist), access to preliminary information may be restricted even after the finalisation of information, if such disclosure could seriously damage the decision-making process or the expression of opinions or would lead to an incorrect interpretation of the content of the information, unless there is a prevailing public interest for its disclosure. According to the public authorities' reports (Table 9.4), these exceptions have constituted the basis for the refusal in 3–5% of cases, ranging from 38 cases in 2014 to 10 in 2016. The decisions led to 14 appeals in these years (Table 9.5).

[68] IC Case UP/II-008-07/14–01/203, Beneficiary vs. Ministry of Agriculture (inspection report).

7.2 The Public Interest Test and Partial Disclosure of Information

Discretionary exemptions are subjected to the proportionality and public interest test (Article 16) meaning that a public authority may conclude, based on arguments, that there is an overriding public interest in disclosure of the protected information. In performing the test in each individual case, the public authority must determine whether access to information may be restricted for one of the legally prescribed reasons and then (1) assess whether there is a public interest in favour of the disclosure (such as accountability, democratic procedure, integrity, legality, etc.), (2) assess whether granting access to requested information would seriously damage protected interests (public interest in protecting the information), and (3) determine the weight of public interest in favour of disclosure and against it including the balance between the two. If public interest prevails over the damage that could be inflicted to protected interests, the information should be disclosed. The results of the public interest test do not set a precedent for future cases but serve as orientation for similar cases depending on the circumstances.

With regard to classified information, the public authority (the owner of the information) must request the Office of the National Security Council's (16§2) opinion on the justification of the classification, which is then used as an argument for or against disclosure (or can provoke the declassification of information). However, information on public spending is not subjected to a public interest test insofar as it does not concern classified information (16§3). In other cases of public spending, information is regularly disclosed even if it entails protected information in line with the principle of proportionality and necessity.[69] Namely, the RTI Law allows that the information is partially disclosed (Article 15§5), in case that some parts of a document containing parts of information that are subjected to the restrictions of the second and third group (exemptions regulated by special laws or related to legally regulated procedures and supervision) must be protected, as a result of a public interest test. The remainder of the document is then made public. On the other hand, information on criminal investigations or information on preliminary documents or deliberations cannot be partially disclosed (first and fourth

[69] For example, information on contracts containing a personal name can be disclosed, but other personal data cannot, such as an address, a personal identification number, or similar.

group). Public authorities report that partial access was granted in 796 cases (2.76%) in 2013, 511 cases (2.33%) in 2014, 296 cases (1.66%) in 2015, and 366 cases (2.11%) in 2016.[70] The low percentage of partial disclosures justifies two other conclusions. As stated in IC AR (2015: 79), public authorities tend to restrict access to the whole document disregarding the possibility of partial disclosure. Also, they frequently fail to conduct a public interest test properly, with the argumentation mostly reserved to the establishment of facts—that there is information, that it represents excepted information, and thus should be protected.[71]

7.3 Time Dimension

With regard to the time dimension, the applicability of exemptions is not absolute. In the case of mandatory exemption, the closure of a criminal investigation constitutes a reason for the cessation of the exception. In the case of discretionary exemptions of the second and third group, the information becomes accessible once the reasons for the exemption cease to be valid (Article 15§7); for example, the information is declassified, the circumstance that justified the commercial secret have significantly changed over time, or similar. In addition, copyright protects the information up to 20 years, if not stipulated otherwise (§6). Finally, with regard to the fourth group of exemptions (preliminary information and deliberations), the restrictions may last even after the information is completed if the disclosure could seriously damage the decision-making process or the expression of opinions or could lead to an incorrect interpretation of the content of the information, unless there is a prevailing public interest for its disclosure (§6).

7.4 Third Party Consent

Third party consent is not a condition for the disclosure of information. However, the holder of the copyright may explicitly give consent to disclose information in writing (Article 15§2/5). However, third party con-

[70] Cf. IC AR (2016), p. 25; (2015), p. 59; (2014), p. 55; (2013), p. 24.

[71] Cf. IC AR (2016), p. 44. Gardašević (2011) argues that the RTI Law requirement that public interest test be 'motive blind' (since the beneficiary must not be requested to state the purpose of the RTI request) has a negative impact on the quality of the test itself. Thus, stating the purpose would force public authorities to take into account the public interest in disclosure.

sent could have weight in the procedure with regard to personal data protection, tax secrets, and commercial or professional secrets. Also, a third party could claim damages before the court that occurred to it due to an illegitimate decision.[72]

7.5 Non-existence of Information

In cases when the public authority is not in possession of information and has not got any knowledge on the location of information, the request is to be dismissed. The beneficiary has the possibility to lodge an appeal challenging such decision (Article 23§4), and the IC may have to conduct an investigation procedure. The public authority is not authorised by law to deny the existence or non-existence of requested information whenever the very fact of the information's existence or non-existence is itself classified or can jeopardise the secrecy of the information requested. In practice, the issue of non-existence of information frequently emerges in cases when beneficiaries request statistical data or analyses on existing information. As reported by the IC,[73] decisions dismissing a request due to the non-existence of information generate between 20 and 40 appeals per year, with only one third of the appeals proving to be unjustified (e.g., 10 out of 33 in 2016).[74]

8 Fees and Costs

Access to information procedures before public authorities, the IC, or the court does not require the payment of any administrative or court fees. Consequently, from the financial cost aspect, the beneficiaries' possibility to pursue their right to information is not expected to be prevented by incurring costs. Charging a fee is allowed only with regard to actual material expenses incurred by providing information such as printing, scanning, copying, and postal costs, according to the criteria set by the IC (Article 19). Public authorities cannot charge the beneficiary for expenses related to employees' labour and are obliged to provide beneficiaries with a calculation of the expenses upon reception of the request.

[72] Article 14 of the Law on State Administration prescribes the responsibility of the state for damages occurred due to illegitimate or irregular decision or activity (wrongdoing).

[73] Cf. IC AR (2016), p. 39; (2015), p. 59; (2014), p. 55; (2013), p. 24.

[74] Cf. IC AR (2016), p. 40.

Table 9.6 Costs 2013–2016

Year	*No. of public authorities*	*No. of adopted requests*	*Total amount charged (EUR)*	*Amount charged per (adopted) request (EUR)*
2013	3452	23,852	19,786.00	0.83
2014	4058	19,299	4271.76	0.22
2015	4539	15,428	1590.00	0.10
2016	4759	16,163	7476.00	0.46

Source: Author, based on IC AR (2013, 2014, 2015, 2016)

The fee-charging criteria are determined by the IC[75] and published, along with public authorities' obligation to publish a pricelist (based on criteria) on their websites (Article 10§1/14). The criteria set the amounts for particular types of expenses and establish three rules. First, public authorities are not obliged to charge the beneficiary if the calculated amount is less than 50 kunas (6.66 EUR), for the purpose of economy and efficiency and for the sake of proportionality in the exercise of beneficiaries' rights and the protection of public interest. Second, if the amount is higher than 150 kunas (20 EUR), the costs must be paid in advance. Third, if the documents are not listed in the criteria, the public authority must determine the charges according to the average market price. This rule is important, since many public authorities were inclined to charge well above market price.

The data on fee-charging as presented in the ARs (Table 9.6) shows that the total amount charged was in decline in the period 2013–2016, with a slight increase in 2016. In this period, the average amount charged per request did not exceed 1 EUR (0.4 EUR on average). Also, approximately 97–98% of public authorities report that they have not been charging for information disclosure.

The decline in the total amount of charges from almost 20,000 EUR in 2013 to 1590 EUR in 2015, as well as the decline in the average charge per request, despite the growth in the number of reporting public authorities, can be attributed to greater proactive disclosure, to electronic delivery,[76] to public authorities' greater awareness of the IC's criteria, as

[75] Criteria for determining the charges for material costs and postal costs related to the information, OG12/2014.

[76] The provision of Article 17§2 instructs public authorities to use electronic delivery as the most economical means, if otherwise not requested by the beneficiary (e.g., postal delivery).

well as to the fact that expenses below 50 kunas do not have to be charged, but, most importantly, to the fact that during that period public authorities have been increasingly aware of the right to information and of the IC's monitoring role. On the other hand, the increase in charging in 2016 might be attributed to public authorities' attempt to recover a part of their expenses, especially in relation to the same beneficiaries after a period where no fees were charged.

The greatest challenge to exercising the RTI is the special price list for particular public bodies' specific information such as documents under special regimes: statistics, archives, and financial information, for example. In addition, under new cost-recovery rules in administrative disputes (April 2017), the party that loses the dispute must bear the other party's costs (representation, material costs), which could prevent beneficiaries from seeking a legal remedy before the court, but also lead to significant costs for the IC.

9 Administrative and Judicial Remedies

As shown in Chap. 1, the legal protection of the RTI went through three phases—from internal review and judicial protection before the Administrative Court in the period 2003–2010, to protection before the Agency for Personal Data Protection and the administrative courts in the period 2011–2013 (first instance administrative courts 2012–2013), to protection by the IC and the High Administrative Court (HAC) from 2013 onwards.[77] Also, in order to ensure the effective protection of citizens' rights and greater accountability of public bodies according to the general principles of administrative law in Europe, the general administrative procedure was significantly reformed in 2009, which was followed by the administrative justice's reform in 2010,[78] now encompassing two-tiered administrative judiciary.

The RTI's protection system in Croatia fulfils the requirement of establishing supervision by an independent, specialised, and centralised body, both at the level of administrative protection (the IC) and judicial protection (the HAC), thus promoting a harmonised approach.

[77] A similar oversight model by the independent body exclusively in charge for access to information was also adopted in Scotland and Ireland (commissioner), as well as in France, Belgium, Italy, Portugal, and Macedonia (commission). For details see Musa (2014).

[78] Law on Administrative Disputes, OG 20/2010, 143/2012, 152/2014, 94/2016, 29/2017, in force from 1 January 2012.

In addition, these instances are entrusted with enforceable adjudicatory powers.[79] Administrative oversight includes the IC's authorization to conduct appellate procedures and control inspections (investigations), as well as to sanction breaches of the Law. The IC has access to any requested information, including classified information. If the request pertains to classified information, the IC must seek the Office of the National Security Council's opinion (Article 25§6). An appeal to the IC can be lodged within 15 days against the decision, or it may also be lodged due to the silence of administration of any public authority bound by the RTI Law.[80] The IC has 30 days to issue a decision, 60 days if a public interest test must be performed, or 90 days if classified information is sought. The IC's decision cannot be vetoed by any public authority, but may only be challenged before the court.

In practice, the greatest challenges for the handling of appeal cases are the long duration of the procedure, the slow reaction of the public authorities, and the IC's insufficient capacities in relation to the scope of affairs designated to the IC, both with regard to the number of employees and to the financial resources available. Since 2014, the IC has been receiving between 600 and 650 appeals annually, with slightly less than two thirds of appeals being lodged due to silence of administration (60–64%). The low number of appeals in comparison to the number of requests submitted annually (17,000–18,000 requests, 3–5% appeals) might indicate that public authorities tend to disclose the information, as well as that citizens are not aware of their right and of the possibility of protection. The share of silence of administration cases indicates a problem in responding on time, which can partially be attributed to the public authorities' organisational capacity to meet the demands of complex requests, as well as the shortness of the timeframe (15 regular days, not working days). Similarly, the IC often fails to close the case within the time limit due to the case log that has been increasing since 2011. The case log is a result of the increased number of appeals, which has not been followed by an increase in the IC's capacity to meet the demands. However, effectiveness has increased; the case closing rate in 2015 was

[79] Cf. OECD Sigma (2010), p. 42.

[80] Under the 2011 regime, appeals against decisions by the Croatian Parliament, the President, the Government, the Supreme Court, the Constitutional Court, and the Chief State Attorney were not allowed, but the beneficiary could seek protection directly before the administrative court.

66.40%, with regard to all appeal cases, compared to 58.10% in 2015, and the case closing rate with regard to the number of appeals received in a particular year grew from 84.29% in 2015 to 106.14% in 2016 (Table 9.7).

According to the statistical data presented in Annual Reports, the IC predominantly does not uphold the decisions of public authorities; in 2015, the IC found the appeal valid and annulled the first instance decision in more than 50% of cases, and in 2016 the share of unjustified refusals rose to 70%. Thus, contrary to the first instance decision of the public authority, the IC either ordered public authorities to provide beneficiaries with access to the requested information (22.84% in 2015, 30.57% in 2016) or to renew the first instance procedure (24.84% in 2015, 40.10% in 2016). In addition, the number of petitions, with beneficiaries mostly complaining of non-publication of documents, is constantly increasing (65% more in 2016, compared to 2015), indicating that public authorities tend to disrespect their legal obligations. From mid-2015, the IC's inspector-advisors have conducted investigations (inspections), imposing 384 measures in total, based on 48 (in situ) investigations, on average 8 measures per public authority (relating to the publication of documents and to the conducting of procedures or public consultations).

However, the number of sanctioning procedures instituted before misdemeanour courts could show a low sanctioning rate (3–7 cases per year, a total of 17 in the period 2014–2016), which obviously does not correspond to the overall picture of the illegality in RTI procedures, indicated by the number of valid appeals and petitions, as well as the measures imposed based on investigations (270 measures in 2016). Still, the IC is reluctant to institute sanctioning procedures more often, mostly because of the procedural burden it puts on offices with low capacities and the uncertain success of the misdemeanour procedure (only two sanctioned heads of authority in the period 2014–2016), mostly due to the long duration of the procedure, the tendency of the courts to dismiss the proposal for sanctioning if it has not been signed by the offender (which is most often the case), as well as the fact that public authorities themselves cannot be sanctioned from mid-2015.

The IC's decisions are reviewed upon complaint by the HAC, the second instance of administrative judiciary. Compared to the 2011–2013 system when only beneficiaries could institute court proceedings, under the current regime, complaints may be lodged by both beneficiaries and public authorities in case they are not satisfied with the IC's decision. Also, beneficiaries may lodge a complaint if the IC

Table 9.7 Information Commissioner—appeals and supervision 2013–2016

	Office		*Appeals*					*Monitoring and supervision*		
Year	No. of employees in the legal service of the IC (appeals + investigations)	Budget (EUR)	Submitted appeals (excl. silence of administration	Appeal cases in procedure	Silence of administration appeals/total appeals	Cases closed	Cases closed/ total cases	Petitions	Investigations	Sanction procedures instituted
	No.	EUR	No.	No.	%	No.	%	No.	No.	No.
2013	4 (4 + 0)	–	515 (184)	644	64.27	495	76.86	17	0	3
2014	4 (4 + 0)	244.712	658 (258)	807	60.79	524	64.93	59	0	4
2015	7 (5 + 2)	311.333	624 (222)	906	64.42	526	58.10	211	20	7
2016	7 (5 + 2)	390.137	635 (251)	1.015	60.47	674	66.40	324	28	6

Source: Author, based on IC AR (2013, 2014, 2015, 2016)

has not issued a decision within the prescribed time limits. The court must decide within 90 days and has access to any requested information, including classified information. The court's powers are broad; it can dismiss or refuse a complaint and confirm the IC's decision, or it can annul the decision and either issue its own decision or order the IC to issue a new decision.

The number of administrative disputes ranges between 29 and 40 in the period 2013–2015, with 33 complaints per year on average (Table 9.8). As a result of the IC's work overload, between 10% and 25% of disputes are initiated due to the silence of the IC. The share of the administrative disputes compared to the total number of decisions is 5–7%, indicating the overall acceptance of the IC's decisions. However, when the cases of silence of administration are excluded and the number of appeals closed each year (137 in 2014, 153 in 2015, and 239 in 2016) is compared to the administrative disputes instituted against the IC's decisions (37, 17, and 26), the share of the IC's decisions challenged before the court is slightly higher, but decreasing, from 27.01% in 2014 to 11.11% in 2015 and 10.88% in 2016. This decrease in the share of the disputes could indicate a greater confidence in the IC's decisions.

With regard to court decisions, the courts predominantly tend to uphold the IC's decisions, with the IC's decisions being annuled in 17.40% cases in 2013, 0% cases in 2014, 18.80% cases in 2015 and 11.10% cases in 2016, most often due to procedural reasons. Cases before first instance courts tend to last longer than legally prescribed, with six cases initiated in 2013 and 2014 that were only settled in 2016.

Finally, beneficiaries have the possibility to issue a complaint before the Ombudsman. There were few cases related to the silence of the IC as well as to the direct seeking of protection before the Ombudsman, who then instructed them to appeal to the IC. Also, the body of last resort is the Constitutional Court, but so far constitutional complaints have been lodged only in two cases related to requests submitted under the 2013 RTI regime. The Constitutional Court dismissed both constitutional complaints lodged by the public authority.[81]

The IC is obliged to submit an annual report to Croatian Parliament on the implementation of the Law. The reports are prepared based on the

[81] Both constitutional complaints were lodged by a state-owned reconstruction and development bank against the decisions of the IC and the HAC obliging the bank to disclose data on loans to natural persons.

Table 9.8 Administrative disputes 2013–2016

Year	*No. of administrative disputes*				*Administrative court's decisions*			*Outcome of the dispute*		
	Total	*Against the IC's decisions*	*Silence of administration of the IC*	*Against decisions on objections*	*Total*	*High Administrative Court*	*Lower courts*	*Complaint dismissed or refused (IC's decision upheld)*	*Termination of the procedure (complaint withdrawn)*	*Decision annulled*
2013	29	n/a	n/a	n/a	23	n/a	n/a	10	9	4
2014	40	37	4	0	40	35	5	36	4	0
2015	29	17	7	5	32	21	11	19	7	6
2016	34	26	8	0	45	39	6	26	8	5

Source: Author, based on IC AR (2013, 2014, 2015, 2016)

data received through the annual reports of public authorities, office statistics, and other information gathered by the IC. Upon a debate in the parliamentary committees and the debates in the plenary session, Parliament tends to accept the IC's reports unanimously.

10 Special Regime for the Media's Access

The constitutional basis and the legal framework regulating access to information by media and journalists have developed separately from general access to information regime.[82] The constitutional guarantee of access to information for journalists had already been introduced in the Constitution of 1990 (Article 37§3), being considered a key ingredient of freedom of expression and free speech and necessary for the democratic transition. On the other hand, citizens' right of access to information was only included in the Constitution in 2010, as a result of the anti-corruption and administrative reform efforts in the EU accession process in the period 2001–2013.

The special regime of access to information by journalists and media was established by the 2004 Law on Media in Article 6.[83] Similarities between the access to information by media and the general RTI regime include the equality of beneficiaries (6§1); the general obligation to provide accurate, complete, and timely information (§1); and the obligation of the head of the public authority to appoint the person responsible for ensuring the accessibility of information (§3). In practice, these are most often PR officers or other media relations persons, who often also serve as RTI information officers. The scope of public authorities that are bound by law roughly corresponds to the scope of public authorities of the RTI Law (executive, legislative, and judicial bodies, local governments, other legal and natural persons that perform public services or functions, §1).

The differences between the two access regimes include a special category of beneficiaries (journalists, §1), type of information (any information, including answers to questions as well as documents, intended for publication), and significantly shorter deadline for issuing a response (no longer than 3 days compared to the usual 15 days under the RTI regime). Although the Law on Media requires that the refusal be made in written form and that it state the reasons for the refusal (§6), it does not prescribe

[82] For details see Rajko (2012).

[83] Law on Media, OG 59/2004, 84/2011, 81/2013.

that the answer must be made in the form of administrative act nor that a public interest test be performed.

However, the main differences between the two regimes result from the obsolescence of specific provisions (§5 and 7), since changes in the legislation regulating secrecy (2007), administrative disputes (2010), and access to information (2011, 2013) were not addressed in later amendments to the Law on Media (in 2011 and 2013). For example, the legal protection defined in §7 as the possibility to lodge a complaint for illegal action to the court ceased to exist in 2010 with the new Law on Administrative Disputes. Thus, the provision on protection is ineffective. The official data on the number or content of such cases is not accessible. However, no matter whether the request submitted by journalist was titled as a request pursuant to the Law on Media or the RTI Law, it is possible to lodge an appeal to the IC if the information sought can be subsumed under the RTI Law definition of information. Still, journalists are usually not satisfied with the protection, since the RTI Law is more suitable for investigative journalism, while for everyday purposes their right as journalists to speedily obtain information is not legally protected. The low number of journalists lodging an appeal to the IC under RTI regime (less than 10%) supports that argument.

11 Special Regime for Access to Environmental Information

In accordance with international instruments and EU legislation,[84] the Croatian Law on Environmental Protection (LEP)[85] and the Government Regulation on Information and Participation of the Public and the Interested Public in Environmental Matters[86] regulate access to information, public consultations, and access to justice in environmental matters as three particular rights, thus establishing a special regime applied when the information pertains to the environment. The LEP prescribes a subsidiary application of the RTI Law (5§1 and 154). With regard to access to justice, it is explicitly prescribed that access to justice is ensured pursu-

[84] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention 1998); Directive 2003/4/EC on Public Access to Environmental Information.

[85] OG 80/2013, 153/2013, 78/2015.

[86] OG 64/2008.

ant to the law regulating access to information (Article 19 LEP), including the appeal procedure before the IC (158§6).

Access to information in environmental matters presumes both the proactive publication of information (Article 156 LEP; examples are listed) and the disclosure of information upon request (Article 157). The differences in relation to the RTI Law include the scope of authorities bound by law (state authorities, bodies of local government, and legal persons performing tasks related to the environment, thus including both the private and the public sector),[87] the character of the information (environment-related information, listed in Article 155 LEP), time limits (in line with the RTI Law, but notification on the extension is possible within 30 days), and the formal and material conditions for the dismissal and the refusal of the request (Article 158).[88] The obligation to perform a public interest test is prescribed in Article 158§5. In addition, a special obligation is prescribed for public authorities to inform the public about the specific procedures, such as in case of conducting environmental impact assessments (Article 160§1). The LEP (Article 165) prescribes a minimum of 30 days of public consultations.

The annual share of appeals to the IC related to environmental information is roughly 3–5% (18–29 appeals annually in 2014–2016), with three quarters of appeals related to silence of administration. A slightly greater share of silence of administration appeals (compared to general 66%) indicates that when it comes to environmental information, public authorities are even more inclined not to respond on time. The appellants are predominantly CSOs (55.17% in 2015, 100% in 2016). Moreover, two thirds of all appeals lodged by CSOs in 2014 were related to environmental information (28 out of 114, or 67.86%).[89] It is possible that the beneficiaries of environmental information (mostly CSOs) are more active and skilful than citizens in pursuing their right to information on environmental matters. In addition, datasets containing environmental information are frequently published as open data by the Ministry of Environment and

[87] For the shortcomings in the definition of public authorities bound by LEP as well as the general harmonisation or the lack of thereof with EU Directive, see Ofak (2016).

[88] The negative precondition for refusal is the fact that the information pertains to omissions (Article 158§4). The reasons for dismissal include incomprehensible or vague requests, information in preparation, internal information, in contrast to the RTI Law which prescribes the possibility of refusal for the latter two. The reasons for refusal are similar but the wording is different and obsolete (the LEP uses the term secrecy).

[89] Cf. IC AR (2014), p. 109.

the Agency for Environmental and Nature Protection, approximately 10% of all datasets published on the Open Data Portal pertain to environmental information.

12 An Overall Assessment of the Effectiveness of the RTI Law and Conclusions

The features and implications of Croatian RTI Law were discussed in the previous chapters. The overall effectiveness of the RTI Law can be assessed, with regard to the formal quality, as adherence to the recognised standards of the formal regulation; the practical implementation of the Law and the challenges it encounters; as well as the outcomes of the RTI system in general as it effects accountability, reduced corruption, and democratic processes, as well as the general protection and exercise of citizens' rights.

With regard to the formal content of the RTI Law, the previous analysis would offer two key conclusions. First, the Croatian RTI Law generally captures the key standards of the RTI Laws regarding the scope of application (broad definition of public sector bodies), beneficiaries, the definition of information, maximum disclosure, and limited exceptions subjected to the public interest test, relative flexibility of procedure, and the right to appeal and sanctioning by the independent institution.[90] It also includes other means for greater transparency and openness, such as public consultations and the re-use of public sector information. Still, in some aspects, the Law is silent, such as on issues like anonymous requests or the possibility of extension of the scope on private entities entering into contractual relations with public administration in the performance of public services (via outsourcing, concessions, etc.). It could be expected that the Law will have to deal with these issues soon in the future, along with a few issues that remain problematic, such as sanctioning. Second, the RTI Law cannot be seen as an isolated island, since it coexists with other legislative pieces that regulate specific issues that arise from its implementation, especially the regulation of administrative procedure and judiciary, the administrative system, sanctioning, and other laws which are considered as parts of the administrative information law, such as data secrecy legislation, data protection legislation, and so on, but also special access regimes, such as media law, environmental law, archives, or statistics. While systemic laws such as laws regulating general administrative procedure and administra-

[90] See Article 19 (2001).

tive justice have been significantly improved and modernised, particular legislation, such as data secrecy, media law, or archives legislation, still must be harmonised in order to reach the full potential of the RTI Law but also to capture the changes that have emerged in the last decade with regard to information dissemination, with technological change being most important. However, it can be expected that future development could favour proactive disclosure, which could make the request model of access less prominent.

With regard to the implementation of the RTI Law in practice, besides the problems arising from the inadequacy of the specific laws, the RTI Law encounters its own problematic areas, which can be seen within a triangle: public authorities/beneficiaries/independent oversight mechanism. Besides a general inclination to data hugging[91] and the resistance to transparency as a key principle of public service (and service orientation in general), public authorities lack the capacity to effectively implement the law, in terms of employees and in terms of the knowledge and skills of the persons designated as the information officers. It has been indicated by the problems with filling out annual report templates, the high share of annulled decisions and the high share of silence of administration cases discussed above, as well as the practical problems in small public authorities or frequent changes in staff in central administration. With regard to the beneficiaries, the key issue pertains to a low awareness of the RTI Law and a low trust in institutions. The arguments include the fact that a great share of appeals is lodged by one group of beneficiaries and the general public's unawareness of the effective protection mechanism. Thus, the key challenge in the future will be developing a greater public awareness, including the introduction of the RTI in the school curricula. Finally, with regard to the Information Commissioner as a third point of effective implementation of the Law, an inadequate capacity has so far been the greatest obstacle to effective implementation, since it has not followed a broad scope of tasks and a workload. The formal status of the IC and its Office thus has not been reflected in the position, image, and strength in practice. Consequently, the challenges to build an effective institution still persist.

In the end, the outcomes of the RTI system in general are much harder to assess. Whether or not it enhances democratic processes and the

[91] Data hugging is a term used to describe the reluctance to release data that is useful to show public authorities' attitude towards their information.

accountability of the public sector as well as reduces corruption could be analysed after a certain implementation log and based on a thorough analysis. However, the greater number of publicly displayed cases of wrongdoing that have emerged as a result of the RTI requests, or generally more informative websites, could indicate that the overall level of transparency has been gradually increasing.

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CHAPTER 10

Freedom of Information in Hungary: A Shifting Landscape

Petra Lea Láncos

1 Introduction[1]

Hungary in the twentieth century experienced a totalitarian regime where the state held absolute power over information, secluding its citizens from diverse information sources, centrally feeding its propaganda to the public, while fervently collecting data on its subjects through an expansive network of informants. With the change of political regime, this system was gradually transformed, aspiring towards a transparent state through unrestricted access to data of public interest and the exercise of democratic control. Concomitantly, guarantees for the protection of personal data were also laid down. In the 1990s, Hungary boasted a modern, technology-neutral, synoptic legislation guaranteeing informational self-determination

[1] I am indebted to Balázs Révész (NAIH) and Endre Győző Szabó (NAIH) for pointing me to the relevant sources.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_10

and freedom of information, which served as a model to other countries in the region. The institutional underpinnings of information rights were developed in a two-tier system, relying on ombudsman-like and judicial protection. In what follows, I describe the legislative development and concept of information rights in Hungary, detailing the most relevant sources. Next, I turn to the data categories under Hungarian law and the conditions for requesting access. Finally, I discuss available remedies and the overall performance of the system.

2 Legislative Development Regarding Information Rights[2]

In Hungary, the legal bases guaranteeing free access to information developed over several years, fragmented along the different facets of information rights. Development was kick-started following the change of political system in 1989. While in the socialist era the Constitution[3] declared the right to freedom of expression and the freedom of the press "in the interest of the workers," it remained silent on possible information rights otherwise indispensable for a viable, free press. Indeed, considering regulatory issues related to freedom of information was conditional upon ministerial permission.[4] Following the democratic turn in Hungary, the amended Constitution enshrined the fundamental right of free access to information together with freedom of expression and freedom of the press,[5] recognizing the complementary nature of these guarantees and foreseeing

[2] Besides the general act on data protection and freedom of information (Act No. LXIII/1992, replaced by Act No. CXII/2011) further, specific rules on the automatic publication or access to specific types of data were laid down in separate norms (e.g. Act No. LV/1990 on members of Parliament asset declarations, Act No. C/1997 on the election procedure regulating the disclosure of campaign expenditures, the "glass pocket act" No. XXIV/2003 on the use of public funds, Act No. CXXIX/2003 on public procurement, Act No. XLIX/2006 on lobby activities, Act No. CVI/2007 on national property, Act No. X/2008 on the publicness of tax returns of leading officials, Act No. XLV/2009 on the protection of classified information, etc.).

[3] Article 55 of Act No. XX/1949 on the Constitution of Hungarian People's Republic.

[4] Könyves-Tóth ironically notes: "of course we, that is those living in the system of socialist dictatorship of the proletariat had absolutely no problems regarding data protection, or the legal guarantees of other human and civil rights, for that matter." Könyves-Tóth (1990, 1992).

[5] Article 61 of Act No. XX/1949 on the Constitution of the Republic of Hungary:

(1) In the Republic of Hungary, everyone has the right to freely express his opinion and furthermore to access and distribute information of public interest.

(2) The Republic of Hungary recognizes and respects the freedom of the press.

a two-thirds majority for adopting relevant legislation. This high threshold for decision-making already indicated the need for a strong consensus in legislating on this politically sensitive issue. Namely, regulating access to information was the subject of great controversy in post-socialist Hungary, in particularly due to the legal, moral and historical problems of access to information held by former Hungarian intelligence services.[6] In 1989 the government called upon the Minister of Justice to submit a bill on data protection and access to data of public interest.[7]

A modern and path-breaking piece of legislation in its time, finally, the act on the protection of personal data and the publicity of data of public interest (Avtv.), was adopted in 1992.[8] As reflected in its title, Avtv. regulated both the protection of and the access to different types of data in a synoptic way.[9] An exemplary law, particularly for its dual structure,[10] Avtv. was the first piece of legislation in Central and Eastern Europe to include provisions on freedom of information.[11] The model character of Avtv. was further underlined by its broad definition of data, rendering it more adaptive to ongoing technological changes.[12] For the purpose of the institutional protection of information rights, Avtv. also established the office of Data Protection Commissioner.[13] The pioneering nature of Avtv. notwithstanding,[14] several provisions had to be amended, the most impor-

[6] "The regulation of the status of records kept by the intelligence services was just as controversial in Hungary, as in Germany. The legislator had to balance several opposing interests, including protecting victims, prosecuting and protecting criminals, transparency of public life, academic research and current affairs journalism." Küpper (2008). László Sólyom, the first president of the Constitutional Court of Hungary, drafted the first bill on freedom of information. The guiding principle underlying his draft was "to guarantee the privacy of the individual by dismantling the secrecy of the state." Sólyom (1988).

[7] Government Decision No. 3022/1989, http://abi.atlatszo.hu/index201.php?menu=avtortenet.

[8] Act No. LXIII/1992 on the protection of personal data and the publicity of data of public interest.

[9] Majtényi (2005).

[10] Polyák (2017).

[11] Kerekes (2012).

[12] Polyák (2017); Majtényi (2005).

[13] Act No. LXIII/1992, Chapter IV, Articles 23–27. Although the position of Data Protection Commissioner should have been filled by 1 October 1993 according to Act No. LIX/1993, consensus regarding the candidate could only be achieved in the summer of 1995 (Resolution of Parliament No. 84/1995 (VII. 6.)).

[14] Kerekes points out that the vague concepts, the random exceptions and the fact that only 4 of the 37 articles referred to freedom of information show how inexperienced the legislator was, nevertheless securing Hungary a prominent position in the transparency of the public sphere. Kerekes (2012).

tant of which from the aspect of information rights were the definition of ex officio disclosure obligations of state bodies,[15] the introduction of the concept of data public on grounds of public interest[16] and the specification of the conditions for rejecting requests for access to data of public interest.[17]

Following the political change in Hungary, one of the most important regulatory issues of access to information was coming to terms with the socialist past[18] through revealing the crimes committed by the socialist regime, lustration of public office holders and helping victims process the injustices they suffered.[19] While this issue was permanently on the regulatory agenda, several legitimate interests and rights had to be reconciled, hampering the legislative process. Meanwhile, a large share of the relevant documents were destroyed or went missing, rendering the process of coming to terms with the totalitarian past illusory.[20] After the first bill on access to the so-called III/III records[21] was withdrawn for its very limited scope,[22] a two-tier solution[23] was found to include under the scope of the 1994 Lustration Act all offices of public trust and those contributing to the formation of public opinion.[24] Yet the Constitutional Court held that the act law fell short of creating an efficient lustration law and declared in its Decision No. 60/1994 (XII. 24.) all information regarding the activities and membership in organizations contrary to the rule of law of persons holding public office or participating in public life, as well as data related to former agents, to be *data of public interest*. On

[15] Act No. XXIV/2003.

[16] Act No. XLVIII/2003; Kerekes (2012).

[17] Act No. XIX/2005.

[18] Varga (2000); Révész (2011).

[19] Ráth and Varga (2015).

[20] The situation was particularly precarious since "even the competent politicians couldn't know what records had been drawn up at the time and they didn't even attempt to pass a decision for the salvaging of the documents." Varga (2000). In contrast with events that took place in the former German Democratic Republic, where activists prevented the hiding and destruction of Stasi records, witnesses claim that Hungarian intelligence services succeeded in destroying a significant portion of such documents. Trócsányi notes that the remaining piecemeal records were insufficient to play a major part in coming to terms with the socialist past. Trócsányi (1999).

[21] "Unit III/III. of the Ministry of the Interior in socialist times was the hub of the secret police that among others, also kept a central archive." Küpper (2008).

[22] Könyves-Tóth (1992).

[23] Halmai (2005).

[24] Act No. XXIII/1994.

the basis of the right to informational self-determination, the Constitutional Court also found that those affected by the activities of the intelligence services shall have access and disposal rights over their relevant data.[25] In response, the legislator adopted the so-called Disclosure Act[26] with the aim of achieving "informational compensation" of victims of the regime. The act established a graduated system of access, which, depending on the status of the person seeking access (person under observation, operative contact person and collaborator, researchers, public at large), allowed for full access or access to anonymized data.[27] Although the Disclosure Act was amended[28] in 2005 following the German model, reclassifying all personal data on operative relationships, collaborators and staff of the intelligence services to be data of public interest,[29] in a much criticized decision,[30] the Constitutional Court found this amendment to be unconstitutional, pointing out that only the data related to persons participating in public life may be made accessible (Decision No. 37/2005. (X. 5.)).

[25] In contrast with the Stasi in former GDR, the erstwhile Hungarian intelligence service was retained with few changes following the political change and the perpetrators of the socialist regime, that is, the staff of the service was only gradually transferred or retired. Varga (2000); Halmai (2005). Ráth and Varga emphasize how important it would have been to pass the necessary law on lustration and access to documents, noting that the passing of time was of constitutional relevance, since the legislator acknowledged the situation without making use of its historical chance to lustrate the public sphere, and now, the cathartic moment is gone. Ráth and Varga (2015). Halmai asserts that one of the greatest debts the political change owed to the individual and society as a whole was informational compensation—a debt that has not been satisfied since. Halmai (2005).

[26] Act No. III/2003 (the Disclosure Act) on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security. László Sólyom also participated in the preparation of this draft law.

[27] Articles 3–5 of Act No. III/2003.

[28] Draft law T/14230 vom 30. Mai 2005.

[29] Article 5 paragraphs 4 and 5 of the amended law.

[30] According to Halmai, the Constitutional Court's decision actually frustrated any further attempt at an efficient informational compensation, since the competing rights of freedom of information and the freedom of scientific research were not considered in sufficient depth. Decision No. 60/1994 (XII. 24.) also shows dogmatic contradictions, since the personal data of public figures held by intelligence services were declared to be data of public interest, thereby blurring the distinction between personal data and data of public interest. This was remedied with the introduction of the concept of data public on grounds of public interest. Halmai (2005).

Act No. XLVIII/2003.

Majtényi et al. (2004); Halmai (2005).

Hungary may have been pioneering freedom of information legislation in the 1990s, yet already a decade later, technological advancements in information communication rendered traditional forms of access outdated.[31] Meanwhile, the PSI-Directive of the EU[32] on the re-use of public information added further pressure on the national legislator, resulting finally in the enactment of Act No. XC/2005 on the Freedom of Information by Electronic Means (Eit.). This new act ensured the petition- and cost-free, rapid access to certain data of public interest through electronic disclosure obligations of certain state bodies.[33,34] Guided by a proactive information policy, the new law also provided for the publicness of the legislative process, legislation and court judgments.[35]

It is worth mentioning the new Hungarian constitution, the so-called Fundamental Law (FL) of Hungary, since it introduced important provisions affecting the freedom of information. While Article VI paragraph 2 of the FL merely reproduced Article 61 of the former Constitution regarding freedom of expression, media freedom and freedom of information, the fourth amendment[36] of the FL included a new provision. Article U paragraph 10 FL provides that documents of the communist state party, of civil society organizations and youth organizations established with the contribution of and/or influenced directly by the communist state party, and of trade unions, created during the communist dictatorship, shall be property of the state and shall be deposited in public archives in the same way as the files of organs performing public duties. The symbolic relevance of this provision is clear, affording constitutional protection to records of the communist state, yet from the perspective of informational compensation, it came 23 years too late. An important step in the fight against corruption[37] is the rule enshrined in Article 39 paragraph 1 FL, prescribing that support or contractual payments from the central budget may only be granted to organizations of which the ownership structure, the organization and the activity aimed at the use of the

[31] Majtényi et al. (2004).

[32] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. Official Journal L 345 , 31/12/2003 P. 0090–0096.

[33] Articles 3–6 of Act No. XC/2005.

[34] See Article 1 of Act No. XC/2005.

[35] Articles 9–20 of Act No. XC/2005.

[36] Amendment of 25 March 2013.

[37] Buzás and Révész (2012).

support are transparent.[38] This is coupled with the duty set forth in paragraph 2 that every organization managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest.

Two decades into its existence, experts considered the revision of Avtv. to be a matter of urgency. Act No. CXII/2011 on informational self-determination and freedom of information (Infotv.) was meant to meet the challenges of the twenty-first century, yet when compared with the Avtv. it repealed, the changes brought by the new act were scarce and failed to integrate solutions successfully applied abroad.[39] In the following, my analysis will mainly focus on the operation of Infotv.

3 Concept of Information Rights in Hungarian Law

As detailed above, one of the most important fundamental rights in the third republic was access to information, both looking back by striving towards coming to terms with the socialist past and looking towards the future by securing citizens' democratic control over the state. Both data protection and freedom of information are to serve the citizens, guaranteeing freedom from the state, protecting the "weaker party" by bolstering its position in relation to the government. In Hungary, the "stronger party" was the state, before and at the time of political change, collecting and keeping data on its citizens while remaining impenetrable and non-transparent to its subjects.

The Hungarian Constitutional Court played a major role in defining freedom of information, which was initially perceived as an auxiliary right to freedom of expression and freedom of the press.[40] One of the most important decisions of the Constitutional Court in relation to freedom of information and its role in enabling democratic control over the state was rendered in respect of the act governing local self-governments.[41] Namely, this act made it possible to hold local council

[38] Official translation, support to be understood as aid or subsidy.
[39] Ibid.
[40] Kerekes (2012); Baka and Szikora (2015).
[41] Act No. LXV/1990 on local self-governments.

meetings in closed session,[42] which restricted the applicant's right of access to data of public interest. The Constitutional Court held that unrestricted access to data of public interest makes it possible to control elected representatives, the executive and the lawfulness and efficacy of public administration. It held that open, transparent and controllable state action constitutes a cornerstone of democracy and is one of the guarantees of state organization conforming to the requirements of the rule of law. Indeed, without the challenge of publicity, the state becomes a mechanism estranged from its citizens; its operation becomes unpredictable, unforeseeable and particularly dangerous, since the opacity of state action means an increased threat to constitutional freedoms.[43]

In its groundbreaking decision on access to historical archives for research purposes, the Constitutional Court declared that free access to data of public interest is more often than not the precondition for exercising freedom of expression.[44] In a similar vein, in its judgment of 2009 in the Kenedi v. Hungary case,[45] the European Court of Human Rights found that Hungary had violated Article 10 ECHR by refusing unrestricted access to documents of the Hungarian State Security Service. In particular, the Ministry of the Interior denied the applicant historian's request claiming that the relevant documents were classified as state secrets, notwithstanding the fact that several domestic court rulings obliged the Ministry to grant access to the data required. The European Court of Human Rights held that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression."[46]

Following the jurisprudence of the Bundesverfassungsgericht of Germany, the Hungarian Constitutional Court held that "freedom of information plays a decisive role in guaranteeing freedom of expression, and thereby also in securing the democratic organization of public life."[47] The publicness of state actions and the transparency of public affairs is without doubt a precondition for enforcing other fundamental

[42] Article 12 paragraph 3–4, Article 17 paragraph 3 of Act No. LXV/1990.
[43] 32/1992 (V. 29.) Abh 1992, 182, 183.
[44] 34/1994. (VI. 24.) Abh 1994, 177, 185.
[45] Kenedi v. Hungary, Application No. 31475/05, 26 May 2009.
[46] Ibid.
[47] 21/2013. (VII. 19.) Abh, Grounds, 31, own translation.

rights, such as freedom of expression and democratic participation rights, and, as such, must be considered one of the guarantees of effective government action.[48] In light of the Constitutional Court's role in the elaboration of freedom of information in a democratic society, it came as a surprise, when it denied the NGO Társaság a Szabadságjogokért access to a complaint requesting constitutional scrutiny of certain provisions of the Criminal Code, claiming that the complaint cannot be disclosed without the permission of the author. In its judgment, the European Court of Human Rights held that "it would be fatal for the freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."[49] The ECtHR went on to state that "obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs' and their ability to provide accurate and reliable information may be adversely affected."[50]

Freedom of information relies on access to data of public interest, which are governed by the principle of publicness.[51] Not only does this mean that the state must not prevent access to such data, but it also places an obligation on data administrators to facilitate access to data of public interest in a proactive way.[52] While freedom of information may be restricted, the conditions for the same must be specified by law and be based on a balancing of the interest in protecting confidentiality and the interest in obtaining access to the relevant data.[53] Two main reasons may justify a restriction of freedom of information: keeping state and professional secrets confidential and the protection of personal data.[54] Finally, all restrictions on information rights must be proportionate.

[48] 8/2016. (IV. 6.) Abh, Grounds, 43.
[49] Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05, 14 April 2009.
[50] Ibid.
[51] 2/2014 (I. 21.) Abh, Grounds, 24.
[52] 21/2013. (VII. 19.) Abh, Grounds, 35, italics by me.
[53] 32/1992 (V. 29.) Abh. 36.
[54] 32/1992 (V. 29.) Abh, 37.

4 Institutional Protection of Information Rights

Avtv.[55] established the office of Data Protection Commissioner with a six-year mandate. Although the position was to be filled by 1 October 1993, in light of the two-thirds majority prescribed for his appointment, political consensus on the person of László Majtényi,[56] the first Data Protection Commissioner, could only be secured in 1995.[57] This post was a unique blend of ombudsman-like and governmental functions,[58] and owing to the synoptic regulatory structure, the Commissioner was responsible for both data privacy and freedom of information cases.[59] In respect of the latter, the Avtv. foresaw that the Data Protection Commissioner monitor the conditions of enforcement of the publicity of the data of public interest and make proposals for enacting and amending legal rules affecting the publicity of the data of public interest, delivering opinions on relevant bills.[60] The Commissioner also contributed to raising awareness regarding the issues of data protection and freedom of information in Hungary. For want of enforceable sanctions, one of the greatest "weapons" in the hands of the Data Protection Commissioner was publicity, since "the less media coverage a case got, the less successful the intervention of the Data Protection Commissioner proved to be."[61] This is why in 2010 the Commissioner proposed that the soft, ombudsman-like competences be supplemented by more stringent powers of an administrative authority,[62] which he finally acquired in his powers as supervisory authority for classified information and his competence to terminate data management in case of a violation of data privacy provisions.

With its Article VI paragraph 3, the new Fundamental Law abolished[63] the office of Data Protection Commissioner and established the National Authority for Data Protection and Freedom of Information (NAIH)[64]

[55] Articles 23–27 Avtv.

[56] Data Protection Commissioners of Hungary: László Majtényi (1995–2001); Attila Péterfalvi (2001–2007); András Jóri (2008–2011).

[57] Resolution of Parliament No. 84/1995 (VII. 6.).

[58] Jóri (2010); Csink (2014).

[59] Csink (2014). Opinion of the Venice Committee No. 672/2012 (18 October 2012).

[60] Article 25 Avtv.

[61] Jóri (2010).

[62] Ibid.

[63] Transitional provisions, Article 16 FL.

[64] Article VI paragraph 3 FL: "The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act."

with a mandate of nine years.[65] According to the official reasoning, the position of Commissioner was abolished since in light of the growing number of privacy breaches he could no longer fulfil his task.[66] The Venice Commission criticized this line of arguments, commenting on Infotv. that the efficacy of an institution depends on its competences, as well as its human and financial resources. It stressed that nothing prevented Hungarian political actors "from endowing an ombudsman with the resources which are required to accomplish its tasks."[67] With the abolition of the position of Data Protection Commissioner, the incumbent Commissioner András Jóri was prematurely discharged.[68]

The European Commission, supported by the European Data Protection Supervisor launched an infringement procedure[69] against Hungary for breaching the independence requirement[70] set forth in the Data Protection Directive[71] by introducing legislation prematurely bringing to an end the term served by the Data Protection Commissioner and creating a new supervisory authority with another person appointed as head of that authority. Hungary pleaded that the independence requirement enshrined in the Directive is of operational nature without creating an individual right to hold a certain position: "to the extent that the operational independence of the supervisory authority is intact, it is of little

[65] Article 40 paragraph 3 Infotv.

[66] Kerekes (2012).

[67] Opinion of the Venice Commission No. 672/2012 (18 October 2012). Recital 120 of the new Data Protection Regulation provides: "Each supervisory authority should be provided with the financial and human resources, premises and infrastructure necessary for the effective performance of their tasks, including those related to mutual assistance and cooperation with other supervisory authorities throughout the Union. Each supervisory authority should have a separate, public annual budget, which may be part of the overall state or national budget." Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, pp. 1–88.

[68] Csink (2014).

[69] C-288/12 Commission v. Hungary.

[70] Article 28 paragraph 1 subparagraph 2 of Directive 95/46/EC of the European Parliament and of the Council 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. OJ L 281, 23.11.1995, pp. 31–50.

[71] Directive 95/46/EC of the European Parliament and of the Council 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 (OJ 1995 L 281, p. 31).

importance that a change be made regarding the person in charge of that authority even before the former incumbent has served his full term of office."[72]

In its judgment, however, the Court of Justice of the European Union emphasized that operational independence in itself does not suffice

> to protect supervisory authorities from all external influence. … [T]he mere risk that the State scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks. … If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence. That is true even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model, which must be organised in such a way as to meet the requirement of independence laid down in the applicable legislation.[73]

The Court of Justice held that with the early termination of the Data Protection Commissioner's mandate, Hungary failed to fulfil its obligations under the Data Protection Directive.[74]

Although the alleged reason for establishing NAIH was to increase its efficiency, the authority no longer has the power to turn to the Constitutional Court and can only proceed in a supervisory capacity in matters of classification of information.

The authority is an "autonomous administrative body" (Article 83 paragraph 1 Infotv.), meaning that in contrast with the erstwhile Data Protection Commissioner, who represented a form of parliamentary control, NAIH is part of the executive branch.[75] According to Article 38 paragraph 2 Infotv., it is the task of NAIH to supervise and promote the enforcement of the rights for the protection of personal data and access to public information and information of public interest. Based on the statistics compiled by NAIH, data protection aspects continue to dominate its

[72] C-288/12 Commission v. Hungary, paragraph 42.
[73] Ibid, paras 52–54.
[74] For details, see Soós (2012).
[75] Csink (2014).

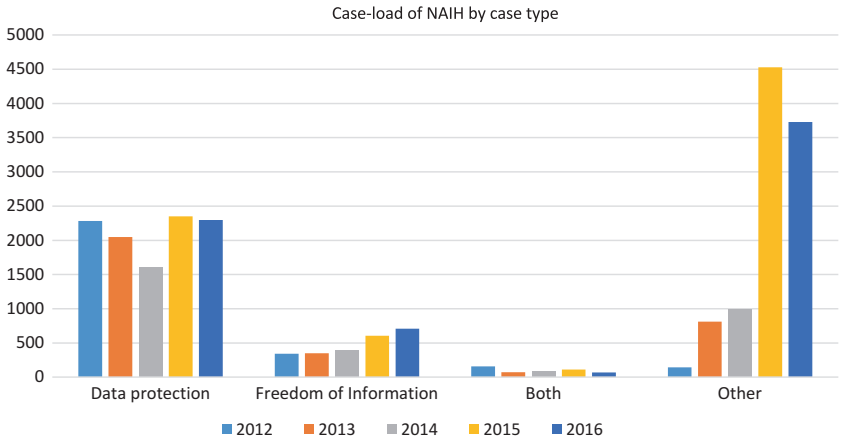

Fig. 10.1 NAIH caseload between 2012 and 2016 (Source: Report on activities in 2014, NAIH B/3002. Report on activities in 2016, NAIH B/13846)

consultation activities; nevertheless, the regulatory issues of freedom of information are slowly on the rise (Figs. 10.1 and 10.2).

In discharging its competences, NAIH carries out investigations upon application and conducts data protection procedures or procedures for the protection of classified information ex officio, initiating judicial procedures or intervening in court actions brought by others. NAIH contributes to good data protection practices and freedom of information by issuing recommendations, organizing conferences and carrying out data protection audits.[76] Finally, NAIH may opine or initiate the adoption of legal acts in line with the requirements of privacy and freedom of information.

5 Data Categories

From the very beginning, Hungarian legislation concerning data protection and freedom of information centred on the concept of data.[77] Unlike other countries regulating documents, records or protocols,[78] the pioneering solution of the Hungarian legislation provided comprehensive

[76] Article 38 paragraph 4 Infotv.
[77] Székely (2004).
[78] Majtényi (2005).

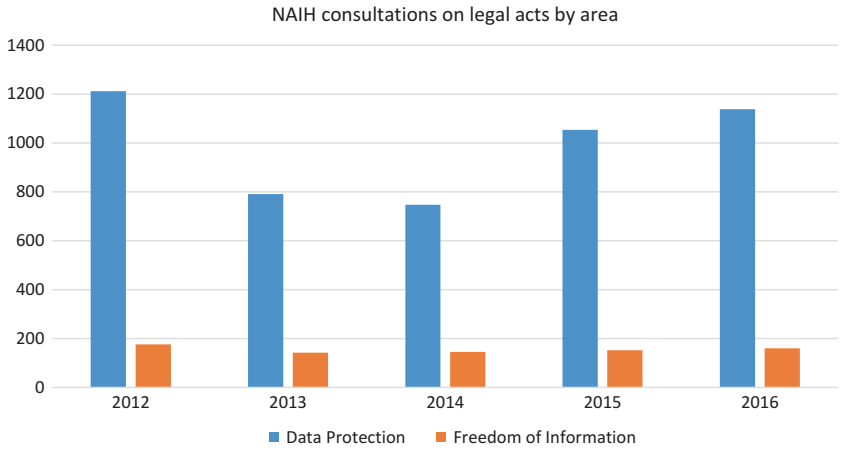

Fig. 10.2 NAIH consultations on legal acts in 2015 and 2016 (Source: Report on activities in 2014, NAIH B/3002. Report on activities in 2016, NAIH B/13846)

protection for its regulatory subject, irrespective of the form and carrier of the data.[79] The progressive approach of the Hungarian legislation can be explained by the fact that it only emerged in the 1990s, at a time when the legislator could already anticipate and consider modern info-communication technologies.

Indeed, the data carrier itself is of no consequence in the relevant legislation, reflecting a technology-neutral, forward-looking approach, open to new technological developments.[80] Whether data is fixed in a digital or analog form on paper, film, disk, CD or otherwise is irrelevant, the law only regulates the data contained therein. Moreover, data fixed on the same carrier do not form an inseparable unit: according to the Kúria (the Hungarian Supreme Court), the same document, for example, the protocol on the meeting of a local self-government, may contain both data of public interest and data that may not be disclosed.[81]

Although neither Avtv. nor Infotv. defined the concept of data, it is clear that both acts employ a very broad concept of the same,[82] covering

[79] Ibid.
[80] Ibid.
[81] [BH 1996.581.], EKINT (2006).
[82] Ibid.

cognitions, construed data, information and the structured aggregates of data.[83] While Hungarian law does not distinguish between data and information, this regulatory imprecision is unproblematic in practice: individual data as well as their combination amounting to information both fall under the scope of Infotv. The manifestation of data covered by the law is also left open, including written data, pictures, photos, maps, prints, music, sound and so on.[84]

Infotv. regulates different types of data,[85] distinguishing between two main categories: *personal data* and *data of public interest*. This strict binarity results from the negative statutory definition of data of public interest, which expressly provides that data of public interest shall mean information or data other than personal data.[86] The rationale behind the juxtaposition of these two categories is the distinction between the spheres of state/non-state activity, that is, the ambits of freedom of information and data privacy. On the one end of the scale, we have the state, which is to be transparent and accountable, whereas on the other, there is the individual exercising his rights to informational self-determination, protected by privacy rights. Between these two extremes, we have personal data which are to be disclosed for reasons of public interest (so-called data public on grounds of public interest).[87]

Article 3 paragraph 2 Infotv. defines personal data as data relating to the data subject, in particular by reference to the name and identification number of the data subject or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity as well as conclusions drawn from the data in regard to the data subject. Data shall be considered personal data as long as it is identifiable which person it describes.[88] Such data may only be processed[89] with the freely and expressly

[83] Ibid.

[84] Ibid.

[85] Act No. CXII/2011, Article 3 paras 3–6.

[86] Act No. CXII/2011, Article 3, para 5.

[87] Székely (2004).

[88] Article 4 paragraph 3 Infotv.

[89] Article 3 paragraph 10 defines "'data' processing' as any operation or the totality of operations performed on the data, irrespective of the procedure applied; in particular, collecting, recording, registering, classifying, storing, modifying, using, querying, transferring, disclosing, synchronising or connecting, blocking, deleting and destructing the data, as well as preventing their further use, taking photos, making audio or visual recordings, as well as registering physical characteristics suitable for personal identification (such as fingerprints or palm prints, DNA samples, iris scans)."

given specific and informed indication of the will of the data subject by which he signifies his agreement to personal data relating to him being processed fully or to the extent of specific operations.[90] Ensuring informational self-determination, Infotv. foresees that the data subject may revoke his consent at any time by way of objection.[91] Meanwhile, Infotv. provides for the possibility of processing personal data even in lack of consent given by the data subject where such processing is necessary as decreed by law or by a local authority based on authorization conferred by law concerning specific data defined therein for the performance of a task carried out in the public interest[92] (mandatory processing).

Within the category of personal data, so-called special data refer to the core of personal identity, including data on racial origin or nationality, political opinions and any affiliation with political parties, religious or philosophical beliefs or trade-union membership, and personal data concerning sex life.[93] These characteristics are at the heart of personal privacy and are typically protected attributes in anti-discrimination law.[94] Another group of specific personal data are those related to physical and mental health, as well as criminal personal data.[95] These are typically processed by the authorities,[96] but out of respect for human dignity[97] and in the interest of rehabilitation, they must be kept confidential. Special data may only be processed with written consent of the data subject or where prescribed by law for the performance of a task carried out in the public interest.[98] Article 4 Infotv. sets forth the principles governing the processing of personal data, such as the purpose limitation principle, data economy, the lawfulness and proportionality of data processing as well as the accuracy, completeness and up-to-dateness of the data processed.

[90] As an exception, Article 6 paragraph 1 foresees that "personal data may be processed also if obtaining the data subject's consent is impossible or it would give rise to disproportionate costs, and the processing of personal data is necessary: a) for compliance with a legal obligation pertaining to the data controller, or b) for the purposes of the legitimate interests pursued by the controller or by a third party, and enforcing these interests is considered proportionate to the limitation of the right for the protection of personal data."

[91] Article 3 paragraphs 7–8 Infotv.

[92] Article 5 paragraph 1 item b) Infotv.

[93] Article 3 paragraph 3 item b) Infotv.

[94] Madarászné Ifju (2014).

[95] Article 3 paragraph 4 Infotv.

[96] Madarászné Ifju (2014).

[97] Ibid.

[98] Article 5 paragraph 2 items b)-c) Infotv.

Data of public interest are to be transparent, since these comprise information belonging to the public, generated in the workings of the state. These are defined as information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities (public service functions), as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks (Article 3 paragraph 5 Infotv.). These include data concerning the scope of authority, competence, organizational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and contracts concluded.

The category of *data public on grounds of public interest* includes any data, other than public information, that would otherwise be considered personal data or business secrets, but the law prescribes that they be published, made available or otherwise disclosed for the benefit of the general public (Article 3 paragraph 6 Infotv.). The introduction of this data category was to promote democratic control and to balance private and public interests[99] regarding certain types of information, in particular, for reasons of combatting corruption.[100] Act No. XCI/2013 resolved the problems surrounding the confidentiality of business secrets in the context of investing public funds. This act amended Infotv. deeming such data to be data public on the grounds of public interest (without publishing protected information, the disclosure of which would be of disproportionate disadvantage to the relevant business activity).[101] NAIH had the opportunity to give general guidance on the delimitation of business secrets from data public on the grounds of public interest in the case relating to a syndicate agreement. The agreement set up a new telecommunications company and was concluded by bodies with public service functions: Magyar Posta Zrt., MVM Zrt. and MFB Invest Zrt. MVM. These denied access to the agreement claiming that it constituted the business strategy of the new telecommunications company and that ensuring access to such data would be contrary to the business interest of the same. NAIH stated that a balance must be found between the right of citizens to access such data and the interest of the national economy, not forgetting the rule that as an

[99] Baka and Szikora (2015).
[100] Révész (2012); Jóri (2010).
[101] Article 2 paragraph 1 of Act No. XCI/2013.

exception, any restriction on accessing information must be interpreted narrowly.[102]

The most notorious attempt to exclude access to documents with reference to business secrets was the case of the foundations of the Hungarian National Bank (MNB). As a result of investigative journalism and the decision of the Kúria stating that the budget of MNB foundations constituted data of public interest, it was revealed that these foundations managed around 1 billion euros stemming from the profit generated by MNB. However, the foundations did not consider these funds to be public funds and failed to observe—among others—public procurement rules regarding the investment of such funds.[103] In review proceedings the Kúria found that the appellate court correctly stated that foundations of MNB carry out public service functions using public funds. The fact that these funds were transferred from MNB to the foundations does not mean that they lose their quality as public funds.[104] Just one day before the decision of the Kúria was brought, a bill[105] for the amendment of Act No. CXXXIX of 2013 on the Hungarian National Bank was submitted to the Hungarian Parliament, establishing that certain data relating to foundations and companies of MNB are to be considered business secrets. The bill declared the amendments to be applicable retroactively in respect of all requests for access to such data. The Hungarian President refused to sign the law adopted by the Parliament and transferred it to the Constitutional Court for consideration. In its Decision No. 8/2016 (IV. 6.), the Constitutional Court restated the decision of the Kúria, noting that organizations cannot evade publicness of their data with reference to their character as foundations. The Constitutional Court further stressed that the amendment failed to state reasons for the restriction of access these data, with both the scope and the period of restriction remaining unspecified in the bill. In his dissenting opinion, justice András Zs. Varga. pointed to the shortcoming that the Constitutional Court failed to clarify whether the data concerned were data of public interest or data public on the grounds of public interest.

It is important to note that private actors are also obliged to disclose all data public on the grounds of public interest upon the request of members

[102] NAIH-4203/2012/V.
[103] Berkes (2017).
[104] Pfv. IV. 20.430/2015/4.
[105] T/9380 (29 February 2016), http://www.parlament.hu/irom40/09380/09380.pdf.

of the public, where their dealings involve public funds.[106] Data public on grounds of public interest therefore typically include information on public servants and persons holding public office, as well as terms of contract where public funds are involved, since there is a legitimate public interest in making such information on private persons or companies available. Rules detailing the disclosure of data public on grounds of public interest include Act No. XXXVI/2012 which foresees that members of the Hungarian Parliament submit their asset declarations by 31 January each year, which are then made public.[107]

Classified data ("state and service secrets") are data that would otherwise pertain to the category of data of public interest or data public on grounds of public interest; however, for overriding reasons (e.g. national defence),[108] these must be kept confidential. Act No. CLV/2009 on the protection of classified information (Mavtv.) foresees that information may only be classified by the person authorized to carry out the classification procedure (Article 4 paragraph 1 Mavtv.) and only for a limited period of validity (Article 3 paragraph 1 item a). In its Decision No. 29/2014 (IX. 30), the Constitutional Court declared that considerations of proportionality must be taken into account in the framework of the classification procedure. Namely, access to data of public interest may only be restricted, in case the interest in keeping the relevant information confidential is greater than the public interest in receiving this information (public interest test). Mavtv.[109] and Infotv.[110] implemented this decision foreseeing a detailed classification procedure premised on a content-based approach and the balancing of relevant interests, including recourse to judicial remedy for the release of the data.

A 2015 case before the NAIH revolved around the issue whether the very same data may coincidentally be classified and public. Namely, the

[106] Article 2 paragraph 2 of Act No. XCI/2013.

[107] For example, see the asset declaration of the Hungarian Prime Minister at http://www.kormany.hu/hu/dok?source=10&type=105#!DocumentBrowse.

[108] Article 27 paragraph 2 Infotv.: "Right of access to data of public interest or data public on grounds of public interest may be restricted by law – with the specific type of data indicated – where considered necessary to safeguard: a) national defence; b) national security; c) prevention and prosecution of criminal offenses; d) environmental protection and nature preservation; e) central financial or foreign exchange policy; f) external relations, relations with international organizations; g) court proceedings or administrative proceedings; h) intellectual property rights."

[109] Article 5 Mavtv.

[110] Articles 62–63 Infotv.

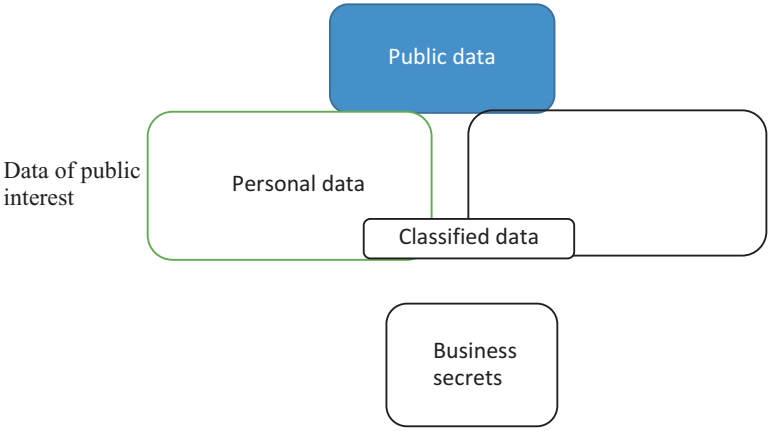

Fig. 10.3 Types of data and their structural relationship (Majtényi) (Source: Majtényi (2005). Majtényi considers data public on the grounds of public interest to be data of public interest)

same set of data were contained in separate documents, where one was classified, however, in respect of the other, the period of validity had elapsed. According to NAIH the subject of the classification procedure is the data and not the document containing it. Therefore, any de-classification decision made by the authorized person must be applicable to all incidences of the same data, no matter which document these may be found in.[111]

According to Majtényi, Hungarian law recognizes the following system of data types (Fig. 10.3).

6 Entities Bound by Disclosure Obligations

Infotv. describes entities bound by disclosure obligations as bodies with public service functions defining them as any person or body attending to statutory state or municipal government functions or performing other public duties provided for by the relevant legislation.[112] As NAIH noted, however, public bodies cannot evade disclosure obligations by reference to the fact that they do not carry out public service functions stipulated by

[111] Report of NAIH for the year 2015, Res. B/8388.
[112] Article 26 paragraph 1 Infotv.

the law. In fact, it suffices that such bodies manage public funds.[113] That is, the circle of those bound by disclosure obligations is not limited to bodies with public service functions. As the Constitutional Court explained in its Decision No. 6/2016 (III. 11.), what is relevant is whether the given entity processes data of public interest—this circumstance in itself results in an obligation to fulfil requests for access. Otherwise entities processing such data could restrict access to the same by referring to the fact that they are not bodies with public service functions under the law. As a result of this comprehensive scope of addressees including also private parties obliged to disclose data of public interest, freedom of information rights are one of the few fundamental rights which are afforded horizontal effect in Hungarian law.[114]

As a general rule, Article 32 Infotv. stipulates that bodies with public service functions shall promote and ensure that the general public is provided with accurate information in a prompt manner concerning the matters under their competence, such as the budgets of the central and municipal governments and the implementation thereof, the management of assets controlled by the central and municipal governments, the appropriation of public funds and special and exclusive rights conferred upon market actors, private organizations or individuals. The system of providing access to data of public interest and data public on grounds of public interest is two-tiered: while certain data must be published by electronic means, others are to be released upon request.

Perhaps one of the gravest breaches of the general disclosure obligations of bodies with public service functions was the abolition of the taking of minutes in cabinet meetings.[115] While in its Decision No. 32/2006 (VII. 13.) the Constitutional Court found that cabinet meetings involve data of public interest and refraining from the taking of minutes amounts to a restriction of the freedom of information,[116] government decree No. 1144/2010 (VII. 7.) "refined" the applicable rules stipulating that such minutes will only be taken "when justified" and upon motion of members of government or with the permission of the Prime Minister. Considering the regulation to be unconstitutional, the Data Protection Commissioner turned to the Constitutional Court;

[113] NAIH-4203/2012/V.
[114] Kovács (1998).
[115] Kerekes (2012).
[116] 32/2006 (VII. 13.) Abh, 430, 439.

however, Act No. CLI/2011 abolished the petition right of the Commissioner, applicable also to pending petitions. Consequently, the Hungarian Constitutional Court could not review the constitutionality of the relevant government decree.[117]

7 The Request for Access, Fees and Costs

Besides detailing the general rules for dealing with requests, Infotv. also obliges bodies with public service functions to adopt their own rules for satisfying requests for access to date of public interest.[118] It is important to note that Hungarian law does not distinguish between different categories of persons or entities lodging requests for information with bodies with public service functions, referring to all applicants as the "requesting party." This means that no requesting parties (e.g. journalists) are privileged in terms of access or time of handling the request.

The request for data of public interest and data public on grounds of public interest may be made verbally, in writing or by electronic means. The data controller may not consider the purpose of the request, since "it is not the citizen who must attest to his interest in acquiring the information, but it is the public service body that must give reasons – invoking relevant statutory justifications – for denying"[119] the request. The personal data of the requesting party may only be processed to the extent necessary to provide access to the requested information and must be erased automatically without delay following the disclosure of the requested data and the payment received.[120] Namely, the data controller may impose a fee for the copy of the document containing the requested data (or may suggest an alternative solution to making a copy). The request must be fulfilled without delay but no later than 15 days from receiving the request.[121] Infotv. allows for derogation in case the requested information is "substantial in terms of size and volume." In these cases a one-time extension of the deadline by 15 days is permissible; however, the requesting party must be informed of the extension within eight days of receiving the request.

[117] Kerekes (2012).
[118] Article 30 paragraph 6 Infotv.
[119] 32/1992. (V. 29.) ABh, III 4, own translation.
[120] Article 28 paragraph 1–2 Infotv.
[121] Article 29 paragraph 1 Infotv.

While Infotv. foresees no special regime for journalists, Article 2 paragraph 3 of Act No. XXXVI/2013 on the election procedure stipulates that requests for access to data of public interest be satisfied within five days during the period of elections. As a special provision deviating from the 15-day rule enshrined in Infotv., the shortness of the time available to election bodies for dealing with requests is justified by the brevity of the election period.[122]

The recent government decree No. 301/2016 (IX. 30.) determines the elements and maximum amounts of the fee chargeable for the copy of the requested information, taking into account the costs of labour, the data carrier used and postage. In case a copy of the document containing the requested data is provided and this also contains any data that cannot be disclosed to the requesting party, the non-disclosable data must be made unrecognizable on the copy. The requested information must be supplied in the form and technical means determined by the requesting party where reasonably possible. Where the information requested had previously been made public electronically, the request may be fulfilled by referring to the public source where the data is available.

In a 2013 case an election office refused to make a copy of the electoral subdivision's protocol, claiming that Article 204 of the Act No. XXXVI/2013 on election procedure contains a special provision, limiting access to viewing a copy of the protocol at the election office. However, NAIH found that this rule did not exclude the applicability of the general rules of Infotv. to provide a copy of the requested document.[123]

The requesting party must be notified within eight days in writing of the refusal of his request, including the reasons for refusal and information on remedies. Requests may not be refused on grounds that they cannot be made available in a readily intelligible form or, where the requesting party's native language is not Hungarian, that the request was not written in another language. Accordingly, NAIH indicated in relation to draft bill No. T/6352 on geodesy and cartography that an amendment to Infotv., restricting access to data of public interest by reason of the fact that such data cannot be made available in readily intelligible form and therefore the interpretation of same requires specific expertise, was unconstitutional.[124]

[122] NAIH-2125/2014/V.
[123] NAIH-973/2014/V.
[124] NAIH-4094/2012/H.

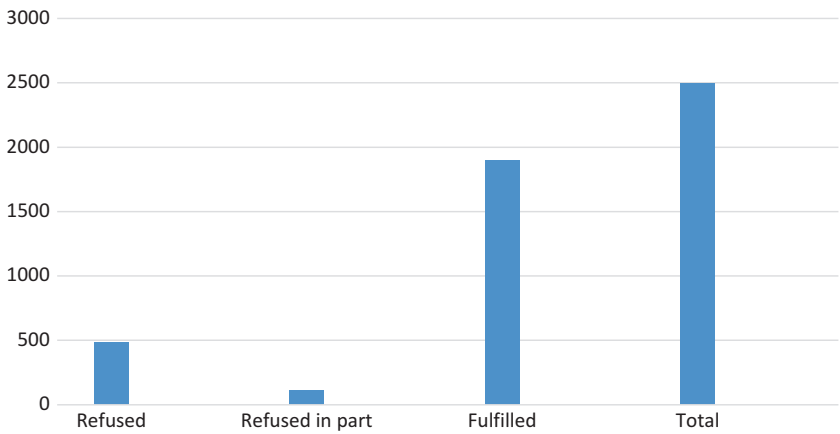

Fig. 10.4 Requests fulfilled and refused in 2016 (Report on activities in 2016, NAIH B/13846)

Infotv. also obliges data controllers to keep records on the requests refused, including the reasons, and to inform the authority thereof each year, by 31 January—without however foreseeing any sanctions for a failure to do so. Thus, the table indicating the total number of requests refused for the year 2016 may be incomplete (Fig. 10.4).

8 Ex Officio Disclosure Obligations

Hungary may have been pioneering freedom of information legislation in the 1990s, yet already a decade later, technological advancements in information communication rendered traditional forms of access outdated.[125] Meanwhile, the PSI-Directive of the EU[126] on the re-use of public information added further pressure on the national legislator, resulting in the enactment of Act No. XC/2005 on the Freedom of Information by Electronic Means (Eit.). This act ensured the petition- and cost-free, rapid access to certain data of public interest through electronic disclosure obligations of certain state bodies.[127] Guided by a proactive information

[125] Majtényi et al. (2004).

[126] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. Official Journal L 345, 31/12/2003 P. 0090–0096.

[127] Articles 1, 3–6 of Act No. XC/2005.

policy, the new law also provided for the publicness of draft bills, legislation and court judgments.[128]

According to László Majtényi—former Data Protection Commissioner and author of the concept of Eit.—"deliberative democracy and democracy in general is inconceivable in the future without e-freedom of information," since data of public interest is increasingly held on electronic data carriers.[129] The act pursued a technology-neutral approach, prescribing that certain data be published on a website in digital form.[130] The equal opportunities of citizens were promoted through cost-free access to digitally published data, preventing situations where certain citizens are excluded from learning these core data, rendering them vulnerable to those in the know.[131] The act declared that access shall not be made contingent upon the disclosure of personal data. Although Eit. was finally repealed,[132] its substance was enshrined in the amended Infotv.[133]

The Annex of Infotv. contains a "standard publication list," detailing the data that must be published and kept up to date by state bodies and bodies with public service functions. The list may be broken down into three main categories: (i) data related to the structure and staff of the body, (ii) data on activities and procedure and, finally, (iii) finances and budget. Further, specific publication lists may be stipulated for particular administrative branches or individual bodies.[134]

Infotv. expressly names those public bodies that fall under the obligation to disclose a standard publication list on their own websites[135] (and

[128] Articles 9–20 of Act No. XC/2005.

[129] Majtényi et al. (2004).

[130] Article 2 paragraph 1 item c) of Act No. XC/2005., Majtényi et al. (2004).

[131] Ibid.

[132] Act No. CCI/2011.

[133] Article 33 paragraph 1 Infotv.: "Access to public information whose publication is rendered mandatory under this Act shall be made available through the internet, in digital format, to the general public without any restriction, in a manner not to allow the identification of specific individuals, in a format allowing for printing or copying without any loss or distortion of data, free of charge, covering also the functions of consultation, downloading, printing, copying and network transmission (hereinafter referred to as "electronic publication")."

[134] Article 6 Paragraph 2 des Gesetzes No. XC/2005. Baka and Szikora (2015).

[135] Article 33 paragraph 2 item a) Infotv: "The Office of the President of the Republic, the Office of the Parliament, the Office of the Constitutional Court, the Office of the Parliamentary Commissioners, the State Audit Office, the Office of the National Judiciary Council, the Office of the Prosecutor General, the Office of Economic Competition, the Public Procurement Board, the Hungarian Academy of Sciences, the National Radio and Television Board"

the so-called public data search website),[136] drawing also other bodies under the scope of this obligation by reference to their functions or jurisdiction (items c–d).[137] Finally, bodies with public service functions' or public education institutions' obligations are eased by allowing them to maintain joint websites or to publish with central websites and information systems.[138] Data thus published must be updated regularly, while the information offered should be easily understandable.[139]

Public bodies may also publish data beyond the scope of what is required under the publication lists. In 2012 NAIH was alerted to the fact that certain municipalities, that is, bodies with public service functions, published on their websites the list of names, debts and addresses of those residents who had failed to pay their local tax or motor vehicle tax on time. They did this, relying on an amendment of Act No. XCII/2003 which allowed for a publication of such data "in accordance with local practice." NAIH drew attention to the fact while there is a local interest in publishing such lists on municipal notice boards, putting these lists on the world wide web makes these otherwise personal data accessible all around the world—also by persons who have no legitimate interest to access the same.[140]

9 Exceptions

As elaborated by the Constitutional Court, freedom of information is not an absolute right[141]; several other rights and interests must be taken into account in managing access.[142] In order to protect these competing rights and interests, access to certain information may be restricted or denied by law. Access may be *restricted* in the general interest, that is, for reasons of national security or defence, for the purposes of prosecution or prevention of offences, in the interest of environmental protection or nature, for

[136] www.kozadat.hu.

[137] "An agency of public administration with competence over the entire territory of the country, in particular ministries, the Prime Minister's Office, agencies with nationwide powers, the central office, the office of the ministry, the national chamber and c) the county (Budapest) office of public administration."

[138] Article 33 paragraphs 3–4 Infotv.

[139] Article 34 paragraphs 2–3 Infotv. Buzás and Révész (2012).

[140] Report of NAIH for the year 2012.

[141] 32/1992 (V. 29.) Abh.

[142] 32/1992 (V. 29.) Abh.

financial and exchange-rate policy reasons, for protection of foreign relations and relations with international organizations and, finally, for the integrity of legal or administrative proceedings.[143] Infotv. expressly provides that access to information may be restricted by European Union legislation with a view to protecting the economic or financial interests of the European Union, including monetary, fiscal and tax policies.[144] NAIH expressly confirmed that classification of data must always be reasoned; a lack of statement of reasons constitutes a violation of the law.[145]

At the same time, access may be *denied*, where the data concerned constitutes personal data, classified information, business secrets or intellectual property. In a 2014 case, the main question was whether special rules apply to the classification of data public on grounds of public interest, such as the contact details of government members, and whether data that has previously been made public may later be classified. NAIH found that neither Mavtv. nor Infotv. allowed for an exception from under the general rules governing the classification of data. However, where data has already been made public, such data may no longer be lawfully classified.[146]

As far as access to the personal data of civil servants carrying out public service functions is concerned, NAIH was called upon to consider a case where access to the entire database detailing the names, positions, salaries, qualifications and so on of KLIK's staff (an institution acting as the employer of Hungarian teachers, with a headcount of 140 000) was requested. NAIH pointed out that while civil servants must anticipate that some of their personal data may become public (data public on grounds of public interest), this is only justified in connection with the specific public service and to an extent that is proportionate. Namely, indiscriminate requests amounting to data retention are contrary to the purpose limitation principle of data management.[147]

Another problematic area where access may be denied are data "generated during the course of decision-making," in respect of which disclosure may be denied for up to ten years from their generation and may only be accessed with the permission of the organization that generated them.

[143] Article 27 paragraph 2 item a)-g) Infotv.
[144] Article 27 paragraph 4 Infotv.
[145] Report of NAIH for the year 2012.
[146] NAIH-2378/2014/T.
[147] Report or NAIH for the year 2013, J/13824.

Here, the vagueness of the concept of data generated during the course of decision-making provided bodies with too much leeway to deny access to data of public interest; therefore, the standards for this category were gradually shaped in the practice of NAIH and the courts.

The so-called Századvég case centred on the issue of access to studies, analyses and expert reports prepared by the political think-tank Századvég as conceptual bases for legislation and government decision-making, commissioned by bodies with public service functions and paid for by public funds. Although NAIH conceded that such documents may in fact be data generated in the course of decision-making, restrictions on the access to such data must not be geared towards rendering decision-making non-transparent, but much rather to preserve the independence of decision-making to avert possible efforts to exert undue influence over the process. Thus, these documents as a whole cannot be generally excluded from public access, only certain data contained therein may be considered, due to their specific nature, as data generated in the course of decision-making.[148] That is, access may only be denied in respect of those data that actually relate to the concrete decision, there must be a causal relationship between the data and the given decision, and refusal must be considered on a case-by-case basis. Where documents contain both data of public interest and data which may not be disclosed, when responding to requests for access, the non-disclosable data must be made unrecognizable in the copy supplied (partial disclosure).

A recent amendment of Infotv. exacerbated the problem by extending the possibility of denying access to information which is "expected to underlie a future possible decision."[149] This amendment and the weak link between the data of public interest and a future possible decision have been highly criticized by experts.

10 Administrative and Judicial Remedies

As far as requests for access to data of public interest or data public on grounds of public interest are concerned, the requesting party must be notified of the refusal of his request within eight days in writing or, if appropriate, electronic means and must be given reasons for the refusal,

[148] NAIH-4442/2012/V.
[149] Article 27 paragraph 6 Infotv.

including information on the remedies available.[150] In case of refusal, silence or the charging of an excessive fee by the data controller, the requesting party is entitled to turn to NAIH or, within 30 days of the refusal of the request, the expiration of the deadline for disclosure or the deadline for paying the fee,[151] to the competent court.[152] Should the requesting party choose to turn to NAIH first and NAIH refuses to examine the notification on the merits or terminates its inquiry, the requesting party may turn to the competent court within 30 days of receiving notice from NAIH.[153] It is important to note that in the judicial proceedings the burden of proof to verify the lawfulness and the reasons for the refusal or the fee payable for the copy lies with the data controller.[154] The competent court proceeds in priority proceedings, in the course of which NAIH may intervene on behalf of the requesting party.[155] Should the court find for the requesting party, it shall order the data controller to disclose the requested information or, where the dispute concerns the amount of the fee charged, it may modify the fee or order the data controller to re-open proceedings for determining the amount.[156]

As mentioned above, the requesting party (referred to as notifier) may decide to turn to NAIH to open an investigation concerning the infringement or an imminent threat of the infringement of his right to access information of public interest.[157] NAIH shall proceed free of charge, in non-administrative proceedings.[158] In the course of its investigation, the authority may only reveal the identity of the notifier in case the inquiry cannot be carried out otherwise.[159] NAIH shall refuse the notification, where there are court proceedings in progress or a final ruling has been rendered in the case, where the notifier refuses the disclosure of his identity, where the notification is manifestly unfounded or has

[150] Article 30 paragraph 3 Infotv.
[151] Article 31 paragraph 1 Infotv.
[152] "Jurisdiction shall be determined by reference to the place where the head offices of the body with public service functions, being the respondent, is located." Article 31 paragraph 5 Infotv.
[153] Article 31 paragraph 3 Infotv.
[154] Article 31 paragraph 2 Infotv.
[155] Article 31 paragraphs 4, 6 Infotv.
[156] Article 31 paragraph 7 Infotv.
[157] Article 52 paragraph 1 Infotv.
[158] Article 52 paragraphs 2, 4 Infotv.
[159] Article 52 paragraph 3 Infotv.

been resubmitted with no new facts or information.[160] NAIH terminates its investigation in case the notification should have been refused, yet NAIH only received such information after it opened investigations or where the investigation becomes obsolete.[161] In case of termination or refusal, NAIH informs the notifier thereof in a reasoned notification.[162] It is interesting to note that the Commissioner of Fundamental Rights may also turn to NAIH where information rights are violated; here, the authority may only refuse the Commissioner's notification where court proceedings are in progress or a final ruling has been rendered.[163]

NAIH proceeds with a deadline of two months from receiving the notification.[164] It may inspect and request copies of all documents of the data controller, may request information from the data controller or its employees or associates and may request the head of the supervisory body of the data controller to conduct an investigation, setting a time limit for fulling these requests.[165] As a result of its investigation, NAIH may find in favour of the notification, launch administrative proceedings for the supervision of classified data or terminate the investigation, finding against the notification.[166] Should NAIH consider that an infringement of information rights took place or the threat thereof exists, it calls upon the data controller to eliminate the same.[167] In case the data controller disagrees with NAIH's findings, it must present its arguments to the authority within 30 days of receiving the notice.[168] Where such arguments fail to convince NAIH of the lawfulness of the data controller's actions, the authority may present a recommendation to the data controller's supervisory body,[169] which in turn shall notify NAIH of its position or the measures taken within 30 days of receipt.[170]

As far as classified information is concerned, where NAIH is of the view that the classification was unlawful, it launches the proceedings for the

[160] Article 53 paragraph 3 Infotv.
[161] Article 53 paragraph 5 Infotv.
[162] Article 53 paragraph 6 Infotv.
[163] Article 53 paragraph 4 Infotv.
[164] Article 55 paragraph 1 Infotv.
[165] Article 54 paragraph 1 items a), c), e); Article 54 paragraph 2 Infotv.
[166] Article 55 paragraph 1 items a), ac), b) Infotv.
[167] Article 56 paragraph 1 Infotv.
[168] Article 56 paragraph 2 Infotv.
[169] Article 56 paragraph 3 Infotv.
[170] Article 56 paragraph 4 Infotv.

supervision of classified data, examining whether the conditions for classifying information were met. In the course of its investigation, NAIH may hear witnesses and experts. Should NAIH arrive at the conclusion that the classification was indeed unlawful, the person in charge of the classification is called upon in a resolution to terminate or amend the level of classification, or its period of validity. The classifier may within 60 days seek judicial review of this decision of NAIH, with the court proceeding in priority proceedings and in closed session. The proceeding chamber may only include judges who have the necessary clearing under the act on national security services.[171] Critics of the new system have noted that the original applicant, who had been denied access to the classified information and whose petition served as the basis for launching the procedure, has no standing in the case.[172] Finally, where the classifier did not seek legal action within the period prescribed, the information in question shall be considered declassified or the level or term of classification shall change in accordance with NAIH's resolution.[173]

11 Critical Considerations

Even if not in organizational form and person, a certain continuity of the functions and competences of the erstwhile Data Protection Commissioner and NAIH may be asserted. With the current authority operating in an ombudsman-like manner, and the statutory possibility of reappointment, however, its leadership cannot escape the political balancing act of caution and ambition characteristic of such offices. With the abolition of the possibility of reappointment, the authority, which is fully independent according to the letter of the law,[174] would cease to be dependent on other state bodies in practice—bodies whom NAIH has authority to investigate and upon which it may impose a fine.

Namely, NAIH has the power to impose fines on entities breaching information rights, and in practice, these entities are mainly state bodies. This also means that NAIH as an administrative authority predominantly

[171] Article 63 paragraphs 2–7 Infotv.

[172] https://atlatszo.hu/2015/07/16/matol-hatalyos-az-infotorveny-modositasa-osszeszedtuk-hogy-mi-valtozott/.

[173] Article 63 paragraph 2 Infotv.

[174] The Infotv. provides for both the financial and institutional independence of NAIH (Articles 38–39) and the personal, political and financial independence of the President of NAIH (Article 40 paragraph 2, Article 41, Article 43).

fines other authorities and bodies exercising public service functions. Critics of this regulation point out that instead of a system where the state "takes money from one pocket, just to put it into another," raising awareness and consciousness among bodies with public service functions to arrive at a culture of respecting information rights would be more expedient. Bodies with public services functions often ignore requests or deadlines, responding only where the case had been taken before the court. Accordingly, NAIH is making efforts to educate bodies with public service functions on their disclosure obligations to instil a culture of openness and compliance.

While experts deem the statutory 15-day deadline for fulfilling requests to be appropriate even for the purposes of the media (in particular, a number of bodies have introduced the practice of "serving members of the media first," reducing waiting time), the possibility of extension foreseen by law can drag out the process, reducing the value of "highly perishable data" particularly in political journalism. Extensions on disclosure within the statutory limits may be a strategy to delay access to highly topical information, which, a maximum of 60 days later (with extensions for excessive amounts of data and payment), would lose its teeth in the hands of journalists. Therefore, a special regime privileging the media by drastically reducing waiting time for journalists should be considered.

Perhaps the gravest problem in this respect is that while freedom of information is one of the most expensive fundamental rights, state bodies with disclosure obligations receive no extra budget for fulfilling requests.[175] This placed a huge burden on certain authorities and bodies, yet this was not the reason for the statutory introduction of the possibility to impose fees for providing copies of the data requested.[176] While fulfilling data requests is indeed expensive, there is broad consensus that in Hungary and in the rest of the world, citizens rarely make use of the right to request data of public interest.[177] Nevertheless, a political debate on so-called abusive requests for data was launched, claiming that citizens request too many or too detailed data "going beyond the original intention of the legislator."[178] The argument was eventually used by the

[175] Kerekes (2012).
[176] Article 29 paragraphs 3 and 4 Infotv. amended by Act No. CXXIX/2015.
[177] Kerekes (2012).
[178] Draft law T/10940 (28 April 2013.), internet, accessed: 30 January 2017.

entities bound by disclosure obligations as well. In one case, the request for access to data of public interest was denied by the data controller on the grounds that "in reality it was not even geared towards accessing the data of public interest, but to abuse information rights."[179] NAIH held that deciding whether a specific action amounted to abusing a right was up to the courts; however, it must be recalled that freedom of information is a fundamental right, in respect of which no restriction for abuse of rights is foreseen. It also noted that the less data bodies with public service functions publish of their own accord, the more requests for access they will have to face.[180]

Instead of bulking up respective budgets, the legislator opted to give bodies with public service functions the discretion to impose fees for fulfilling their disclosure obligations. This changed the situation from a formerly free service to a payable one. While these bodies merely have to attest that supplying the requested data goes beyond their core tasks, they are free to impose huge fees in line with government decree No. 301/2016 (IX. 30.). Namely, the decree merely regulates maximum fees per item, but no cap for total fees was set and the possibility of extremely high costs may have a chilling effect on requests. Imposing the maximum fees per item and unlawfully making VAT payable for the copies made may deter requests. Further, making citizens pay potentially high figures for participating in the democratic control of the state appears as a quasi-punishment for exercising their information rights. Furnishing bodies exercising public service functions with the necessary technical, financial and human resources should therefore be considered.

Finally, in respect of classified information, a legislative lacuna exists, leading to situations where information is only classified years after it is generated, even though conditions for classification are met. NAIH stressed that the fact that Mavtv. does not regulate when classification has to take place is against legal certainty and potentially violates the right to access data of public interests. Therefore, classification should be undertaken within reasonable time from the generation of the data, so that restrictions on the access to such information are not drawn out indefinitely.[181]

[179] NAIH-1361-2/2014/V.
[180] Report of NAIH for the year 2014, B-3002.
[181] Report on activities in 2016, NAIH B/13846.

12 An Overall Assessment of the Effectiveness of Freedom of Information in Hungary

The 1990s saw Hungary pioneering the modern guarantees of freedom of information in its region. Following the teething problems of the young democracy, legislation governing access to data of public interest was consolidated. The overall operation of the system guaranteeing freedom of information shows both weaknesses and strengths.

While criticism has been voiced, these primarily concern the legislative framework within which NAIH operates and not the performance of the authority itself. One of the most important but less visible contributions of NAIH to freedom of information is the education of central state and local self-government bodies to a culture of openness in dealing with requests for information. An important innovation of Hungarian freedom of information law is the concept of data public on grounds of public interest. This new concept bridged formerly irreconcilable data types, promoting access in cases where data would otherwise be considered personal data or a business secret. Another positive development was the introduction of the so-called public interest test (applied widely abroad) for cases where the restriction of access to data lies in the discretion of the data controller.

Negative trends are also emerging. An important point where experts see backtracking is that in contrast with the Data Protection Commissioner, NAIH does not have the right to turn directly to the Constitutional Court in instances where it considers that a norm governing freedom of information is unconstitutional.[182] This reduction of powers led to a situation where clearly unconstitutional situations may continue to prevail. In recent years, endeavours to evade the public eye through efforts at retroactive classification and to exert a chilling effect on requests for access to data of public interest through introducing a cost element have been considered as an affront to freedom of information in Hungary. NAIH and the Hungarian judicial system play an important role in constraining such efforts and restoring some public trust in the transparency of public affairs.

Finally, one of the system's weaknesses is surely the access to records compiled by the intelligence services of the communist regime, an issue that continues to haunt Hungarian politics. As far as the status of these records is concerned, the omission of the legislator, coupled with the

[182] Article 71 of Act No. CLI/2011 on the Constitutional Court.

problematic decision of the Constitutional Court, resulted in a missed opportunity to deal with the atrocities of the past. This is the area where the Hungarian freedom of information rules have failed to deliver.

For the near future, two important points should be considered to refine the system of freedom of information in Hungary. First, journalists should be afforded a privilege regarding deadlines for dealing with their requests for data of public interest, so that the public can be informed about topical issues in a timely manner. Second, the possibility of denying access to information which is "expected to underlie a future possible decision" should be constrained through detailed rules setting forth the exact conditions for invoking this rule.

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CHAPTER 11

Freedom of Information in Romania: Legal and Empirical Insights

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1 Introduction

Citizens' right to know about the activity of public institutions is one of the principles at the heart of a cultural change between the government and the citizens: from a monistic government that is assembled around one source of power, to a government which empowers people and the civil society organizations to become responsible and to get involved in solving community problems.[1] The government only manages the administrative activity on behalf of citizens, and therefore the true owners of public information are citizens.[2] Providing access to public information is

[1] Birkinshaw 2001.
[2] UK Prime Minister Gordon Brown *apud* Hazell and Worthy 2010, p. 356.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_11

believed to bring many benefits, such as increasing transparency and accountability of public institutions, enhancing public participation, improving quality of the decision making in the government and an increase of overall effectiveness of administration[3]; however, over time the research had questioned its ability to improve the quality of government.[4] Free access to public information is not anymore the privilege enjoyed by few advanced democracies, but it became a piece of legislation passed by many countries around the world in response to domestic and international pressures for transparency and good governance.[5] There is the assumption that once adopted, the legislation will be diligently implemented by public institutions[6]; however, countries from Central and Eastern Europe which passed new laws in the spirit of democratic values and a free market in a limited period of time faced difficulties in building the implementation machinery and in internalizing the new values. The case study of Romanian FOIA illustrates the challenges of making the activity of politicians and civil servants subjected to public scrutiny in the context of major public administration reforms.

Romania is a unitary state and a semi-presidential republic. The country has a two-tier administrative division: 41 counties that have equal responsibilities and 3,181 municipalities, cities and communes. The government is represented at the county level by the prefect who coordinates deconcentrated services from central government to the county level. Cities have a mayor and a Local Council, both being directly elected by the citizens for a four-year term. County Councils are directly elected for a four-year term, and the president of the County Council is elected by the county councilors from among them. Romania has a population of approximately 19,500,000 people. Romania gained its freedom in December 1989 with the fall of the communism regime, and became a member state of the European Union in 2007.

The analysis of the Freedom of Information Act in Romania is based on several sources of information. We conducted a quantitative analysis of the annual FOIA reports of 127 public institutions for the period 2010–2016, as follows: 32 City Halls of cities county residence, 33 County Councils, 23 City Halls of smaller cities and three City Halls of Bucharest Sectors, 18 Prefectures, seven ministries and five public institutions subordinated to the Government or Ministries, four Police County Inspectorates, Chamber of Deputy and Senate (Annex 11.1 includes the full list of the

[3] James 2006.
[4] Cucciniello et al. 2017.
[5] Hazell and Worthy 2010.
[6] Worthy 2010.

analyzed institutions). We checked the webpages of all City Halls of cities county residence, County Councils and Prefectures, and in the case we did not find the reports for all seven years we sent a request by email to the officer responsible for access to public information asking for the missing reports. We checked all the webpages of City Halls of all cities in Romania, and looked for those institutions that uploaded the reports between 2010 and 2016, but instead of emailing to all cities missing some of the reports, we emailed only to those City Halls which had at least two or three out of seven reports. In the case of ministries, we included in the analysis only those ministries which functioned continuously in the last seven years. All the other institutions were selected because they had the reports for the entire analyzed period. We did not aim to include in the sample all the public institutions and authorities which have to bind the law because it would have been a very difficult process collecting all the reports. In addition, some of the institutions we emailed replied that they did not have the reports older than three years, because the law of archives allowed them to destroy those reports. Some institutions which were initially included in the sample had to be extracted because of inconsistency in filling out the reports. For example, four institutions included verbal requests in the total number of requests in some years, while in other years they did not include them; therefore, great differences in the total number of requests existed between two subsequent years (for example, City Hall Galați reported 49,684 requests in 2010, 48 in 2011, 41,375 in 2012 and 59 in 2013). We extracted from the FOIA annual reports information on the total number of requests, requests answered favorably, redirected, rejected (and the reason of rejection), the way of addressing the request (on paper or by email), who addressed the request (citizens or legal entities), number of administrative and legal complaints (and how they were solved).

The case study is based on the analysis of several documents: (a) legislation and official government reports, (b) reports from nongovernmental organizations and think tanks engaged in monitoring FOIA implementation, (c) academic articles which analyzed challenges of FOIA implementation in Romania, (d) newspaper articles on free access to information from leading Romanian national newspapers. In addition, we conducted six semi-structured interviews with civil servants responsible with FOIA implementation[7] in March and April 2017: three of them worked for City

[7] Civil servants responsible for FOIA implementation in each public institution are named information officers in this manuscript. No confusion should be created between them and an Information Commissioner, as Romania does not have one.

Halls of cities county residence and three of them for County Councils. The main questions were about the implementation of law in their respective institutions, the challenges they faced and how they solved them; we mainly discussed all the topics covered in this case study with these key informants. We diversified the sources of information by including an analysis of the jurisprudence in order to identify the challenges of FOIA implementation over time.

Based on all these sources, we built a case study which analyzes the political context in which FOIA was adopted in Romania, how the law regulates the free access to public information, how it was amended to better address both the procedural problems as well as the technological and social changes that occurred over time, and which were the main obstacles for building the institutional capacity and incorporating transparency principles in everyday practice of public institutions. We exemplify how the administrative courts decided on key issues regarding FOIA implementation, and the challenges of unifying the practice of law enforcement. The next section presents the evolution of the law starting with some political considerations of its adoption, and observing its progress over time.

2 Short History of FOIA in Romania

More than ten years passed since the 1989 revolution until FOIA was adopted by the Romanian Parliament in October 2001. The public administration that came out of communism was opaque and resistant to change, and the public institutions had a low administrative capacity to implement reforms.[8] In the first years after the revolution, there was a public pressure to open the archives and the secret police records,[9] while at the same time politicians worked toward passing a law for the protection of classified data. It was very close for Romania to have a law on the protection of classified data before a law on free access to public information.[10]

The window of opportunity for passing the Freedom of Information Act along with other laws that would increase government transparency and accountability was opened by the accession process of the country to the European Union, which required the government's commitment toward building institutions and procedures in accordance with the democratic values.[11] The final version of FOIA was a concession between the draft pro-

[8] Schnell 2016.
[9] Dragoș 2006, p. 26.
[10] Mungiu-Pippidi 2001, p. 2.
[11] APADOR-CH 2007, p. 5.

posed by the Ministry of Public Information (a new ministry in the cabinet installed the year before) and the proposal of the National Liberal Party (a party in opposition at that time). The adoption of the law came in the context of a strong support from several national nongovernmental organizations and think tanks which advocated for securing free access to public information and acted as policy entrepreneurs in passing FOIA in Romania. In March 2011, a meeting mediated by the think tank Romanian Academic Society was held at the Ministry of Public Information headquarter with the participation of the government and the opposition representatives, as well as of the civil society. The new version of the law sent to Parliament was a combination of the government's proposal and civil society's recommendations included in the National Liberal Party project.[12] The discussions on the new proposal did not linger for long in the Parliament; therefore, at the end of September 2001, both chambers of the Parliament agreed on the final version of the law, and in October 2001 the law came into effect as Law no. 544/2001.[13] In February 2002, the implementation norms of the law were passed,[14] and in two years the Parliament adopted the Law no. 52/2003 on transparent decision making in public institutions.[15]

The adoption of Freedom of Information Act was a great achievement for the government and the civil society; however, a long way had to be walked until an effective and predictable openness of the government was achieved.[16] The efforts toward building administrative capacity for enforcing FOIA provisions lacked "a truly powerful FOIA coordination agency – one that could entrust higher visibility and political salience to the task" (World Bank 2012, p. 9). In 2003 the Ministry of Public Information was closed, and its successor the Agency for Governmental Strategies played a marginal role in enhancing the implementation; in 2009 the agency became a department in the General Secretary of the Government. This department continued the efforts to monitor regularly the implementation of the law and to make recommendations for a

[12] Mungiu-Pippidi 2001, p. 2.

[13] Law no. 544 from 12 October 2001 on free access to public information, published in the Official Gazette of Romania no. 663 from 23 October 2001.

[14] Government Decision no. 123 from 7 February 2002 on implementation norms of Law no. 544/2001 on free access to public information, published in the Official Gazette of Romania no. 167 from 8 March 2002.

[15] Law no. 52 from 21 January 2003 on transparency of decision making in public institutions, published in the Official Gazette of Romania no. 749 from 3 February 2003.

[16] Dragoș et al. 2012.

unitary application of the law; however, the diligent disclosure of public information differed among public institutions from central and local level, and in different fields of the government activity.

In November 2015 the appointment of a civil society activist as the head of the newly established Ministry of Public Consultation and Civic Dialog signaled the importance given to increase government transparency and the involvement of the civil society in the decision making process. The new minister had a rich experience on the free access to public information as the nongovernmental organization she ran before (namely, Institute for Public Policy) implemented several projects that monitored FOIA implementation over time. The ministry initiated broad consultations with public institutions and civil society, and in July 2016 amended FOIA methodological norms by including new provisions that would better fit the technological progress, unify the practice of disclosing public information across public institutions and would address those unclear aspects signaled by public institutions and civil society.[17] The ministry remained in the structure of the subsequent government that came into office in January 2017.

The principle of free access to public information is necessary, but it needs to become embedded in the core values of the public officials and civil servants and to be transposed in the everyday practice of public institutions. The next sections depict the main features of FOIA in Romania and the main challenges of its implementation over time.

3 Beneficiaries of Access to Information

Romanian FOIA grants any citizen or legal entity the right to request and obtain from public institutions information of public interest. Romanian Constitution in its article 31 states that "the right of any person to have access to any information cannot be restricted"; however, the right to information must not be prejudicial to the measures protecting young people or national security. According to the art. 1 of FOIA: "the free and unobstructed access of a person to any information of public interest constitutes one of the fundamental principles of the relations between citizens and public authorities, in accordance with the Romanian Constitution and with the international documents ratified by the Romanian Parliament".

[17] Government Decision no. 478 from 6 July 2016 on modifying and improving the implementation norms of the Government Decision no. 123/2002, published in the Official Gazette of Romania no. 516 from 8 July 2016.

Table 11.1 Total no. of requests between 2010 and 2016

Total no. of requests	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
City Halls of cities county residence	4,201	4,223	2,628	3,227	3,129	4,412	5,639
City Halls of smaller cities	1,794	1,677	1,502	1,841	1,826	2,024	2,337
County Councils	2,373	1,493	1,060	1,357	1,652	2,057	1,851
Prefectures	780	768	617	646	739	714	1,639
Ministries and subordinated institutions	45,213	26,337	27,095	26,256	24,052	24,117	28,181
Police County Inspectorates	2,383	7,707	9,399	12,992	6,975	8,716	5,566
Chamber of Deputy and Senate	886	899	857	1,219	1,369	2,091	2,214
Total	**57,630**	**43,104**	**43,158**	**47,538**	**39,742**	**44,131**	**47,427**

Source: Authors, based on FOIA annual reports

In the first years after FOIA adoption, the number of requests for public information was low because of the lack of knowledge about the existence of law among citizens.[18] One interviwed information officer declared that the requests coming from national NGOs (especially those active in the field of defending human rights, democratic values, public policy and anti-corruption) outnumbered the requests from citizens. These NGOs were instrumental in improving citizens' awareness about their right to public information and improving the compliance of public institutions with FOIA provisions.

In order to analyze the number of requests over time and their distribution by type of beneficiaries, we collected information from 889 annual FOIA reports published by 127 public institutions between 2010 and 2016. We found that the total number of requests for public information reported by the researched institutions declined between 2010 and 2016. However, the number of requests submitted to City Halls increased both in the case of cities county residence and smaller cities, as well as in the case of Police County Inspectorates, Prefectures and the chambers of Parliament (see Table 11.1). For example, the City Halls of Cluj-Napoca, Timișoara, Sector 2 of Bucharest, Constanța and Bacău faced the largest increases in the number of requests: Cluj-Napoca from 298 to 903

[18] Pro Democracy Association and IRIS 2003.

(approx. three times), Timișoara from 148 to 580 (almost four times), Sector 2 of Bucharest from 53 to 236 (approx. four times), Constanța from 70 to 237 (more than three times) and Bacău from 84 to 230 (almost three times). It is interesting the case of the Oradea City Hall, which faced a dramatic decline from 1,191 requests in 2010 to 330 in 2016.

The results contradict the expectation that the number of requests would increase as citizens become more aware of the law and the rights that they have in relation with the public administration. The general decrease in the total number of requests between 2010 and 2016 might be caused by the increase in the amount of information that public institutions disclosed through different channels such as webpages, mass media, social media or their own publications. In addition, citizens were provided with more opportunities to get involved in consultation committees organized by public institutions; therefore, the amount of information that people had about the activity of public institutions increased over time. However, since 2014 the number of requests is on an increasing trend.

The healthy FOIA regime depends on who makes the requests because larger numbers of requests coming from mass-media and businesses make a different regime than when access to information is driven by the public.[19] Annual FOIA reports collect data about the beneficiaries of the information of public interest and divide them into two categories: citizens and legal entities. The category of legal entities is very broad and includes companies, nongovernmental organizations, mass media, political parties, law firms and so on. The analysis of the requests by the type of beneficiaries indicates a fluctuation from year to year, which makes difficult to identify a trend. For example, in 2013 citizens addressed the largest number of requests (31,160) over the entire analyzed period, only that the next year the number declined to the lowest level. In 2016, the total number of requests coming from citizens reached the same level as in 2011. We could not identify a trend in the case of requests addressed by legal entities between 2010 and 2016. However, the proportion of requests from citizens was larger than those coming from legal entities (see Table 11.2).

When looking closer by the type of public institution, the proportion of requests from citizens is larger than the requests from legal entities in the case of City Halls of smaller cities, Prefectures, ministries and subordinated institutions, and the chambers of Parliament. Over the past seven years, the proportion of beneficiaries of public information provided by

[19] Hazell and Worthy 2010, p. 354.

City Halls of cities county residence changed, as the proportion of legal entities' requests increased and outnumbered the requests of citizens (Table 11.3).

The interviews that we have conducted gave us interesting insights on the particular categories of beneficiaries who use FOIA law. It is interesting the case of a County Council where the number of requests coming from legal firms to read the winning bid offers increased in the past years;

Table 11.2 Requests by type of beneficiaries

Beneficiaries	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
Citizens	26,182	27,588	24,683	31,160	20,055	22,047	27,342
Legal entities	26,292	14,576	17,542	13,399	18,818	21,103	19,552
Total	52,474	42,164	42,225	44,559	38,873	43,150	46,894

Source: Authors, based on FOIA annual reports

Table 11.3 Proportion of requests by the type of beneficiaries and institutions

Beneficiaries		*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
City Halls of cities county residence	Citizens	57.49%	58.61%	49.98%	48.51%	39.75%	39.26%	48.80%
	Legal entities	42.51%	41.39%	50.02%	51.49%	60.25%	60.74%	51.20%
City Halls of smaller cities	Citizens	73.75%	78.11%	73.44%	54.76%	49.39%	53.53%	61.64%
	Legal entities	26.25%	21.89%	26.56%	45.24%	50.61%	46.47%	38.36%
County Councils	Citizens	41.64%	46.17%	38.52%	40.34%	26.34%	25.94%	36.01%
	Legal entities	58.36%	53.83%	61.48%	59.66%	73.66%	74.06%	63.99%
Prefectures	Citizens	65.89%	71.41%	80.81%	79.19%	73.94%	71.88%	88.34%
	Legal entities	34.11%	28.59%	19.19%	20.81%	26.06%	28.12%	11.66%
Ministries and subordinated institutions	Citizens	46.69%	66.49%	72.52%	72.19%	67.96%	69.88%	69.54%
	Legal entities	53.31%	33.51%	27.48%	27.81%	32.04%	30.12%	30.46%
Police County Inspectorates	Citizens	76.29%	66.74%	18.22%	75.77%	1.81%	1.28%	1.29%
	Legal entities	23.71%	33.26%	81.78%	24.23%	98.19%	98.72%	98.71%
Chamber of Deputy and Senate	Citizens	56.61%	53.38%	61.14%	53.08%	63.76%	80.85%	78.36%
	Legal entities	43.39%	46.62%	38.86%	46.92%	36.24%	19.15%	21.64%

Source: Authors, based on FOIA annual reports

the lawyers used the right to have access to procurement contracts to identify proofs that the legal procedures were broken, and to require the annulment of contracts, therefore helping their clients who occupied the second position to win the contract (interview with an information officer). The same information officer described that before electoral campaigns the candidates had requested information of public interest about the activity of public institution in order to either document themselves for formulating their electoral proposals, or to identify mistakes in the activity of public officials, who might be their opponents in the elections, and therefore grounding accusations against their activity or how they had managed the public institution.

The NGOs continued to be active in testing FOIA implementation; however, their use of law had much broadened, and it became an instrument for collecting information about the activity of public institutions[20] or a very useful tool in the hands of civic activists fighting to solve public problems.[21] However, as the use of FOIA increased, civil servants complained that they were requested more often to create new information, rather than to provide existing information, and they gave the impression that the law was a burden for them.[22]

4 Entities Which Are Bound by the Law

Romanian FOIA defines the public authorities and institutions which are bound to disclose information of public interest as any authority or public institution that uses or manages financial public resources, any autonomous public company ("regie autonomă" in Romanian) and companies regulated by the Law no. 31/1990 that are under the authority, coordination or subordination of a central or local public authority, and to which the Romanian state or an administrative territorial unit is a sole or major shareholder, and any operator or regional operator, as they are defined by the Law no. 51/2006 on community services. In addition, political parties, sports federations and nongovernmental organizations of public utility, which receive public funds, have to apply the provisions of FOIA.

Over time, the category of entities which are bound by law was enlarged. In 2006, the Law no. 371/2006 included the national companies

[20] Societatea Academică Română 2009; APADOR-CH 2007.
[21] Pelehatăi 2017.
[22] Simina and Felseghi 2017.

and commercial companies under the authority of a central or local public authority, and to which the Romanian state or an administrative territorial unit is the sole or major shareholder. In 2016, the Law no. 144/2016 included any operator or regional operator as they were defined by Law no. 51/2006 on community services, and political parties, sports federations and nongovernmental organizations of public utility, which receive public funds. The number of entities covered by the law is very large, including the entire spectrum of public authorities and institutions, state companies, autonomous public companies, as well as new forms of organizations that emerged more recently being private or nongovernmental and which provide services of public utility or use public funds. For example, hospitals, universities and judicial courts are bound to apply FOIA provisions. Over time, some of the organizations became more accustomed to answer the requests for public information than others; however, the hospitals and public universities lacked the practice of being questioned about how they spent public funds, and public companies had the tendency to consider themselves as private companies and argued that they were not required to bind transparency requirements.[23]

Administrative courts were instrumental in clarifying whether some organizations were subjects of FOIA provisions. For example, Cluj Court of Appeal decided that CEC Bank, even though it was subordinated to the Ministry of Public Finance, was not bound to FOIA provisions.[24] The court decision was based on the rule that a bank under the authority of a public institution is bound to disclose information of public interest only if it meets two rules: the bank has as the sole or majority stakeholder the state, and it uses or manages public funds. Therefore, CEC Bank, which did not use public funds, was not required to apply FOIA.

Another similar situation was in the case of nongovernmental organizations of public utility[25] and private organizations that received the status of public utility through the law or government decision. These organizations become subjects of FOIA provisions if they meet several criteria: receive responsibilities of public authority, own public property, receive public funds and function according to the public finance legislation.[26] Cluj

[23] Societatea Academică Română 2009, pp. 20–21.

[24] Civil decision no. 5139/CA/2015 of Cluj Court of Appeal.

[25] Such as National Union of Bars from Romania, National Union of Public Notaries from Romania, Romanian Order of Architects.

[26] Dragoș 2009, p. 78.

Court of Appeal decided that Cluj Bar was not a legal entity of public interest because it did not use or manage public funds.[27]

According to the law, public authorities and institutions are required to organize an office for information and public relations or to appoint a person having responsibilities in this field. However, the mere establishment of these offices did not improve the flow of information from the public institutions to the regular citizens, or the citizens used their right to request more information. Building the administrative capacity for implementing the law was a gradual process, as the FOIA was a fragile tool in the hands of poorly trained civil servants who perceived this activity as being marginal comparative with other tasks they had to perform.[28] In the first years after adoption, Ministry for Public Information provided assistance and formal training for concerned civil servants, but the ongoing process of professionalization in order to ensure a uniform application of the law was terminated in 2003 when the ministry was dissolved. Its successor agency continued to monitor the application of the law, identify problems and formulate recommendations, but did not have the legal or financial means to constrain or penalize public institutions which did not diligently apply the law. The vacuum of strings to strengthen the law was filled in by nongovernmental organizations which monitored continuously the implementation of the law.

Researches conducted over time are valuable sources of documentation regarding the challenges which occurred in FOIA implementation. They testify that implementation was indeed the missing link[29] in the success of this law. A research conducted by Pro Democracy Association in 2003 found that a small proportion of the public institutions researched had an office or a civil servant with responsibilities in providing information of public interest. Even though 58.4% of 884 public entities researched provided contact information of offices or civil servants responsible for FOIA, when later the association's volunteers actually requested information of public interest, they found civil servants who officially received responsibilities for implementing the law, but who were unaware of it or did not know the provisions of the law. The research repeated by Pro Democracy Association in 2007 found overall improvements in the implementation of the law, but small public institutions (such as City Halls of

[27] Civil decision no. 5886/CA/2015 of Cluj Court of Appeal.
[28] World Bank 2012; Pro Democracy Association and Transparency International 2007.
[29] Dunn et al. 2006.

communes) had a low FOIA capacity because the frequent transfers of responsibilities from one civil servant to another made difficult the real professionalization of services provided by those public institutions.[30] In addition, during the round tables organized through the same research project in 2007, civil servants responsible for public relations complained about the inexistence of training events.

According to a research conducted in 2015 by the Department for Governmental Strategies on 20 central institutions, 42 Prefectures, 42 City Halls of county seats and four City Halls of smaller cities showed that 21% of analyzed public institutions had one person appointed to implement FOIA.[31]

5 The Request for Access

According to art. 6 of FOIA, the request for information of public interest should contain the following elements: the public institution or the authority to which the request is addressed; the requested information so that it would allow the public institution to identify the information of public interest; the applicant's surname, last name and signature; as well as the address where to send the answer. There is no obligation to provide a motif for the request; however, the petitioner has to disclose his/her name and address, otherwise, the public institution will not answer the request.

All the requests, disregarding the channel they were submitted, including verbal ones, should be registered immediately by the information officer on a special registry for public information requests and answers. FOIA methodological norms provide a template for this registry, which requires the information officer to collect such information about each request as the data and the channel of receiving, the name of the applicant, whether it is a citizen or legal entity, information required, date and timeframe for sending the answer.

In order to help applicants correctly formulate the requests, the FOIA methodological norms provide petitioners with a model-form which indicates the information that the request should contain, and the public institutions are bound to disseminate it by posting the form on their webpages and by informing the citizens about its existence. However, it cannot be a reason for refusing access to public information if the request is drafted in

[30] Pro Democracy Association and Transparency International 2007.

[31] Foundation note for modifying the implementation norms of Law no. 544/2001, 2016.

another form than the prescribed model. Information of public interest can be requested and answered in writing or electronically. The written requests shall be answered by the public institutions in the format requested by the applicant, which can be also electronically. If the public information exists also in editable format, it can be provided to the plaintiff in this format upon his/her request. In order to prevent situations when access to public information was denied because of lack of handwritten signature on electronic requests, the 2016 changes to the methodological norms added a new provision saying that the lack of handwritten signature on the request transmitted electronically cannot be a reason for not supplying the requested information. Also, Alba Court of Appeal decided that an illegible written request cannot constitute a reason for refusal to communicate information, because the public institution which encounters difficulties in understanding which are the requested information has to notify the petitioner about this fact.[32]

The analysis of the channels used for requesting public information for the sample of 127 public institutions between 2010 and 2016 shows a decline in the proportion of written requests and an increase in the number of requests addressed electronically or verbally. The proportion of written requests declined from 38.26% in 2010 to 17.62% in 2016, while the requests addressed electronically increased from 27.48% to 41.39%. The number of cases when petitioners requested verbally information increased from 34.24% to 41.00%, however, this change should be interpreted carefully because not all public institutions disclosed the number of verbal requests in their annual FOIA reports, and when these data are reported they tend to outnumber the written and electronic requests. These findings show that public institutions use more the email when communicating with citizens (Table 11.4).

A closer analysis on how petitioners requested information of public interest shows that in 2016 they used predominantly electronic means (emails or online applications from institution's websites). The largest proportion of electronic requests were reported by County Councils (72.33%), followed by City Halls of cities county residence (50.28%), City Halls of smaller cities (49.64%) and ministries and subordinated institutions (47.80%). In the case of Police County Inspectorates (95.18%) and Chamber of Deputy and Senate (80.22%), the largest proportion of applicants requested information verbally. All public institutions included in

[32] Civil decision no. 2447/2010 of Alba Court of Appeal.

Table 11.4 Distribution of the public information requests by the channels of addressing the request

	2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
In writing	38.28%	15.82%	15.11%	15.66%	18.37%	18.07%	17.62%
Electronically	27.48%	25.43%	25.92%	30.00%	32.90%	32.64%	41.39%
Verbally	34.24%	58.76%	58.97%	54.35%	48.73%	49.29%	41.00%

Source: Authors, based on FOIA annual reports

the analysis reported a decline in the number of written requests between 2010 and 2016; the only exceptions are City Halls of smaller cities which reported a small increase, but the small number of City Halls included in the sample could have influenced the findings (Table 11.5).

The findings of our research show a change in the channel used for sending the requests for information of public interest comparatively with the findings of the research conducted by other organizations. The predominant channel used between 2003 and 2009 was the verbal requests according to an analysis of the annual FOIA reports conducted by the Department for Governmental Strategies (World Bank 2012). While the verbal requests declined from 73% in 2003 to 54% in 2008, the proportion of written requests increased from 21% in 2003 to 38.70% in 2009. The proportion of requests sent by email increased with 3% from 6% in 2003 to 9% in 2009. According to the same study, a plausible explanation for a high number of verbal requests could be that public institutions reported all interactions with the citizens as requests of public information to show a high volume of activity (World Bank 2012).

The research conducted by Pro Democracy Association and Transparency International (2007) found that the communication through electronic channels (especially emails) to solve the requests was not used sufficiently in 2007. The evidences collected by Pro Democracy Association through a research conducted in 2003 showed the difficulties faced by its volunteers in registering the requests for public information (one volunteer had to wait until information officer received the approval of the public institution director to register the request) (Pro Democracy Association and IRIS 2003). Many volunteers faced the reluctance of the civil servants in registering the requests who questioned about the motif of requesting the information. However, over time the level of professionalization of information officers improved. Still, a great challenge is of dealing with vexatious or repetitive requests.

Table 11.5 Distribution of the public information requests by the channel and the type of institutions

		2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
City Halls of cities county residence	In writing	39.58%	37.53%	51.84%	47.20%	47.47%	43.26%	38.19%
	Electronically	24.42%	22.08%	31.50%	43.39%	42.41%	50.14%	50.28%
	Verbally	36.00%	40.40%	16.66%	9.41%	10.12%	6.60%	11.54%
City Halls of smaller cities	In writing	28.22%	24.92%	26.32%	25.03%	20.89%	28.95%	29.78%
	Electronically	13.06%	15.86%	19.40%	17.39%	26.61%	34.84%	49.64%
	Verbally	58.72%	59.22%	54.28%	57.59%	52.50%	36.21%	20.58%
County Councils	In writing	74.88%	48.40%	44.09%	39.58%	43.09%	38.87%	27.55%
	Electronically	20.30%	42.05%	47.65%	57.16%	53.19%	58.87%	72.33%
	Verbally	4.82%	9.55%	8.26%	3.26%	3.72%	2.26%	0.11%
Prefectures	In writing	61.46%	61.39%	60.68%	55.92%	41.97%	49.28%	21.45%
	Electronically	24.64%	28.38%	23.76%	27.23%	38.49%	30.37%	15.07%
	Verbally	13.91%	10.23%	15.56%	16.86%	19.54%	20.34%	63.48%
Ministries and subordinated institutions	In writing	38.70%	13.56%	14.51%	17.60%	18.62%	18.43%	16.79%
	Electronically	29.91%	32.51%	33.19%	42.90%	40.16%	40.22%	47.80%
	Verbally	31.39%	53.94%	52.31%	39.51%	41.23%	41.35%	35.42%
Police County Inspectorates	In writing	2.28%	0.61%	0.63%	0.56%	0.09%	0.17%	0.40%
	Electronically	7.44%	2.70%	2.54%	1.60%	2.86%	2.06%	4.42%
	Verbally	90.28%	96.69%	96.83%	97.84%	97.05%	97.77%	95.18%
Chamber of Deputy and Senate	In writing	8.54%	7.40%	4.02%	6.06%	2.08%	2.52%	2.63%
	Electronically	24.93%	15.84%	22.70%	28.92%	19.42%	14.17%	17.15%
	Verbally	66.53%	76.75%	73.28%	65.02%	78.50%	83.32%	80.22%

Source: Authors, based on FOIA annual reports

Three information officers that we have interviewed described that they had received requests coming from the same citizens who regularly sent requests for information of public interest. In some cases, answering their requests was challenging because they asked for large number of documents or information, which, as one information officer said, it almost "blocked the activity of the public institution". In other circumstances, the requests for the large number of information came just before major holidays (such as Christmas). Even though the information officers said that they did not question the motif of the petitioners and acknowledged the right of citizens to request information, their perception was that sometimes they were just given work to do on purpose with no further use of the information. Another information officer described the situation when a regular petitioner failed to take the responses sent by the public institution by mail, and afterwards complained that he did not receive the answer even though the public institution had the proofs that it sent the answers. In all the cases, the information officers declared that they tried to diligently answer the vexatious requests even though sometimes it was difficult to meet the deadlines or collect large amounts of information. The case of Cluj-Napoca City Hall stands out among the public institutions analyzed because of the large number of actions in courts in 2010 comparatively with other public institutions (53 out of 255 actions in courts were against Cluj-Napoca City Hall). When interviewed about this particular situation, the information officer from Cluj-Napoca declared that the actions were filed by prisoners who used their cases as a reason to get out of jail to prepare their defenses; the City Hall representative said that the institution did not receive any request for public information from the respective persons in advance. Their complaints were finally rejected.

Romanian FOIA does not regulate how public institutions should solve "vexatious requests" and does not allow information officers to refuse to disclose the information if the requests fall in the category of "vexatious" requests, as is the case in other countries.[33]

6 The Response/Answer

The 2016 changes to FOIA methodological norms provide public institutions with a model-form for answering the requests for public information. The model-form indicates the structure and the elements that the

[33] According to Scottish FOIA, public bodies are allowed to refuse to disclose information if the request is considered "vexatious" (Cherry and McMeneny 2013).

answer should contain, such as the name and address of the public institution, the name of the information officer, the number and date for the answer from the registry of public information requests, the name and address of the petitioner, the number and date for the request from the registry. The model-form also includes standard formulations that cover a broad range of answers, such as providing the answer and explaining that the institution needs 30 days to answer the request instead of ten days because it requires complex information, that the request was redirected to another public institution which has the information and which will deliver the response or that the information is excepted from public access. In addition, the petitioner can be informed about the costs of copying the documents, and a standard formulation is recommended to be used, which indicates the bank account for transferring the money.

The methodological norms provide guidelines for information officers on how to answer the requests. They should conduct a first assessment of the request and decide if the information requested is an information *ex officio*, an exempted information or if the public institution holds the information. If the public institution does not hold the information, the information officer should forward the request to appropriate institution and notify the petitioner of this. If the institution has the information, the officer should send the request to the competent departments to check if the information is not exempted.

The mere request addressed to a public institution does not guarantee that the petitioner receives the information. A major challenge of FOIA implementation in Romania is that public institutions provide incomplete answers or other information or documents than the ones requested.[34]

The analysis of how public institutions responded to FOIA requests show that the proportion of positive answers remained the same between 2010 and 2016, but those forwarded to other institutions decreased (Table 11.6). This result might indicate an improvement of citizens' knowledge about the responsibilities of public institutions that might be reflected in addressing correctly their requests. The number of requests rejected increased slowly from 1.49% in 2010 to 3.33% in 2016.

In 2010, the majority of requests were rejected because the information was excepted from public disclosure or did not exist. However, the proportion of the category "other reasons" increased over the analyzed period (Table 11.7). Even though the slow increase of rejected requests

[34] Pro Democracy Association and IRIS 2003.

Table 11.6 Distribution of responses based on how they were solved

	2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
Total requests	57,630	43,104	44,284	47,538	39,742	44,131	47,427
Positive answers	93.74%	96.27%	95.43%	92.37%	94.45%	94.31%	93.46%
Forwarded to others institutions	4.67%	1.68%	1.71%	5.36%	2.42%	2.49%	2.78%
Rejected	1.49%	1.87%	2.82%	2.23%	3.12%	2.98%	3.33%

Source: Authors, based on FOIA annual reports

Table 11.7 Distribution of requests rejected by types of reasons

	2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
Total requests rejected	852	789	1,156	1,031	1,208	1,277	1,550
Information excepted	42.96%	45.37%	33.65%	37.83%	37.58%	36.26%	36.58%
Nonexistent information	43.43%	49.56%	48.70%	51.21%	45.28%	48.24%	41.23%
No reason	0.00%	0.00%	0.00%	0.00%	0.00%	0.08%	0.00%
Other reasons	13.38%	4.94%	17.65%	9.60%	16.80%	15.43%	22.13%

Source: Authors, based on FOIA annual reports

might be worrying, their number decreased from 17% in 2007 and 39% in 2008, according to the World Bank analysis (World Bank 2012).

City Halls of cities county residence rejected 9.43% of the total requests in 2016, while City Halls of smaller cities rejected 5.05% in the same year. The public institutions which received the largest number of wrongly addressed requests were County Councils—7.67% in 2016. This problem might be caused by the large number of public institutions subordinated to the County Councils (such as autonomous public companies for road and water, airports, sport facilities, hospitals, special needs schools, etc.) which might have hold the information (Table 11.8).

A positive answer reported by a public institution does not mean that the answer is complete or contains all the information requested.[35] For example, Cluj Court of Appeal decided that a response given within the legal timeframes, but which gives other information than that requested, even though the information is similar, is a refusal to communicate the

[35] According to Civil decision no. 601/CA/2009 of Bacău Court of Appeal, the fact that the petitioner received an answer is not the fulfillment of the obligations under FOIA if the answer does not contain the requested information.

Table 11.8 Distribution of responses by type of institution

Beneficiaries		*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
City Halls of cities county residence	Total requests	4,201	4,223	2,628	3,227	3,129	4,412	5,639
	Positive answers	92.67%	90.22%	91.10%	85.93%	87.28%	90.59%	85.60%
	Forwarded to other institutions	1.90%	4.14%	3.73%	6.82%	2.24%	2.09%	4.97%
	Rejected	4.78%	3.98%	4.79%	6.91%	10.39%	6.55%	9.43%
City Halls of smaller cities	Total requests	1,794	1,677	1,502	1,841	1,826	2,024	2,337
	Positive answers	92.03%	93.56%	93.21%	94.30%	94.25%	88.29%	89.82%
	Forwarded to other institutions	3.46%	3.04%	3.33%	2.82%	2.68%	4.89%	5.05%
	Rejected	3.90%	3.40%	3.46%	2.88%	3.07%	3.90%	5.13%
County Councils	Total requests	2,373	1,493	1,060	1,357	1,652	2,057	1,851
	Positive answers	93.93%	91.23%	91.70%	92.41%	93.95%	91.54%	89.09%
	Forwarded to other institutions	2.87%	4.89%	4.34%	3.46%	3.63%	5.20%	7.67%
	Rejected	2.78%	3.35%	3.96%	3.98%	2.24%	3.26%	2.86%
Prefectures	Total requests	780	768	617	646	739	714	1,639
	Positive answers	78.08%	86.85%	83.31%	77.86%	80.24%	77.45%	91.28%
	Forwarded to other institutions	8.85%	5.47%	5.35%	6.50%	6.90%	3.36%	4.15%
	Rejected	10.51%	7.68%	11.35%	15.63%	12.86%	18.63%	4.21%
Ministries and subordinated institutions	Total requests	45,213	26,337	27,095	26,256	24,052	24,117	28,181
	Positive answers	93.81%	97.18%	95.32%	90.33%	94.36%	94.56%	94.29%
	Forwarded to other institutions	5.29%	1.43%	1.52%	7.46%	2.81%	2.69%	2.50%
	Rejected	0.89%	1.39%	3.16%	2.19%	2.82%	2.75%	2.53%

(*continued*)

Table 11.8 (continued)

Beneficiaries		*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
Police County Inspectorates	Total requests	2,383	7,707	9,399	12,992	6,975	8,716	5,566
	Positive answers	99.16%	98.74%	99.11%	98.01%	98.92%	97.96%	99.25%
	Forwarded to other institutions	0.71%	0.09%	0.73%	1.72%	0.75%	1.39%	0.02%
	Rejected	0.13%	1.17%	0.16%	0.27%	0.33%	0.65%	0.74%
Chamber of Deputy and Senate	Total requests	886	899	857	1,219	1,369	2,091	2,214
	Positive answers	96.95%	98.11%	98.60%	98.03%	98.25%	98.37%	97.43%
	Forwarded to other institutions	0.11%	0.00%	0.00%	0.16%	0.07%	0.38%	0.23%
	Rejected	2.93%	1.89%	1.40%	1.80%	1.68%	1.24%	2.35%

Source: Authors, based on FOIA annual reports

information.[36] Public institutions should provide the information requested as long as they have the information, even if the request was sent to the wrong institution,[37] and this cannot be the reason for rejecting the request.

A Court of Appeal decided that a public institution did not fulfill the obligations under the Law no. 544/2001 by inviting the applicant to consult the information at the public institution headquarter if it is information other than that communicated *ex officio* and which can be consulted at the institution's headquarter. Also, the malfunction of a public institution as well as synopsis caused by legislative changes cannot be motives for refusing the request of public information.[38]

7 The Relation Between Documents and Information

FOIA requires public institutions to release copies of documents, and not to create new information. The Law no. 109/2007 on the reuse of public information has a similar interpretation, as art. 7 alin. (1) states that public

[36] Civil decision no. 3715/2015 of Cluj Court of Appeal.
[37] Civil decision no. 57/2015 of Cluj Court of Appeal.
[38] Civil decision no. 990/CA/2010 of Cluj Court of Appeal.

institutions are not bound to create, adapt documents or provide extracts from documents if this would require disproportionate costs, which exceed the scope of a single operation. Several Courts of Appeal decided that FOIA does not require public institutions to create statistics at the citizens' requests but to provide that information held at a time and in the form it was at that time (without the obligation to process it according to the requests formulated by citizens).[39] But the courts' practice is not unitary. In 2014, Brașov Court of Appeal ruled that a City Hall has to provide the petitioner with the requested information, even though it involved to create a new document, and not copies of documents which contained the information.[40]

However, information officers have different approaches to this issue. One interviewed information officer said that he received a request for centralized data about the activity of all 47 subordinated institutions, and that his institution did not have; instead of forwarding the request to the subordinated institutions and notifying the petitioner that he would receive the response from each institution, he requested the information from subordinated institutions, centralized the data, and sent the answer to the petitioner. However, this is a rare situation, because the public institutions are reluctant to produce new information which requires a large volume of work.[41]

Even though "FOIA let to an improvement in the access to 'raw' government information",[42] citizens face difficulties in reading and understanding some of the documents, such as the budget or the balance sheet, therefore they need additional information to fully understand the documents and their legal implications.

8 Methods of Providing Public Information *Ex Officio*

Information communicated *ex officio* increases the transparency of public institutions and reduces the number of requests for information. They indicate the minimum number of information that all public institutions have to disclose to citizens.

[39] Civil decision no. 57/CA/2015 of Cluj Court of Appeal; Civil decision no. 2047/CA/2010 of Bucharest Court of Appeal.

[40] Civil decision no. 1974/R from 26 August 2014 of Brașov Court of Appeal.

[41] Brașov Court of Appeal decided that a petitioner cannot require a public institution to create new documents that would generate a blockage of the respective public institution's activity (Civil decision no. 169/2015).

[42] Schnell 2016.

According to art. 5 of FOIA, every public institution and authority is required to provide *ex officio* the following information:

(a) the normative acts governing the organization and functioning of public institution;
(b) the organization structure, the responsibilities of the departments, the functioning schedule and the audience program of the public institution;
(c) the name of the persons occupying leading positions and the name of the officer responsible for disseminating information of public interest;
(d) the contact information of the public institution: name, address, phone and fax numbers, email address and webpage address;
(e) the financial sources, budget and balance sheet;
(f) the programs and the development strategies;
(g) the list with documents of public interest;
(h) the list with documents produced or managed by the public institution;
(i) the procedures for challenging the public institution's decisions when a person considers he/she was prejudiced relative to his/her right to have access to information of public interest.

Access to information *ex officio* is provided through the display at the public institution headquarter or by publication in the Official Gazette of Romania or in mass media, in public institution publications as well as on its own webpage. In the same time, information *ex officio* can be consulted at the public institution headquarter, in a specially designated area. The changes brought to FOIA methodological norms in 2016 required all public institutions to display the information *ex officio* on their webpages, and provided public institutions a model form on how to organize the information. The publication of information *ex officio* on the public institution's webpage does not exempt public institution from communicating the information upon citizens' request.[43]

Acknowledging the right of the ethnic groups to have access to public information, the FOIA methodological norms require all administrative

[43] Constanța Court of Appeal decided in several cases against Constanța City Hall which refused to provide information ex officio upon citizens' request because the information were already published on the City Hall webpage (Civil decisions nr. 639/CA from 20 of May 2015, 660/CA from 25 of May 2015, 11 of June 2015).

units, where a national minority represents at least 20% of the total population, to disseminate the information *ex officio* also in the minority language. In addition, public institutions are bound to make accessible their webpages for people with disability.

Public institutions are bound to publish and update yearly an information bulletin which should contain the information *ex officio*. In addition, public institutions are required to prepare an activity report at least yearly, which should be published in the Official Gazette of Romania.

In addition to information *ex officio*, FOIA requires public institutions to disclose privatization and procurement contracts upon citizens' request. This information was not classified initially as information of public interest, as it was included later in the law. In 2006, a new provision included in the law[44] required public institutions to disclose procurement contracts, and the access could not be restricted unless the contracts contained classified information or information which was protected by the right to intellectual property. Another change from 2007[45] bound them to disclose privatization contracts concluded after 2007, and gave citizens the right to consult them at the public institution headquarter.

The practice of FOIA implementation showed that the amount of information *ex officio* disclosed increased gradually over time. An analysis conducted by the Department for Government Strategies regarding FOIA implementation at the level of Prefectures, County Councils and ministries in 2011 showed an improvement comparatively with 2010.[46] Still, the amount of information proactively disclosed was small, as the analysis highlighted that normative acts governing the organization and functioning of public institutions (information *ex officio*) were the most frequently requested information by petitioners. This conclusion revealed that releasing public information was a marginal task for public institutions, and they did not perceive that increasing the amount of information published would reduce the work load of civil servants. According to the same analysis, in 2011, 29 out of 42 Prefectures published the information *ex officio* to a large degree, and 25 out of 42 County Councils disclosed a very good proportion of information, while the rest of the institutions released only partly the information *ex officio*. Similar conclusions were reached by an

[44] Law no. 380 from 5 October 2006 published in Official Gazette of Romania no. 846 from 13 October 2006.

[45] Law no. 188 from 19 June 2007 published in Official Gazette of Romania no. 425 from 26 June 2007.

[46] General Secretary of Government, Department for Government Strategies 2012, p. 7.

analysis of the accessibility of information *ex officio* displayed on the webpages of County Councils.[47] The analysis evaluated not only if the mandatory information was displayed but also whether it was accessible and novel. A research conducted in 2014 found that in the case of 20 out of 41 County Councils the information *ex officio* was complete and accessible on the webpages. Still, as webpages become the main venue for collecting information, many public institutions need to improve, update and make accessible public information.

Ministry for Public Consultation and Civic Dialog, established in November 2015, was essential in improving the disclosure of information *ex officio*. Throughout the year 2016 it monitored three times the webpages of 109 City Halls (of cities county residence and all the other cities having the rank of a municipality), County Councils and Prefectures.[48] After the first analysis, public institutions improved considerably the proportion of information *ex officio* displayed on their webpages, which indicates that they need a supervising institution to constantly monitor their activity and to guide them. We conducted our own analysis of the databases created by the Ministry for Public Consultation and Civic Dialog, and we analyzed the display of 15 items[49] which were monitored every time during the three observations (Table 11.9). Our analysis revealed that at the beginning of 2016 the average proportion of information displayed by municipalities was 64.89%, and it improved significantly by the end of the year when it reached 86.79%. County Councils and Prefectures increased their compliance with FOIA requirements, all Prefectures being reported to fully disclose the information *ex officio*.

In December 2015 and February 2016, the Ministry for Public Consultation and Civic Dialog monitored the webpages of all ministries.

[47] Ranta 2014, p. 111.

[48] Databases created by the Ministry for Public Consultation and Civic Dialog based on the analysis of public institutions' webpages are available at http://data.gov.ro/organization/ministerul-pentru-consultare-publica-si-dialog-civic.

[49] (1) The normative acts governing the organization and functioning of public institutions; (2) the organization structure; (3) the attributions of the departments; (4) the functioning schedule; (5) the audience program; (6) the name of the persons occupying leading positions, and the name of the officer responsible for disseminating information of public interest; (7) the contact information of the public institution; (8) the financial sources; (9) the budget for 2015; (10) the balance sheet for 2014; (11) the programs and development strategies (2015); (12) the list with documents of public interest; (13) the list with documents produced or managed by the public institution; (14) the procedures for challenging the public institution's decisions; (15) the annual FOIA report for 2014.

Table 11.9 The average proportion of information *ex officio* displayed on institutions' webpage

	Average proportion of information ex officio displayed on institutions' webpage (date of analysis)		
City Halls of municipalities	64.89% (February 2016)	86.42% (March 2016)	86.79% (November 2016)
County Councils	75.61% (January 2016)	94.31% (March 2016)	96.91% (November 2016)
Prefectures	72.06% (January 2016)	100% (February 2016)	100% (November 2016)
Ministries	68.52% (December 2015)	99.63% (February 2016)	–

Source: Authors, based on data collected by the Ministry for Public Consultation and Civic Dialog

The average proportion of information *ex officio* was 68.52% in 2015, but by February 2016 all ministries disclosed all information or were in the process to fully comply with FOIA requirements (Table 11.9).

The monitoring conducted by the Ministry for Public Consultation and Civic Dialog highlights that public institutions in Romania need institutional support and supervision to proactively deliver information of public interest to a larger extent. The steady increase of the information displayed on the webpages, as the main vehicle of communication, in addition to information *ex officio*, can improve the activity of public institutions, reduce the operational costs and improve citizens' satisfaction. However, the progress to increase the transparency of public institutions should be strengthened at the level of smaller cities which show a lower compliance with FOIA provisions.

9 Excepted Information

The following seven categories of information are exempted from free access according to art. 12 of Law no. 544/2001:

(1) information regarding national defense, public security and order, if they belong to the categories of classified information, according to the law;
(2) information regarding the deliberations of public authorities, as well as those concerning the economic and political interest of Romania, if they belong to the category of classified information, according to the law;

(3) information regarding commercial or financial activities, if their publicity infringes the intellectual or industrial property rights and the principle of fair competition, according to the law;
(4) information regarding personal data, according to the law;
(5) information regarding the procedure during a criminal or disciplinary investigation, if the outcome of the investigation is jeopardized, if confidential sources are disclosed or if life, physical integrity or health of a person are endangered in the course of or as a result of the investigation;
(6) information regarding judicial procedures, if their publicity breaches the right to a fair trial or a legitimate interest of one of the parties;
(7) information that would endanger the measures for the protection of youth if made public.

In the months following FOIA adoption, two separate pieces of legislation have been passed to regulate the scope of classified information and personal data,[50] namely, the Law no. 677/2001 on the protection of persons with regard to the processing of personal data (passed in November 2001) and the Law no. 182/2002 on the protection of classified data (adopted on April 2002). The Law no. 677/2001 regulates the right of individuals to have their private life protected and establishes how public institutions should manage personal data about citizens. In this regard, public institutions are prohibited to disclose data that would make a person identifiable; information about criminal offenses or contraventions should be stored carefully and managed only by public institutions, and the release of health information about individuals should be made only to protect public health and to prevent an imminent danger. Public institutions are prohibited to process personal data regarding racial or ethnic origin, political, religious, philosophical and trade union affiliation.

Law no. 182/2002 institutes the national protection system of classified information against spying or unauthorized access, as well as against unauthorized sabotage or destruction. According to the law, the following information falls under the category of state secrets and is prohibited from public disclosure: information about country defense system, maps

[50] Law no. 677 from 21 November 2001 on the protection of persons with regard to processing of personal data and free circulation of these data, published in Official Gazette of Romania no. 790 from 12 December 2001.

Law no. 182 from 12 April 2002 on the protection of classified data, published in Official Gazette of Romania no. 248 from 12 April 2002.

and geological prospects which assess the national mineral reserves, plans about the supply with electrical, thermal and water energy, research in the field of nuclear technology, information about issuing and printing of banknotes and metal coins, and the external activities of the Romanian state which are not intended for publicity. Public institutions are forbidden to classify information, data and documents as state secrets in order to conceal violations of the law, administrative errors, limitation of access to information of public interest, unlawful restriction of the exercise of rights of any person or harm to other legitimate interests.

The information which favors or hides breaches of the law by public institutions cannot be included in the category of classified information (art. 13 of FOIA). According to art. 14 alin. (1), information on the citizens' personal data may become information of public interest only if it affects the capacity to exercise a public office.

In case the requested information is on a document that contains information exempted from the free access, such as personal data, the document will be communicated after the anonymization of the excepted information.[51] All of the interviewed information officers responsible with FOIA implementation confirmed that they cover personal data before releasing the requested information. However, some documents which contain personal data are not released if they are not of public interest. For example, a Court of Appeal agreed that a County School Inspectorate correctly refused to provide copies of evaluation sheets of the pupils who participated at a competition to a teacher who wanted to compare the evaluations of his pupils with the evaluations of other pupils.[52] In addition, in order to ensure a fair investigation, courts have ruled that petitioners cannot receive copies of documents or information regarding the procedure during a criminal investigation.[53]

Public institutions raised different exceptions when refusing to disclose information of public interest. There are many lawsuits that have as the subject the refusal of public institutions to disclose procurement contracts, privatization contracts, concession contracts or contracts for services externalized to private companies. When refusing to discolose the infromation, the majority of public institutions raised the exception that the contracts' publicity would infringe the intellectual or industrial property rights and the principle of fair competition. For example, in 2009 Metrorex (Bucharest

[51] Civil decision no. 633/CA/2009 of Alba Court of Appeal.
[52] Civil decision no. 35/CA from 21 January 2015 of Constanța Court of Appeal.
[53] Civil decision no. 57/2015 of Cluj Court of Appeal.

metro company) refused to disclose a copy of the publicity contract concluded with a private company for the spaces within the metro stations, under the argument that the publicity would violate the fair competition principle. Metrorex released a copy of the contract only after Bucharest Tribunal gave a decision in this regard.[54] In 2010 Local Council of Sector 1 Bucharest refused to provide a copy of the garbage collection contract concluded with a private company by arguing the need to protect personal data, fair competition and intellectual or property rights.[55] Constanța City Hall refused to release a copy of a concession contract raising the same argument.[56] The Authority for State Assets Management (ASAM) refused to provide a copy of the privatization contract of the Automobile Craiova (Cars Craiova) Company to Ford Motor Company.[57] After Bucharest Court of Appeal ruled that ASAM has to provide the privatization contract, ASAM sued the petitioner (which was a coalition of nongovernmental organizations) by formulating an appeal for the annulment of the Bucharest Court of Appeal civil decision, and argued that Ford Motor Company was against the communication of the privatization contract because the contract contained a confidentiality clause. During the lawsuit, ASAM dropped the appeal and invited the petitioner to copy the requested documents.

Courts have decided that some excepted information should be released because there is an overriding public interest in disclosure. For example, a City Hall refused to release copies of the contracts concluded with the law firms and the amount of money paid for their legal services. The municipality argued that the regulations on the lawyers' activity prohibited the clients from violating the confidentiality agreements with regard to the fees and the activities of the lawyers without their consent. The Tribunal and the Court of Appeal decided that the public interest, in this case how public funds were spent for legal services provided by law firms, prevails over the contract confidentiality.[58] In other cases the public interest test was used to decide if personal data should be released.

In several cases public institutions refused to disclose building permits and their annexes because they infringed the intellectual property of economic activities. For example, a County Council refused several requests for copies of building permits and their annexes regarding the construction

[54] File number no. 40291/3/2009 of Bucharest Tribunal.
[55] File number 15267/3/2010 of Bucharest Tribunal.
[56] Civil decision no. 623CA from 18 May 2015 of Constanța Court of Appeal.
[57] Civil decision no. 1087 from 26 April 2010 of Bucharest Court of Appeal.
[58] Civil decision no. 111/CA from 2 February 2015 of Constanța Court of Appeal.

of a wind mill park because their release would infringe the intellectual property and fair competition, and in addition the contracts contained personal data.[59] The Courts of Appeal decided that the information was public data, and it should be released.

10 Timeframes for Answering the Requests

The Law no. 544/2001 provides different deadlines for communicating public information *ex officio* or upon request. The information *ex officio* should be available at the public institution headquarter by displaying it in a public place, and by allowing the interested persons to read it in special place inside the institution headquarter. Therefore, the information *ex officio* should be communicated immediately, but no later than five days by indicating the place where the information is available. The five-day deadline applies to the requests received in writing (on paper or electronically), and the immediate communication for verbal requests.

In the case of information of public interest requested by petitioners, public institutions and authorities are bound by law to answer within strict deadlines: (a) ten days for communicating the information if the access is granted; (b) maximum 30 days if the access is granted, but the answer is difficult and complex or involves a large volume of documents, on the condition that the information officer notifies in writing the petitioner about the need of extra time within ten days from registering the request; (c) five days for communicating that the access was denied (e.g., in the case the requested information is identified as being excepted)—the refusal must be motivated; (d) five days for communicating the applicant that the requested information is not in the field of activity of the institution, and that the request was redirected to the responsible institution. Information of public interest requested verbally by mass media should be answered immediately or within 24 hours at most. In the case the petitioner requests further information after receiving the response from the public institution, the new request will be dealt with as a new request and answered within the same timeframes indicated previously.

In the case of information requested verbally, the civil servants from the public relation offices are bound to explain to the applicants the conditions of providing access to information of public interest, and they can

[59] Civil decision no. 5/CA from 6 January 2014 of Constanţa Court of Appeal; Civil decision no. 1237/CA from 23 October 2014 of Constanţa Court of Appeal.

communicate the information on the spot. In the case the information cannot be communicated immediately, the petitioner is guided to write the request, and the request will be answered within the deadlines indicated previously. The public institutions are bound to announce the program when citizens can request verbally information of public interest, and one day per week the public relation program should be extended after the functioning hours of the institution.

The 30-day timeframe prescribed by law for answering the request is mandatory, and the public institutions have the obligation to organize their activity in such a way that this term is respected irrespective of the volume of requested information.[60] However, particular circumstances that impinge on the capacity of public institutions to answer the requests were accepted by a Court of Appeal as good reasons that the public institution did not provide the answer within the prescribed timeframe, and therefore it did not refuse to disclose public information.[61]

The initial form of the Law no. 544/2001 was unclear on several aspects regarding the timeframes for answering the requests, and it created confusion in implementing the legislation. The law did not specify whether the timeframes include calendar days or business days, and it used different wording for registering the request than the wording used in the methodological norms (the law specified "receiving the request", while the methodological norms "registering the request") (Foundation note for modifying the implementation norms of Law no. 544/2001, 2016). These two issues let public institutions calculate differently the deadlines. In 2016, the changes made by the government to the methodological norms clarified these issues by including provisions that the deadlines run from when the request is registered, and when calculating the timeframe the day when the request is registered is not included in the deadline, nor the day on which the term is reached. In addition, when the last day of a term falls on a non-lucrative day, the term is extended until the next working day.

[60] Bucharest Court of Appeal, Decision no. 76/2003.

[61] Civil decision no. 806 from 24 June 2015 of Constanța Court of Appeal. A City Hall answered a request about the property over several plots of land after 83 days and only after the petitioner started a lawsuit with a court of appeal. The Court of Appeal accepted the City Hall argument that it could not answer accurate information because it was in the process of surveying all land properties within the boundaries of the community. However, the City Hall should have informed the petitioner that would need more time for answering the request.

The Law no. 544/2001 was unclear also on how to answer the request when the petitioner did not specify in the request that it was formulated based on Law no. 544/2001. This situation created confusion on how to categorize the request: as a petition or as a request for information of public interest. Some public institutions decided wrongly that it was a petition and therefore applied the deadlines for answering a petition which gave them more time to answer the request.[62] For example, the research conducted in 2015 by the Direction for Governmental Strategies showed that 63% of civil servants responsible for FOIA implementation would categorize such requests as petitions and would answer them within 30 days.[63] The changes from 2016 to the methodological norms of Law no. 544/2001 solved this issue by saying that the deadlines according to the FOIA law should be applied also for those requests for information of public interest when the applicant did not invoke this law in the request.

11 Administrative and Judicial Remedies

According to articles 21 and 22 of FOIA, the explicit or tacit refusal of the information officer to enforce the provisions of the law constitutes a violation of the law and entails the disciplinary responsibility of the culprit. Against the refusal to disclose information of public interest, the harmed person can address an internal administrative appeal to the head of the public institution within 30 days since he/she has taken note of the respective refusal. If, after the administrative investigation, the complaint proves well-grounded, the answer shall be communicated to the harmed person within 15 days since filing the complaint, and the answer shall contain both the information of public interest initially requested and the disciplinary penalties taken against the culprit. Another procedure given by law to the harmed persons against the refusal of public institutions is to file a complaint with the administrative court of the tribunal in whose territorial jurisdiction the respective person lives or where the public institution's headquarter is located. The complaint shall be made within 30 days since the answer to the initial request was received. The court can require the public institution to provide the requested public information and to pay moral and/or patrimonial damages. The decision of the tribunal is subject to appeal, and the decision of the Court of Appeal shall be final and irrevocable. In order to help the petitioners to obtain the public information

[62] Government Ordinance no. 27 from 30 January 2002 regulating the settlement of petitions, published in Official Gazette of Romania no. 84 from 1 February 2002.

[63] Foundation note for modifying the implementation norms of Law no. 544/2001, 2016.

requested in the shortest period of time, both the complaint and the appeal shall be judged in court in an emergency procedure and shall be exempted from stamp duty. The action in court can be filed against the public institution, not the civil servants working within these institutions.[64]

The Romanian Ombudsman (People's Advocate) did not receive any authority to enforce the freedom of information legislation or to mediate the conflict between plaintiffs and public institutions. It has an advisory role, and its recommendations are weak because it does not have the power to sanction breaches of the law.[65] Romania does not have an Information Commissioner or any organizational setting to which a harmed petitioner can address to before making a complaint to an administrative court.[66]

The practice of FOIA implementation in Romania showed that courts were instrumental in enforcing the free access to public information because the public institutions were "reluctant to disclose information and used the judicial review as a delay in implementing the law".[67] In many cases, public institutions disclosed requested public information only after the harmed petitioners filed complaints with the administrative courts of tribunals.[68] In addition, courts were important in interpreting the law, even though their decisions were different sometimes in similar cases.[69] Nongovernmental organizations and think tanks played also an important role in creating precedent cases as grounds for future decisions by "bringing strategic litigations to court and allowing judges to pass rulings in this field".[70]

When analyzing how final decisions of courts of appeals which required public institutions to disclose requested information were put into practice, the practice showed that either they were not implemented by public institutions,[71] or they were put into practice with delay or even with bad faith.[72]

[64] Civil decision no. 1295/CA/2010 of Bucharest Court of Appeal.

[65] World Bank 2012, p. 13.

[66] Petroiu 2014, p. 112; Dragoș 2006, p. 31.

[67] Cobârzan et al. 2008, p. 59.

[68] Civil decisions of Constanța Court of Appeal nr. 872/CA from 8 September 2014 and nr. 1006/CA from 24 September 2014; Civil decision nr. 40291/3/2009 of Bucharest Tribunal; Civil decision nr. 44188/3/2009 of Bucharest Tribunal.

[69] Institute for Public Policies 2011, p. 5.

[70] World Bank 2012, p. 13; Societatea Academică Română 2009, p. 31.

[71] Eximbank director refused to execute the final decision nr. 40515/3/2009 of Bucharest Court of Appeal and disclose a publicity contract.

[72] Baia Mare mayor repeatedly refused to execute the decisions of Cluj Court of Appeal which required Baia Mare City Hall to disclose information about spending of public money. When finally the mayor invited the petitioner to photocopy, for a cost, several documents, totaling 402 pages, those papers were disparate documents containing information that could have different interpretations so that the mayor's response could not be considered to have implemented the decision of the Cluj Court of Appeal.

Table 11.10 Distribution of responses to the administrative appeals and actions in court between 2010 and 2016

	2010	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*
Total administrative appeals	183	154	102	104	142	107	446
In favor of the applicant	48.63%	23.38%	19.61%	20.19%	39.44%	16.82%	8.97%
Rejected	43.72%	60.39%	78.43%	75.96%	53.52%	77.57%	90.81%
Pending	7.65%	16.23%	1.96%	3.85%	7.04%	5.61%	0.22%
Total actions in court	255	217	141	79	84	77	344
Decided for the applicant	1.96%	6.45%	9.22%	16.46%	41.67%	7.79%	10.47%
Decided for the institution	49.02%	45.62%	40.43%	27.85%	19.05%	15.58%	22.97%
Pending	49.02%	47.93%	50.35%	55.70%	39.29%	76.62%	66.57%

Source: Authors, based on FOIA annual reports

However, one unclear aspect impinged on the implementation of the administrative and judicial appeals. It was unclear whether the administrative appeal is a procedure mandatory prior to address to the court. The majority of the doctrine was that FOIA introduced a different procedure from the law on administrative contentious, which required the harmed petitioner to file an administrative complaint prior to address to the court.

The data that we have collected from FOIA annual reports of 127 public institutions show that both the administrative appeals and the actions in courts decreased between 2010 and 2015, then they increased abruptly in 2016 (see Table 11.10). The higher number of both administrative appeals and complaints to administrative courts in 2016 was caused by the increase of complaints in the case of Cluj-Napoca City Hall. For example, 233 out of 446 administrative complaints and 230 out of 344 actions in court in 2016 were filed against this institution.[73] Leaving apart the data for Cluj-Napoca City Hall, in 2016 the overall number of administrative and judicial remedies increased in 2016.[74]

Between 2010 and 2016, public institutions rejected the majority of the administrative appeals, while courts tended to decide in favor of public institutions (Table 11.10). This discouraging finding is confirmed by the

[73] The information officer from Cluj-Napoca City Hall declared that the majority of complaints were filed by the same citizen who submited large number of requests monthly.

[74] According to Ministry for Public Consultation and Civic Dialog, the number of lawsuits in Tribunals increased from 812 in 2013 to 1,530 in 2015.

research conducted by the Institute for Public Policies in 2011 which found that a petitioner had only 30% chances to win a lawsuit against a public institution in the first instance, and the chances were even lower if the first-instance decision was appealed to the Court of Appeal.[75] The objectivity of the internal administrative appeal might be questioned because the members of the same organization have the responsibility to decide on the complaints against their colleagues.

An analysis of the solutions to the administrative appeals between 2003 and 2009 shows that the majority of the solutions were in favor of the petitioners,[76] which indicates that the information officers took some time to familiarize with the law. The number of petitioners who looked for judicial remedies differed among counties, as there were counties with higher number of lawsuits and counties with none or just one case between October 2001 and May 2004.[77] However, the overall number was low in the first years after the adoption of FOIA, and later it increased in part due to litigations initiated by some nongovernmental organizations which tested the implementation of the law.[78]

According to an analysis from 2016 of the Ministry for Public Consultation and Civic Dialog, the average duration of a lawsuit was six months.[79] Even though the duration might be discouraging for petitioners, it slowly decreased from 7.4 months to six months (that the Institute for Public Policies calculated for a lawsuit for the 2009 and 2010 actions in courts).[80]

According to the Institute of Public Policies (2011), the City Halls were the institutions which were most frequently sued. Even though they are more numerous comparative with other public bodies, the largest number of lawsuits were about the restoration of property rights, which is a responsibility that falls under the City Hall authority.[81] In addition, the actions in courts were about the salary of public employees (including requests about how their own salary was calculated), information about criminal cases and expenditure made out of public money (Ibidem).

[75] Institute for Public Policies 2011, p. 37.
[76] World Bank 2012, p. 15.
[77] Institute for Public Policies 2004, p. 2.
[78] World Bank 2012, p. 15.
[79] Ministry for Public Consultation and Civic Dialog 2016.
[80] Institute for Public Policies 2011, p. 32.
[81] Institute for Public Policies 2011, p. 35.

12 Fees and Costs

The cost of copying the documents was a challenge in the implementation of FOIA legislation in Romania because the first form of the law required the petitioner to pay for the expenses in the case the request for public information involved making copies of the official documents. In addition, the law regulated that persons conducting studies in their own interest or in professional interest are granted access to the authority or public institution's documents, but they have to pay if they request copies of official documents. Public institution informs the applicant about the cost of copies, and only after the applicant agrees on the total cost, the public institution proceeds to copy the documents. The applicant has the option to read the documents provided by information officer without paying any fees—some applicants prefer such a solution when reading a large number of pages as it is the case of procurement contracts or bids offers.

The changes made in 2016 to the implementation norms of the Law no. 544/2001 defined the costs for copying documents as the direct cost of technical operations of copying the requested information on paper. The definition did not refer to costs of searching, extracting and putting the information on the format requested by the petitioner, therefore eliminating the opportunity for abusive increases of copying fees that would discourage the access to public information.

Before 2016, the loose regulation generated abuses in the implementation of the law. One issue was that some public institutions adopted very high fees in order to obstruct citizens' access to public information.[82] The most mediatized case was of Șelimbăr City Council (Sibiu County) which adopted a fee of 100,000 lei (approximately 22 Euros currently) on one page. The decision was ruled to be legal by an administrative court, creating a dangerous precedent for other public institutions. Another case was of Bistrița City Hall, which charged the petitioners a fee of 45 lei (approximately 10 Euros currently) for searching for requested documents and making copies, in addition a fee of 1 leu (approximately 0.22 Euro) was charged for one copied page.[83] However, Bistrița City Hall abolished the fee for searching the documents. Petitioners became dissatisfied with the

[82] Dragoș and Neamțu 2009a, p. 61; Institute for Public Policies 2009, p. 4.
[83] Petroiu 2014, p. 130.

cost of copying when they requested large number of documents and the total cost was very large.[84]

However, no similar situations of abusive fees occurred, even though some other cases of high fees were reported as limiting the access to public information. For example, Medgidia City Hall (Constanța County) had a fee of 5 lei per page (approx. 1.10 Euro) up until 2016. The majority of public institutions do not charge fees for copying documents because they find it too cumbersome to collect them especially if the number of copies is small (World Bank 2012). In the first years after FOIA adoption, some deconcentrated public institutions, such as the Cluj House of Health Insurance,[85] could not cash the copying fees because, according to the law at that time, they could not have such category of revenues.

In July 2016, the Ministry for Public Consultation and Civic Dialog modified the FOIA implementation norms by including an upper limit of 0.05% of the medium salary on the economy for the copying services per page. An analysis that we have conducted on the copying fees charged by 28 public institutions (City Halls, County Councils and Prefectures) in 2016 shows that the fees range from 0.25 lei (approximately 0.05 Euro) to 3 lei (approximately 0.67 Euro), and they differ according to the size of the page, if the copy is black or colored, or if the copy is certified by the public institution that it corresponds to the original document. The average cost per page is around 0.5 lei (approximately 0.10 Euro).

The charges for the reuse of public information are regulated by Law no. 109/2007. According to the 2015 amendment to the law, the reuse of public information is free, but public institutions are allowed to charge a fee that would cover the costs of collection, preparation, reproduction and dissemination of public information.[86] According to the same amend-

[84] A petitioner requested a copy of a procurement contract of 2,824 pages and the total cost mounted to 8,472 lei (approx. 1,814 Euros). Brașov Court of Appeal decided that the public institution did not refuse to disclose information when asking the petitioner to pay the multiplication costs (Civil decision no. 2017/R/2014).

[85] Pro Democracy Association 2003, p. 40.

[86] According to the 2007 version of the law, the fee could not exceed the cost of collection, production, reproduction and dissemination of documents. After 2008, when the law was amended first time, the charge was limited to the cost of copying the documents. See also Dragoș and Neamțu 2009b, pp. 18–22.

ment, libraries (including university libraries), museums and archives are allowed to add to the fee a profit that should not be higher than 5% above the reference interest rate of the National Bank of Romania. In addition, the fees are not limited in the case of public institutions that are bound to generate revenues to cover a significant proportion of the costs of performing their public service activity, and in the case of documents for which a public institution is required to generate revenue to cover a significant proportion of the costs of its collection, compilation, reproduction and dissemination, under the law. However, the conditions imposed by the public institution on the reuse of public information should not unnecessarily limit the possibilities for the reuse or should not be used to restrict competition.

13 Special Regime for the Access of Mass Media to the Information of Public Interest

An important section of the Law no. 544/2001 regulates the collaboration between public institutions and mass media. According to the law, public institutions and authorities are bound to designate an employee from the public relations and information office as a spokesperson in order to provide mass media access to the information of public interest. In addition, public institutions and authorities are required to organize regularly (recommended one by month) press conferences to communicate information of public interest. Public authorities are required to answer to any information of public interest during press conferences. Public authorities are bound to give accreditation without discrimination to the journalists and the mass media representatives. Accreditation is granted, upon request, in two days since its registration. Public authorities may refuse to give accreditation to a journalist or can withdraw one journalist's accreditation only for acts which hinder the normal activity of the public institution, and which are not related to the respective journalist's opinions as expressed in the press. Public authorities and institutions are required to inform mass media in due time about the press conferences or any other public action organized by them, and they cannot deny in any way the access of mass media to such public actions. However, mass media is not bound to publish the information provided by the public authorities and institutions.

The timeframe for answering mass media requests for information of public interest is shorter. According to the Law no. 544/2001, the information of public interest requested verbally by mass media should be communicated, as a rule immediately, or in maximum 24 hours. However, the communication with mass media is conducted careful by civil servants responsible for providing information of public interest. Some of the civil servants interviewed said that they prefered to respond in written to verbal requests of journalists in order to have a proof of the comunicated information. There were cases when journalists truncated the information or presented misleading information. However, many journalists prefer to communicate directly with the head of the institution or with the public relation officer, who might be a different person than the information officer.

14 Special Regime for Access to Environmental Information

Romania signed the Aarhus Convention in 1998 and ratified it through the Law no. 86/2000. The Government Decision no. 878/2005 fully transposed into the national legislation the Aarhus Convention and the 2003/4/CE Directive. Public institutions are required to make available to any petitioner, at his/her request, environmental information held by them without justifying the purpose for which the information was requested. The public institution should make available the environmental information at that date indicated by the applicant within one month from the date it received the request, but no later than two months if the information requested involves a large volume of work and with a prior notification of the petitioner.

The Government Decision no. 878/2005 stipulates in article 22 that the public authorities need to make at the least the following information available to the public:

(a) the texts of treaties, conventions and international agreements to which Romania is a party, as well as the local, regional, national or community legislation on the environment or related to the environment;
(b) policies, plans and programs related to the environment;

(c) progress reports on the implementation of the documents and instruments referred to at (a) and (b) when produced or held electronically by the public authorities;
(d) environmental status reports;
(e) data or summaries of data from monitoring activities that affect or might affect the environment;
(f) approvals, agreements and permits for activities with significant environmental impact;
(g) environmental impact studies and environmental risk assessments.

Public authorities for environmental protection are required to publish annually on their websites the national, regional or local reports on the state of the environment.

Public institutions partially implement the legislation on environment information. They disclose some of the information, and in certain cases they provide reluctantly the information, being concerned mainly with not being criticized for not complying with the law. An analysis of the websites of public institutions responsible for environmental protection conducted in 2015 highlighted the main deficiencies in environmental information disclosure.[87] Even though public institutions published environmental information, the information was poorly organized and the data was highly technical and difficult to understand by the average citizens. There were differences in the amount of information disclosed by the National Agency for Environmental Protection and its regional branches. The same study showed that public institutions refused to disclose copies of environmental reports/studies conducted by natural/legal persons on the grounds that these studies belong to the experts who produced them; however, in some cases the applicants were allowed to consult the studies at the headquarters of the public institutions. Access to environmental information is free, but the applicants have to pay for the price of hard copies of environmental reports. The expensive costs of multiplying large documents discouraged the applicants to pay for the requested information. The contribution of the legislation to environmental information is not positive, as public institutions rather imitate environmental transparency.

[87] Dragoș and Neamțu 2015, pp. 210–211.

15 An Overall Assessment of the Effectiveness of the FOIA

Romania has made steady progress toward achieving greater transparency of the public administration. Even though the law was passed in response to international pressure for transparency and governance, in the years that followed its adoption it became more than just a symbolic paper. The overall assessment of the effectiveness of Romanian FOIA shows that it provides access to the information produced or managed by a wide range of institutions, some of which were not used to be subjected to public scrutiny.

The courts were instrumental in interpreting the law, and NGOs and think tanks played also an important role in creating precedent cases as grounds for future decisions by bringing strategic litigations to court and allowing judges to pass rulings in this field. The efforts toward building administrative capacity for enforcing FOIA provisions lacked a truly powerful coordination agency that would train the civil servants, unify the implementation practices and would monitor that all entities bound to apply the law disclose the information of public interest. When the Ministry of Public Consultation and Civic Dialog was established at the end of 2015 rapid progress was made with regard to the amount of information *ex officio*, and it successfully amended the legislation to remediate the issues signaled by a broad range of stakeholders.

It is difficult to assess the overall impact of FOIA on the accountability, corruption and trust in government. Individual cases show that the law is a useful tool in the hands of civil society activists who use it to document and solve public problems. In addition, cases were reported of lawyers who used it to identify proofs that the legal procedures were broken and to require the annulment of contracts, therefore helping their clients who classified on the second position to win the contracts. Therefore, Romanian FOIA is more than disclosing public information, it became an instrument for those who search to improve the activity of public administration and to reduce cases of corruption or breakings of the law.

However, few public institutions disclose proactively public information, and civil servants are reluctant to produce new information. Therefore, future efforts should be targeted toward increasing the amount of information that is disclosed on the public institution webpage or on social media.

Annex 11.1: List of Public Institutions Whose Annual FOIA Reports Were Analyzed

1	City Halls of cities county residence: Arad, Bacău, Baia Mare, Bistrița, Botoșani, Brăila, Brașov, Bucharest General City Hall, Buzău, Călărași, Cluj-Napoca, Constanța, Craiova, Deva, Focșani, Iași, Oradea, Pitești, Ploiești, Râmnicu-Vâlcea, Reșița, Sfântu Gheorghe, Sibiu, Slobozia, Suceava, Târgoviște, Târgu-Jiu, Târgu-Mureș, Timișoara, Tulcea, Vaslui, Zalău	32
2	City Halls of smaller cities: Câmpulung (Argeș), Dorohoi (Botoșani), Făgăraș (Brașov), Turda (Cluj), Gherla (Cluj), Lugoj (Timișoara), Adjud (Vrancea), Moreni (Dâmbovița), Zărnești (Brașov), Urziceni (Ialomița), Săliștea de Sus (Maramureș), Sighișoara (Mureș), Iernut (Mureș), Luduș (Mureș), Bicaz (Neamț), Jibou (Sălaj), Câmpulung Moldovenesc (Suceava), Fălticeni (Suceava), Frasin (Suceava), Gura Humorului (Suceava), Sulina (Tulcea), Huși (Vaslui), Negrești (Vaslui) and three City Halls of Bucharest Sectors: Sectors 1, 2 and 4	26 (23+3)
3	County Councils: Alba, Arad, Argeș, Bacău, Bistrița, Botoșani, Brașov, Brăila, Buzău, Caraș-Severin, Cluj, Constanța, Covasna, Dâmbovița, Dolj, Galați, Giurgiu, Gorj, Harghita, Hunedoara, Ialomița, Ilfov, Mureș, Neamț, Olt, Prahova, Satu Mare, Sălaj, Suceava, Teleorman, Timiș, Vaslui, Vâlcea	33
4	Prefectures: Arad, Bacău, Bihor, Bistrița, Brașov, București, Buzău, Constanța, Covasna, Dolj, Gorj, Iași, Mureș, Prahova, Sălaj, Tulcea, Vâlcea, Vrancea	18
5	Ministries: Ministry of Regional Development and Public Administration, Ministry of National Defense, Ministry of Public Finance, Ministry of Justice, Ministry of Work and Social Justice, Ministry of Transportation, Ministry of Agriculture	7
6	Public institutions subordinated to the government or ministries: General Secretary of Government, National Agency of Civil Servants, General Inspectorate for Emergency Situations, Agency for Driving License and Vehicle Registration, National Agency for Consumer Protection	5
7	Police County Inspectorates: Bacău, Bihor, Bistrița-Năsăud, Cluj	4
8	Chamber of Deputy and Senate	2
	Total	127

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CHAPTER 12

The Laws of Transparency in Action: Freedom of Information in the Czech Republic

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_12

1 Introduction[1]

The Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens as stated in Article 1 of the Czech Constitution.[2] It *shall also observe its obligations derived from international law*.[3]

One of the key principles of the Czech Republic as a democratic state (and also of its good governance) is definitely the principle of transparency (freedom of information). This transparency is without doubt connected to free access of information. Moreover, the democratic right to access information should be as broad as possible because it allows public administration to be controlled by the community.[4]

Until the end of the twentieth century, there was no comprehensive legal regulation of the right to information in our country.

The Constitution of the Czechoslovak Republic of 1920 guaranteed freedom of expression which is closely related to the right to information. However, it was not possible to derive from this freedom the right of access to information for persons against the state. At that time, regulation of the access to information could be found in many acts dealing with different parts of public administration, but there wasn't any comprehensive legal regulation.

During the Communist period, many fundamental human rights and freedoms were either not regulated in law or were in practice unenforceable. Similar is true for the free access to information. This was also in line with the real policy of the former regime.

[1] This chapter resulted from research project within Czech Science Foundation (GACR) No. GA13-30730S "Measures of protection of rights in public administration, their system and effectiveness".

[2] English translations of the Constitution of the Czech Republic as well as the Charter of Fundamental Rights and Freedoms as well as the further components of the Czech Constitution can be found at https://www.usoud.cz/en/legal-basis/.

[3] For more data and information about the Czech Republic, see, for example, http://www.oecd.org/czech/ or http://data.un.org/CountryProfile.aspx?crName=Czech%20Republic.

[4] Compare also Recommendation No. R (98) 12 of the Committee of Ministers to Member States on Supervision of Local Authorities' Action stating i.a. that *transparency is the best guarantee that public authorities carry out their acts in the interests of the community, that it is an essential prerequisite for effective political supervision by citizens and that, therefore, strengthening it allows the reduction of other forms of supervision.*

Firstly, in the Czech Republic, the right to information was constitutionally guaranteed in the Constitutional Act of 9 January 1991, in connection with the adoption of the Charter of Fundamental Rights and Freedoms. This right was part of the constitutional order: *The freedom of expression and the right to information are guaranteed. State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law*. Following the collapse (split) of the Czechoslovak Republic, the mentioned Charter of Fundamental Rights and Freedoms remained a basic part of the constitutional order in the Czech Republic.

In spite of the above, there was still a lack of implementing legislation in the legal order that would specify the access to information. The draft implementing act was not elaborated until 1998. The amended proposal was finally approved by the Chamber of Deputies in the Parliament of the Czech Republic, and after some problems the Freedom of Information Act (FOIA) became effective by law on 1 January 2000. This FOIA has been subsequently amended several times, but most provisions of FOIA have not been principally changed since 1999.

To sum up, the right of access to information was first guaranteed in the Charter of Fundamental Rights and Freedoms, and the implementing legislation came into effect on 1 January 2000. This law should be primarily considered as the expression of an evolving democratic state because adoption of FOIA was not connected with the accession of the Czech Republic to the European Union.

Although FOIA has been effective for more than 16 years, there have still been many problems with interpretation and application of this act, also regarding its scope and many other problems. These problems are usually dealt with by the administrative courts or the Constitutional Court of the Czech Republic. The decisions of these courts are usually based on the effort of these courts to preserve this fundamental right as much as possible.[5]

[5] For example, see decision of Czech Constitutional Court I. ÚS 3930/14, 16th June 2015.

2 Beneficiaries of Access to Information

The right of access to information is one of the important foundations of the Czech legal system, and this right is established in the Czech Constitution. Here, it is in a relatively broad form in terms of "everyone's right to information about the activities of public entities" (Article 17 of the Charter of Fundamental Rights and Freedoms).

As the Supreme Administrative Court repeatedly stated: "The right to information and the corresponding duty of the public authority is one of the key elements of the relationship between the state and the individual; its purpose is the participation of civil society in governance".[6] There are neither statutory provisions that unduly qualify the applicants with this right to obtain information nor are there any inappropriate obstacles placed in the way of such information applicants. The basic applicant distinction is whether the requester is a natural person or a legal entity.

At the same time, the information provided to those requesting it is always the same, without any variances based on the stated reason for having requested it. As such, there are no requirements for a requester to specify their reasons for requesting information. Public authorities are thus obligated to provide requested information to all requesting parties on a non-discriminatory basis. (The one exception to this requirement can be a situation in which the requester can be shown to be abusing their right of access—i.e. a situation in which the request is not based on a genuine desire to obtain information, but rather, it is based on a desire to abuse and "bully the obligated authority").[7]

The so-called *obligated* public authorities (i.e. in accordance with the legal definition of those authorities that are required to provide information to the public, within their area of responsibility) post on the internet any information, which individual requesters have asked for. However, it is never possible on the internet to identify or draw any conclusions as to who the person or legal entity was that requested access to the particular published information (the actual identity of the applicants is not made public). Based on the authors' experience, those that request information include both citizens and entities with an active public interest objective and those with a more personal (private) need to obtain specific information.

[6] Decision of Supreme Administrative Court 2 Ans 13/2012-14, 15th November 2012.
[7] In decision of Supreme Administrative Court 8 As 114/2013-36, 4th August 2014.

There are also situations when applicants use the submission of a large volume of requests not to receive specifically needed information but rather, in their area of public interest, to generate and create added pressure on a particular obligated entity. In such situations, it is always necessary for the respective government entity to carefully assess the proportionality between the legitimate right of requesters to information, which is needed by them for their own legitimate interests, and their desire, on the other hand, to abuse their rights to obtain information.

With respect to helping those needing assistance in submitting an information request, there are several non-governmental organizations (NGOs) that provide a free service. These NGOs not only help in preparing an initial information request but also help to overcome procedural problems in situations where the information is not properly provided, or where it is provided in an untimely manner. One of these non-governmental organizations, *Otevřená společnost*, *o.p.s.* (the "Open Society Non-Governmental Organization"), organizes an annual "*Open* versus *Closed*" contest, which assesses the overall quality of the public access to their information, which has been provided by public entities over the past year. (This contest looks at the quality and nature of the access provided, the degree of support offered, the relative freedom of speech and completeness of the data provided.) On the basis of submitted nominations, the contest looks to highlight individual actions, which have contributed to either an improvement in or a deterioration of the respective information access rights provided by the public administration.

3 Entities That Are Bound by the Law

In terms of the Czech Constitution, those entities responsible for providing free public access to information include all authorities involved in the conduct of public administration. In particular, this would include all administrative and other bodies of the national and local governments, including those with the right to make administrative decisions on individual rights, legally protected interests and the obligations of natural and legal persons with respect to the public administration.

The applicable Czech legislation also makes reference to *public institutions* having the same information obligations; however, there is no specific, separate definition of what constitutes a "public institution". As a result, decisions on applicability have to be made for each entity on the basis of status—that is, should that particular entity be properly considered

to be a "public institution"? The basis of the relevant decision-making comes from previous decisions by the Czech Constitutional Court, which are then in turn implemented and followed by the local administrative courts.

The basic criteria of these decisions, with respect to determining whether an entity is a public institution, include the following: does the entity fulfill a public purpose? What is the relationship between the entity and any national or local governmental body, including in its establishment, founding or terms of oversight? As an example, included in this potentially broad definition of public institutions would be public schools and hospitals, public and state-owned companies, enterprises, public funds and endowments.[8]

In accordance with the above broad definition, "public institutions" can also include private commercial companies, which are majority owned (usually—but not exclusively—100% owned) by a national or local authority; and, wherein, this governmental body has had a founding role; it decides on the composition of the company's board of directors and supervisory board; and, it supervises the activities of the company (an example here would be the majority state-owned, joint-stock company ČEZ a.s.,[9] which is active in the field of energy).

Case law has also determined that a business entity (trading company) can also be characterized as a "public institution" to which the above information disclosure requirements are applicable in certain types of situations. These would include situations in which neither a national or local government has an ownership interest or related rights and situations in which in a public authority doesn't directly interfere with determined detailed rights and obligations of the business. Such public-institution-equivalent businesses would include those, which have entered into a public service agreement (and have entered into such agreement pursuant to a statutory regulation of the Ministry of Transport). And, for such a business, public information disclosure obligations would include providing information on their public transportation schedules. The courts have concluded that within the mandate defined by a public contract, such a company is exercising a public administrative function; to the extent of this activity, it is obligated to provide such information to the public. However, in the scope of its activities which are not related to the

[8] See Korbel, F. et al., pp. 26–29; Furek, A., Rothanzl, L., Jírovec T., p. 32.

[9] Decision of Supreme Administrative Court 2 Ans 4/2009-93, 6th October 2009.

management of a public function or the fulfillment of a public contract, this business is not affected by the statutory obligation to provide information.[10]

In case of doubt as to whether a particular person is an obliged entity or not, the Czech courts can judge a person from a material point of view, whereas a formal point of view (organizational point of view) is not important. Thus, it is not decisive whether a person is of private or public law, but relevant is what kind of activity is performed by that person.

The Czech FOIA also uses the term "obliged entities", which is used for all entities bound by the law to provide information according to FOIA. This term includes all the entities that were mentioned above, and therefore it is also used in this text.

As evidenced by the above, the applicable law and regulations determine the scope of an obligated entity's information disclosure requirements; but what is excluded are more detailed specifications on the organizational arrangements, which must be in place in relation to the fulfillment of these obligations. Thus, it is up to each obligated entity to determine whether it needs a dedicated unit of the organization (or person) to be responsible for the fulfillment of these information disclosure requirements or, alternatively, to let each organizational unit itself (or person) to be responsible for fulfilling information requests based on the type and nature of the request received and the activities and responsibilities of that unit or person.

4 The Request for Access

There are no formal procedures in place within the Czech Republic to facilitate a request for information. The process is variable and can be quite informal. The basic requirements are: (1) no anonymous information requests will be honored (the identity of the requesting party must be provided); (2) the requester must define and identify with sufficient specificity the information that they are seeking from the obligated entity under the statutory regulation. The request must be sufficiently clear, certain and specific as to allow the providing party to determine the scope of the information to be provided. If insufficient, the obligated entities can ask the applicant to further clarify their request; and unless there is an appropriate response to such a request, the application may be rejected.

[10] See decision of Regional Court in Brno 62 A 26/2012-129, 7th June 2013, or decision of Supreme Administrative Court 5 As 57/2013-16, 27th September 2017.

At times, this request for additional information is misconstrued as being a basis for an overall rejection of a request for information; however, information requests cannot be too vague, they need to have a reasonable degree of specificity.

Along with the lack of any legally mandated submission procedures to request information, there are also a variety of different ways in which obligated entities require such requests to be submitted. Some require requests to come in electronically using the Czech data box system (which is a particular Czech means of communication within public administration, to be used by both legal entities and natural persons, which was established in connection with its computerization) or through e-mails confirmed by a recognized electronic signature (qualified certificate). While these more specific electronic communication requirements may be somewhat controversial, with respect to the actual text of the legal provisions, the clearly prevailing opinion is that even normal e-mail is a duly and properly submitted request for information.

If the obligated entity has an [general] e-mail address for [the equivalent of] a mail room, the information requester must send their e-mail request to such an address (otherwise, the submission of a request can be made to any known e-mail address of the obligated entity).[11] In practice, there have also been situations in which the e-mail of the obligated entity has been set up in such a way that it rejects (or doesn't accept) e-mail messages without a recognized electronic signature. However, such an approach is flawed because even when something is sent electronically, also when it relates to other types of administrative proceedings, it can be sent to the administrative authorities by ordinary e-mail; such a submission is considered to have been made in a timely and proper fashion if it is confirmed within five days or supplemented by the prescribed ("official") means of communication (e.g. sent through a regular postal service-type mailing). If the above-referenced type of electronic signature requirement was in place in such a situation, the participants in the proceedings would be unjustly deprived of the possibility of making such timely submissions (by regular e-mail) and would thus be unable to comply with the prescribed deadlines.[12]

[11] See decision of Supreme Administrative Court 1 Ans 5/2010-172, 16th December 2010.

[12] See decision of Czech Constitutional Court I. ÚS 3930/14, 16 June 2015. The court stated: "Procedural rules designed to protect the rights of the information seeker must be interpreted in such a way that they are effective in practice. It cannot be interpreted in a way that denies protection without there being any good reason".

A situation in which an applicant may have their request[13] for information delayed is one in which they submit a request in a formally correct manner, but have instead addressed their request to the wrong entity—that is, one without responsibilities (authority) in relation to the requested information. In such a situation, the entity receiving the misdirected request has seven days in which to respond to the requesting party. If the requesting party believes that the entity's response is in error, the party has the right to file a complaint, through which the applicant can seek to have their information request handled in a manner which they consider due and proper (i.e. by either having the requested information provided or through the issuance of an administrative decision rejecting the request). If the requesting party is still unsatisfied with the final decision resolving their complaint, they can file a cause-of-action in the regular civil courts.

The general regulatory statutes don't expressly address situations in which the obligated entity is literally overwhelmed with requests for information which have been submitted by a single party. However, in judicial practice [and based on earlier court decisions], it has been established that otherwise obligated entities have the right to reject such requests. If such requests are made by the same applicant for providing the same information, which has been previously been provided to the applicant, this can also be considered a valid reason for a refusal to respond to such a request.[14]

Likewise, it is possible to reject requests in situations where the previous actions of the requesting party make it seem that the objective is not to receive the requested information but, rather, to overburden the obligated entity by having them handle a large number of requests for a variety of information, thus rendering the obligated entity's other activities impossible to perform.[15] Such actions on the party of an information requester can, under such circumstances, be considered as "vexatious",

[13] The legal regulations and requirements applicable to access to information on the environment take a different approach and assume that, if a request is submitted to an otherwise obligated entity and that entity does not have the requested information available and currently, under special legislation, doesn't have the obligation to retain, hold or have such information, then, the respective entity will inform the requesting party, without undue delay (within 15 days of receipt) of the request that the requested information cannot therefore be provided. If the addressed and otherwise obligated entity is aware of another entity which does, in fact, have or retains the requested information, then the first entity will forward to this other entity the submitted request and do so within the time limits noted in the first sentence above, and it shall so inform the requesting party.

[14] See decision of Supreme Administrative Court 3 As 13/2007-75, 28th March 2008.

[15] See decision of City Court in Prague 10A 126/2011-60, 27th February 2013.

and such behavior is not protected by statute. Notwithstanding, it should be noted that the rejection of information requests because of the abusive (vexatious) nature of such requests should only be undertaken in exceptional cases, where the actions of the party whose requests are being rejected for this reason are very obvious and clear. Otherwise the constitutional rights of parties to the receipt of requested information need to be followed and adhered to.

In the Czech Republic, over the years, requests for information (under the FOIA) have become a regular part of social and political life and of public administration. As a result, many thousands of such requests are submitted (by different subjects/beneficiaries for different reasons) and dealt with by the administrative authorities annually in the Czech Republic (as can be seen in Table 12.1 below). An interesting example is that all ministries together usually deal with about 3.000–3.500 requests every year. This means that ministries are receiving the same or more requests than other central government authorities, regions and capital city Prague together.

Table 12.1 Statistics of requests

Obliged entity	*2016*	*2015*	*2014*	*2013*	*2012*
Ministry of Transport	381	386	322	345	194
Ministry of Finance	371	376	391	307	470
Ministry of Culture	136	98	79	81	92
Ministry of Defense	128	142	142	104	126
Ministry of Labor and Social Affairs	230	214	153	135	120
Ministry for Regional Development	203	218	137	115	119
Ministry of Industry and Trade	212	181	187	120	100
Ministry of Justice	730	638	656	546	557
Ministry of Education, Youth and Sports	470	170	122	147	135
Ministry of Interior	408	239	293	401	493
Ministry of Foreign Affairs	117	117	112	130	178
Ministry of Health	218	197	109	133	168
Ministry of Agriculture	157	198	135	172	530
Ministry of the Environment	115	112	104	86	86
Total ministries	**3876**	**3286**	**2942**	**2822**	**3368**
(Selected) other central government authorities[a]	**789**	**694**	**611**	**656**	**510**
Capital city Prague	**467**	**446**	**370**	**456**	**438**
Regions (13)	**1803**	**1447**	**1085**	**1260**	**1086**
(Selected) statutory cities (12)[b]	**2300**	**1802**	**1591**	**1368**	**1307**

[a]Authors do not have any statistics of the Office for Personal Data Protection, neither Council for Radio and Television Broadcasting

[b]According to statistics of statutory cities Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín

5 The Response/Answer. The Relation Between Documents and Information. Timeframes for Answering and Responding to Requests. Administrative and Judicial Remedies

Here it is worth noting that statutory requirements for obligated entities responses do not entail formal requirements. Thus, there are a number of ways in which responses can be made. These can be from an oral request with the response of the granting of a requester's access to documents that contain the desired information.[16]

When a request for information is responded to by sending information to the requesting party, a transmittal note may be included with a general description of what is being provided. Also, instead of individually providing pieces of requested information, a requesting party may be referred to previously published and already freely available piece of information (primarily on the website). In this type of situation, the cover note would include directions to the requester in terms of how and where they can find the already published information. Although this requirement to provide a transmittal note with information on the provided material is not part of the applicable legal requirements, it is a logical [and reasonable] part of the response process—that is, one in which the obligated entity is required to keep a record and possibly an administrative file on the procedures to be followed for the handling of requests for information (hence, a copy of the respective transmittal should be included with the related record/administrative file). Also, such a step can be considered an example of good practice when some form of communication between the requesting party and the obligated entity is maintained (where it is not just the requested information which is forwarded and provided without anything more).

For information which is to be provided, it is always essential that it exists in some type of recorded format—whether printed or electronic.[17]

[16] Furek, A., Rothanzl, L., Jírovec T., p. 709.

[17] Free access to information does not mean creating any new information. In decision of Supreme Administrative Court 6 As 33/2011-83, 20 October 2011, this court stated: "The information that the obligated entity is obliged to provide is the existing information available to the obliged entity, usually as soon as the request for information is sent to the obliged entity".

The manner in which the information has been recorded is also then determinative in terms of the manner in which it will be provided to a requesting party. Although as a general practice, information is provided to requesters in the format in which they have requested the information; if such a response is unduly burdensome on the supplying entity, then it is not required.

If, on the basis of the submitted information request, the otherwise to-be-obligated entity can determine that for reasons by which it is permitted to do so under the law, it cannot provide the requested information, then it issues an administrative decision on its (complete or partial) rejection of the submitted request.

Although the right to access information is interpreted very widely and according to case law, this right usually prevails over other rights, and as stated above, there are in practice many rejected requests every year (compare Table 12.1 and Table 12.2) (Table 12.2).

As noted above, the requesting party can file an appeal against such a decision in accordance with the applicable administrative procedures. The appeal will go to a higher-level authority,[18] which oversees the respective otherwise obligated entity, to make a decision on the appeal.

The appeals in the Czech Republic are usually against rejections. Some obliged entities have to face appeals relating to at least half of their rejections (compare Table 12.2 and Table 12.3) (Table 12.3).

Again, as noted above, if the requesting party's appeal is denied, the party is then free to use the court system for relief and to challenge this decision.

In hearing a complaint on such a matter, it is the task of the court to also examine whether there has been a legitimate reason for rejecting the request. If not, the court is entitled to cancel both the appeal and original decision rejecting the request and to instead order the obligated entity to provide the requested information. This aspect of the judicial review process, in relation to reviewing requests for information, represents a significant exception to the general concept of the administrative judiciary, which is fundamentally based on the appeal principle (i.e. the court is qualified to replace the decisions of administrative bodies, and the challenged decision of that administrative body is "just" canceled). In practice,

[18] If the obliged entity is town or village, the higher-level authority is usually the Regional Office.

Table 12.2 Statistics of rejections

Obliged entity	*2016*	*2015*	*2014*	*2013*	*2012*
Ministry of Transport	114	73	48	118	36
Ministry of Finance	87	55	60	22	45
Ministry of Culture	7	13	1	3	10
Ministry of Defense	19	15	33	25	21
Ministry of Labor and Social Affairs	43	27	40	34	24
Ministry for Regional Development	6	4	6	5	2
Ministry of Industry and Trade	92	43	43	35	15
Ministry of Justice	11	28	22	13	7
Ministry of Education, Youth and Sports	24	17	6	9	8
Ministry of Interior	45	17	19	13	29
Ministry of Foreign Affairs	21	14	8	4	2
Ministry of Health	35	22	28	22	24
Ministry of Agriculture	10	6	5	3	25
Ministry of the Environment	35	16	7	5	4
Total ministries	**549**	**350**	**326**	**311**	**252**
(Selected) other central government authorities[a]	**137**	**163**	**117**	**84**	**65**
Capital city Prague	**62**	**112**	**35**	**68**	**24**
Regions (13)	**338**	**187**	**205**	**250**	**195**
(Selected) statutory cities (12)[b]	**538**	**256**	**227**	**154**	**151**

[a]Authors do not have any statistics of the Office for Personal Data Protection, neither Council for Radio and Television Broadcasting

[b]According to statistics of statutory cities Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín

however, such court decisions are not too often this cut-and-dried. Instead, the courts more generally follow their standard method of decision-making [with respect to the handling of appeals] and refer the matter back to the administrative body [the obligated entity] for further consideration. However, this could also serve as an enforcement order for information requesters who have been unsuccessful in their request to receive information.

In practice, even though many rejections have to face appeals, a relatively small number of cases are heard by administrative courts (Table 12.4).

The big problems encountered with respect to the obligations of obligated entities to provide information are situations in which the respective entity is a chronic abuser, which has repeatedly and illegally been rejecting information requests; the senior supervisory body has then, on the basis of

Table 12.3 Statistics of appeals (against rejections)

Obliged entity	*2016*	*2015*	*2014*	*2013*	*2012*
Ministry of Transport	11	10	14	19	4
Ministry of Finance	12	21	9	10	12
Ministry of Culture	0	1	2	2	13
Ministry of Defense	2	5	7	13	6
Ministry of Labor and Social Affairs	8	10	13	7	9
Ministry for Regional Development	5	4	2	2	2
Ministry of Industry and Trade	14	4	8	16	3
Ministry of Justice	4	12	7	4	4
Ministry of Education, Youth and Sports	5	9	6	7	2
Ministry of Interior	10	4	8	0	10
Ministry of Foreign Affairs	16	4	6	0	1
Ministry of Health	4	7	5	3	5
Ministry of Agriculture	2	4	2	3	9
Ministry of the Environment	9	5	2	3	2
Total ministries	**102**	**100**	**91**	**89**	**82**
(Selected) other central government authorities[a]	**31**	**62**	**33**	**41**	**31**
Capital city Prague	**29**	**53**	**43**	**66**	**45**
Regions (13)	**85**	**56**	**79**	**97**	**43**
(Selected) statutory cities (12)[b]	**258**	**78**	**76**	**57**	**47**

[a]Authors do not have any statistics of the Office for Personal Data Protection, neither Council for Radio and Television Broadcasting

[b]According to statistics of statutory cities Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín

the information requesters' appeals, had to be continually annulling the earlier decisions and returning the case for further consideration, doing so without having the option of issuing a firm administrative order to the obligated entity to provide information. In practice, this process is often referred to as information "ping-pong", against which the information requesters have no long-term defense.

A certain change in this matter was recently brought about in a decision on a case by the Supreme Administrative Court (although it is only applicable in exceptional situations). The decision recognized that the information requester had turned to an administrative court to reverse an earlier rejection of an appeal against a decision by an obligated entity to not provide requested information (with the resultant requirement for compulsory reconsideration of the request for information by the requestor). And, in this case, the court issued a substantive judicial decision, in which, after due consideration of all of the circumstances surrounding the appeal,

Table 12.4 Court proceedings

Obliged entity	*2016*	*2015*	*2014*	*2013*	*2012*
Ministry of Transport	4	2	3	4	4
Ministry of Finance	2	0	3	7	7
Ministry of Culture	0	2	0	4	5
Ministry of Defense	0	0	0	1	0
Ministry of Labor and Social Affairs	3	0	0	11	0
Ministry for Regional Development	0	0	0	0	0
Ministry of Industry and Trade	4	3	0	2	3
Ministry of Justice	2	0	0	2	0
Ministry of Education, Youth and Sports	1	0	2	1	0
Ministry of Interior	12	5	5	4	6
Ministry of Foreign Affairs	5	4	3	2	0
Ministry of Health	0	0	0	0	0
Ministry of Agriculture	0	1	0	0	0
Ministry of the Environment	0	0	0	0	1
Total ministries	**33**	**17**	**16**	**38**	**26**
(Selected) other central government authorities[a]	**7**	**4**	**1**	**1**	**1**
Capital city Prague	**7**	**6**	**5**	**0**	**2**
Regions (13)	**3**	**1**	**3**	**1**	**0**
(Selected) statutory cities (12)[b]	**1**	**4**	**0**	**0**	**1**

[a]Authors do not have any statistics of the Office for Personal Data Protection, neither Council for Radio and Television Broadcasting

[b]According to statistics of statutory cities Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín

the court ordered the obligated entity to provide the requested information. In other words, the court's decision then acted as an enforcement order on the obligated entity to provide the requested information.[19]

In terms of timeframes for the processing of the submitted information requests (i.e. for the providing of information or a decision on rejecting the request), the basic timeframe is set at 15 days. An additional (maximum) ten-day extension is possible if additional time is required for the entity to provide the information, but, to get this extension, the obligated entity needs to inform the requesting party; this extension is only permitted in situations referenced under the law, in which there are objective, serious reasons inhibiting and preventing the due and timely processing of the information request (e.g. the request is too large and is looking for a

[19] See decision of Supreme Administrative Court č.j. 3 As 278/2015-44, 10th November 2016.

disparate range of information; the documents containing the requested information are located in several separate/territorial departments and/or the need to properly consult and coordinate with other entities that are significantly involved in relation to the required information).

Should a request for information not be handled fully or in a timely manner, current legislation makes a procedural device available to requesters, which is known as a *complaint*. (Under earlier legislation, the inaction of an obligated entity for a specified period of time would have been considered a decision on withholding information against which an appeal could be lodged.) With a complaint, an information requesting party can turn to the senior supervising entity, which will then order the obligated entity to process the information request within a maximum period of 15 days, from the day the decision is received. If neither procedure leads to the proper handling of an information request and the obligated entity continues to fail to provide the information, it is then possible for the requesting party to take the matter before an administrative court.

Complaints are the means of protection of the right, which are also used quite often by requesting parties (Table 12.5).

To fully address all of the ramifications of this issue, it should be noted that the senior authority in the matter can also confirm the decision of the otherwise obligated entity (if made in accordance with the law) and/or, in certain situations, directly take over the handling of the respective information request.

In summary, if the obligated entity issues a decision rejecting an information request, the appropriate procedural response is to file an appeal under the general rules of administrative procedure. In situations where a request has not been processed properly (and therefore there has been no decision rejecting the information request), the requesting party may use the complaint procedure, which can compel action by the to-be-obligated entity. Decisions under both procedural steps are made by a senior authority (unless the obligated entity itself has not made a response, consisting primarily of providing the requested information). If a requesting party has still not received their requested information in a proper and timely manner, after utilizing the above-noted procedural steps, which are provided for under the law, the party may seek relief from the administrative courts to provide protection of their right to access information.

Also, in connection with the search for more effective instruments to force the obligated entities to properly handle requests for information (i.e. to prevent the aforementioned “ping-pong” effect wherein there is

Table 12.5 Complaints

Obliged entity	*2016*	*2015*	*2014*	*2013*	*2012*
Ministry of Transport	9	7	8	31	30
Ministry of Finance	13	8	8	36	23
Ministry of Culture	9	0	1	1	3
Ministry of Defense	5	5	5	6	5
Ministry of Labor and Social Affairs	9	14	19	0	7
Ministry for Regional Development	11	7	3	11	6
Ministry of Industry and Trade	6	6	2	1	1
Ministry of Justice	45	43	19	22	17
Ministry of Education, Youth and Sports	18	9	11	11	7
Ministry of Interior	35	38	18	103	48
Ministry of Foreign Affairs	2	3	1	6	2
Ministry of Health	10	4	5	3	16
Ministry of Agriculture	2	5	7	5	20
Ministry of the Environment	14	11	4	9	7
Total ministries	**188**	**160**	**111**	**245**	**192**
(Selected) other central government authorities[a]	**17**	**17**	**7**	**7**	**9**
Capital city Prague	**63**	**97**	**9**	**29**	**88**
Regions (13)	**99**	**46**	**42**	**105**	**90**
(Selected) statutory cities (12)[b]	**144**	**63**	**58**	**22**	**37**

[a]Authors do not have any statistics of the Office for Personal Data Protection, neither Council for Radio and Television Broadcasting

[b]According to statistics of statutory cities Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín

the repeated issuance of a decision to reject a request by the obligated entity and overriding order for reconsideration from the senior body), the idea of introducing what is referred to as an *information order* has been introduced.[20] Such an order would be in the hands of the senior authority, which could, in the context of an appeal or complaint by an information requester, order the obligated entity to provide the requested information. Effectively, this would give the requesting party an enforcement order against the obligated entity. This would be analogous to the process that is currently being made available through the administrative courts in their reviewing of a decision that has been rejected.

[20] See http://www.mvcr.cz/clanek/informace-pravo-na-informace-versus-jejich-ochrana.aspx.

Other considerations have been directed toward the establishment of a so-called *Information Commissioner*,[21] who would represent an institution with a central role in the providing of information, also establishing an institution which would provide standardized procedures and give assistance to the authorities with responsibilities in providing this information. There has also been discussion about the possibility of an office for the Information Commissioner acting as a senior authority with respect to all obligated entities; and, through this authority, it would take on the responsibility for handling all information request appeals and complaints.

Among the legislative proposals, there has also been one to assign the administrative-legal recourse to specific persons, which, within the organizational structure of the obliged entities, which are responsible for handling requests for information and which do not comply with the law, would be empowered to act.

The relevant reflections and discussions have not yet led to these ideas being transferred into actual legislation. On a practical level, there has been the introduction of the information order. Regarding the position of "Information Commissioner", the feeling has been that the responsibilities to be assigned to such a position can already be handled by the various ministries, whose competencies already include responsibilities in this area, in accordance with a resolution by the government and especially the Ministry of the Interior, as the coordinator of the legislation. At the same time, it was concluded that the costs that would be incurred in the establishment of an "Office of the Information Commissioner" (the establishment of a new institution) are not commensurate with the potential benefits to be achieved—especially given the belief that significant improvements can be achieved by other means (reference was made to the "information order").

Finally, the negative impact on obligated entities—and, possibly also, at least indirectly, on specific persons involved with the providing of requested information—can be liability for damage, including non-pecuniary damage, related to delays in the proper and timely fulfillment of information requests (a failure to follow official procedures).[22] Court decisions in this area are as yet all related to specific (versus general) issues, and thus it is not possible to note any settled decision-making practices.

[21] Ibidem.

[22] See Act No. 82/1998 Coll. On liability for damage caused in the exercise of public authority or by improper official procedure, as last amended.

6 Methods of Providing Public Information Ex Officio

Current legislation imposes a general obligation on the legally defined public institutions to make information on the scope of their activities, their procedural processes, organizational structure, relevant laws and processed concepts (e.g. budget, investments) freely accessible to the public via the internet and at their offices. In addition, these obligated entities are required to post on their websites any other information which they have previously provided to parties submitting a specific information request.

A publication *Solving Life Situations* has also been prepared and made available to the public. Within there is information on the various procedures to be followed when requesting information and assistance from different bodies of the public administration—including things such as requesting a building permit, ID card, the payment of social security benefits and so on. Included in this publication are the specific requirements for each such request and any related fee obligations. Where applicable, information is also provided on relevant legislation.

Along with the above, there are also specific requirements related to the disclosure of information on the environment. In the broadest sense, these include the publication of documents connected with Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA), which are to be published in an electronic form.

A large amount of information is made available to the public in relation to the legislative process in the Czech Republic. This includes information from both chambers of the Parliament—specifically, information on all proposed and pending legislation, transcripts of meetings and voting results. This is very different from the practices of local governmental bodies with respect to them making information about their decision-making processes electronically available. Here, the amount of information being disclosed is dependent on local practices and the degree of willingness of local political leaders to release and publish such information. It can also depend on the size of the particular town or village and/or size of the local official apparatus. The release of such local governmental information often is done through its issuance in local periodicals (a local newspaper) or information leaflets which are usually free of charge delivered to citizens.

7 Excepted Information

7.1 Scope of Such Exceptions

It is obvious that the right to information cannot be absolute and without exceptions; they have been considered and taken into account in the applicable legislation. Thus, there are certain types of information, which authorities and public institutions (obliged entities) do not have to release.

Examples of the types of information, which would be exempt from release requirements, would include confidential and classified information, information related to a particular person (including personal data), trade secrets, information about the financial status of persons and parties which are not otherwise obligated to disclose such information, information about ongoing criminal proceedings and on the activities of the law enforcement. It is also not required to disclose information on particular viewpoints and opinions, information on pending future decisions and on creating new information. Most of these exceptions will be discussed below.

7.2 Non-existence of the Document as an Exception to the Freedom of Access

One of the defining characteristics of information is that it has been recorded (and as such, available in some type of archived fashion). If such an archive of information doesn't exist, then there is no way it can be provided as a new record of the information would have to be created. If a request is received for information to be provided for which there is no record, then the information request can be processed as any other request, with the response to the requester that the information does not in fact exist.[23] The Supreme Administrative Court also assessed this exception in terms of its compatibility with the constitutional order, mainly Article 17 of the Charter of Fundamental Rights and Freedoms. This court stated that this exemption is consistent with the constitutional order of the Czech Republic.[24]

[23] The purpose of this exclusion is a certain level of protection of the obliged entity from the need to generate new information for the purpose of processing the response on request. See decision of Supreme Administrative Court 4 As 37/2011-93, 20 April 2012, or decision of this court 8 As 9/2013-30, 27 November 2013.

[24] See decision of Supreme Administrative Court 1 As 141/2011-67, 9th February 2012.

In some court decisions, however, the view has been taken that the response to a request for non-existent information can only be handled informally. This response option (the rejection of the information request due to the non-existence of information), however, cannot be absolute. This is because related information to the request may need to be (and should be) communicated to the requesting party. For example, there may be a request to know about the occurrence of an event or action of an obligated entity. While it may have not been documented, the fact can be confirmed that it took place and this information can be duly and properly conveyed to the information requester, in addition to letting the party know that there are no other records.[25]

7.3 Partial Disclosure

In general, the limitations on the rights of requesting parties to receive requested information have to be strictly observed in favor of the right to the information. As such, whenever obligated entities are only able to provide part or some of the requested information as they are relying on a legal exemption to not provide all requested information, they not only need to provide whatever information they can but also to let the requesting party know why part of their request was rejected. Partial compliance thus takes precedence over total rejection.

In practice, the majority of situations in which only partial data is supplied in relation to an information request is related to the anonymization of personal data, the redacting of trade secrets information and confidential business information on business documents. The Czech courts have issued numerous options in regard to which information requests cannot be entirely rejected and the need to provide at least some of the requested information. The option to entirely reject a request for information cannot be taken if it should be impossible to properly remove all of the information that is exempted from disclosure and still have some type of meaningful information to release. Any such complete rejections of a request must be duly justified.[26]

[25] Furek, A., Rothanzl, L., Jírovec T., p. 64.

[26] See decision of Supreme Administrative Court 1 As 51/2009-106, 11th August 2009, decision of Supreme Administrative Court 2 As 87/2006-94, 15th June 2007 or decision of Supreme Administrative Court 7 As 20/2013-23, 27th February 2014.

Excepted Information ***Official/state secrets, international relations/foreign policy; defense/ national security; third party consent. The economy of the state, monetary and financial issues of the state.***

The legislation on information disclosure clearly excludes the requirement to disclose data that is considered "classified" under the Czech act on the protection of classified information.[27] As defined, *"classified" information* would include information *in any form, recorded on any media and labeled as such in accordance with this act, whose disclosure or misuse could cause harm to the interests of the Czech Republic, or which might be disadvantageous to the interest of the country, and that is included in the list of classified information*, which is issued by the government in the form of a regulation. The degree of secrecy is then expressed on a scale running down from "top secret", "secret", to "confidential" and lastly "restricted". This list of classified information will contain partial lists of classified information from the intelligence services, the ministries and other central government bodies.[28]

If not all of the requested information falls into a classified category, the obligated entity is again obliged to provide as much information as possible insofar as to what can actually be disclosed—as discussed above under "partial disclosure".

Excepted Information ***Protection of personal information and privacy, Protection of commercial interest/business secrets; the protection of information on decision-making and the formulation of public policy, protection of information on ongoing proceedings and investigations.***

Other information release exemptions include personality and personal data. It is important to note that there are no blanket and absolute exemptions in this area. The usual situation is one in which some, but not all, information can be disclosed. The protection of personality arises out of the Charter of Fundamental Rights and Freedoms, the general

[27] Act No. 412/2005 Coll., on classified information and security competencies, as last amended.

[28] Other central government bodies defined especially in Act No. 2/1969 Coll., on the establishing of ministries and other central government authorities of the Czech Republic, as last amended.

provisions of which have been included in the Czech Civil Code.[29] With respect to this, it is generally information of a personal nature which is protected, although it is clear that there can be a variety of situations in which the boundaries between public and personal information are crossed.

In the Czech Republic, there is some difference of opinion with respect to the issue of what is public (disclosable) and what is not-to-be-disclosed personal information in relation to records of public meetings (including the meetings of local government councils) in which individual citizens have voiced their opinions and records of the meeting are kept.[30] According to some, any speech at a meeting of a public body is a public appearance in matters of public interest, and therefore recording can be made and information provided to anyone requesting it, without any restrictions (including any personal data of private persons). However, what doesn't apply is the automatic agreement of the presenter [the person making the speech] with its unrestricted dissemination through the internet. This question has not yet been firmly decided; and, in accordance with certain opinions, the personal data of individuals in these records must be protected and thus not disclosed to the public.

Also protected are "trade secrets". This is a fairly broad term, as currently defined in the Czech Civil Code. For an outline of the issues, however, we will highlight some of the most common situations in which information is exempt from disclosure because it is considered a trade secret. These are typically a directory of customers or suppliers, business plans, production costs and pricing calculations.[31]

Also excluded from disclosure requirements are questions concerning opinions, information relating to decisions yet to be made and information that has yet to be created. In all three categories of information, the request would require something new to be created (a record of something that

[29] Act No. 89/2012 Coll., the Civil Code.

[30] See decision of City Court in Prague 8 A 316/2011-47, 13 March 2012. In this decision court stated: "Speeches and other manifestations of private persons do not have personal character". However, Regional Court in Hradec Králové in its decision 52 A 12/2012-27, 30 August 2012, stated that these records may contain speeches of personal character which should be protected.

[31] Furek, A., Rothanzl, L., Jírovec T., p. 464–465. For example, see decision of Regional Court in Brno 29 A 52/2012-141, 10 February 2015, or Regional Court in Plzeň 30 A 8/2012-87, 28 June 2013.

has yet to be decided, written down or made into a record); and, since the requester is asking for something that doesn't yet exist, there is no obligation of any public institutions to provide it.

On the question of criminal proceedings and the activities of law enforcement bodies, there is legitimate exemption from information disclosure obligations. Providing such information could jeopardize the rights of third parties; it could detract from or inhibit the crime prevention activities of law enforcement, including their ability to discover and detect criminal activities and behavior and thus ensure the safety of the citizens and residents of the Czech Republic. With respect to information on ongoing criminal proceedings, a major role is played by the need to protect information that might violate a person's right to the presumption of innocence.[32]

7.4 The Public Interest Test

Whenever a conflict arises between the Czech Constitution's guaranteed right to information with any other constitutionally guaranteed rights, it is up to the local courts to make a determination in each such situation. They will do so by carefully looking into all of the related facts and circumstances.

The Czech Constitutional Court has put together a decision algorithm with which to weigh conflicting fundamental rights and freedoms. They are determined by basic procedural criteria,[33] the content of which are as follows:

- The first criterion to be considered is the appropriateness of the request and to determine whether, by limiting a particular fundamental right, it is possible to achieve the desired objective.
- The second is the need to determine whether the objective being pursued through the information request could not also be achieved by other means, which would not impinge upon or otherwise restrict other fundamental rights and freedoms.
- The third criterion is to compare the severity of the related conflicting fundamental rights.

[32] See decision of Supreme Administrative Court 8 As 114/2013-36, 4 August 2014.
[33] See decision of Czech Constitutional Court I. ÚS 2269/10, 23 February 2011.

The public interest test when requesting information is basically a proportionality test.[34] And, with regard to this test, a formal legal reason for not providing the information is not in all cases necessary as a reason for non-disclosure. Thus, through the proportionality test, it may be determined that the public interest in the release of information (as has been well shown in practice) outweighs other privacy rights and the requirements related to the protection of personal data, property rights and other rights.

8 Fees and Costs

The Czech FOIA also recognizes that the providing of information does entail certain costs, and the act expressly states that, in connection with the provision of information, the obligated entities may request a payment in an amount which shall not exceed their cost of making copies, obtaining technical data carriers and sending information to the requesting party. The obligated entity may also ask for payment for an exceptionally extensive search for information. What is important here is to recognize that the right to receive a payment for costs is a right—but not an obligation.[35] And, in situations in which costs are to be charged, the obligated entity is required to have a published list of charges reflecting such costs.

The most frequent questions brought before the Czech courts with respect to information release charges are those related to extensive searches. Here the obligated entities are required to provide reasonable justification for this *extraordinary vastness*, and this is the area in which mistakes are often made. These costs can also include the costs associated with processing the information, because to handle an unusually large amount of information usually entails more than just finding the information.[36] However, it is questionable as to whether such costs can include charges for the cost of anonymization of confidential information and so on.

[34] See decision of Czech Constitutional Court Pl. ÚS 15/96, 9 October 1996.
[35] See decision of Supreme Administrative Court 6 As 68/2014-21, 25 June 2014.
[36] See decision of Supreme Administrative Court 6 A 83/2001-39, 13 October 2004.

9 Special Regime for the Access of Mass Media

Mass media has privileged access to information that would otherwise be protected against disclosure. There is a term here which can be translated as "reporting license" which is contained mainly in the Czech Civil Code in relation to the protection of the personality. Due to this license, it is possible to record and use the portrait of a person or audio and video recordings for the press, radio, television or similar coverage without the consent of this person.

Also, the legislation on copyright (the Copyright Act) explicitly uses the term "office and reporting license" or "intelligence license". *The copyright is not interfered by the person, who uses the work in connection with reporting on current events, and to the extent consistent with the informative purposes or adequately uses the work in the periodical press, television or radio broadcast or other mass media in order to provide news about current political, economic or religious affairs, already published in another mass media or its translation*.[37]

The actual act on free access to information, which doesn't otherwise favor the interest of mass media, does also recognize that there are situations in which the mass media might deserve to have access to (and make use of) information based on the public interest test. And, in line with the wording of the Copyright Act and the Civil Code, mass media may be given a priority right to information, even in situations in which such a right may conflict with another fundamental right, thus in favor of mass media fulfilling its intelligence reporting mission.

10 Special Regime for Access to Environmental Information

An essential component of the fundamental right to information is the right to have access to information about the environment. The most important and key source of law in this area is the Aarhus Convention.[38] In accordance with this Convention, obligated entities are required to provide, collect and update information about the environment, and to do so in such a way that it can be both actively and passively accessed (upon

[37] Par. 34 of the Copyright Act.

[38] Convention on access to information, public participation in decision-making and access to legal protection in environmental matters.

request). The uniqueness of this sub-area of information law required the Czech Republic to pass a special law.

With regard to the active collection and dissemination of information, it is a narrow range of information that is characterized by importance and/or urgency. It may be information in the case of emergency, about the transfer and release of pollutants and so on. A prerequisite to meet this "gathering" obligation is the existence of certain systems, especially information systems that make it possible *to ensure an adequate flow of information to public authorities about any proposed and existing activities which may significantly affect the environment.*[39] Compared to the general information obligation, the specific section of providing information on the environment differs mainly with respect to required activities related to the collection and provision of information on the side of public authorities. Of course, it is possible to be provided environmental information upon request, but such requests can be refused. These are all common features of the general obligation to provide information.

11 Overall Assessment of the FOIA in the Czech Republic

The right to information has been guaranteed in the Czech Republic for few years. The first step was the Article 17 of the Charter of Fundamental Rights and Freedoms which states the obligation of state bodies and local self-government bodies to proportionally provide information on their activities. Practice showed that this (fundamental) right (without the Act which defines more clearly the obligations of obliged entities as well as procedural regime) is not effective. The reason was simple; many obliged entities refused to provide the information.

In 1999, the FOIA was adopted and the situation changed. The right to information is nowadays enforceable due to many means to afford protection of this right. As stated above, it is mainly the system of administrative courts. The Supreme Administrative Court usually interprets the FOIA on behalf of applicants. Obliged entities cannot without legitimate legal reason refuse to provide information or require high fees for providing information.

The development of free access to information has led to rapid improvement of transparency in the Czech Republic. Nowadays, right to informa-

[39] See Article 5 of the Aarhus Convention.

tion is well-known through almost whole Czech society. This right is used to control public bodies (state bodies as well as self-government bodies). If these bodies illegally refuse to provide information, applicants are used to file appeals or take the matter to administrative court. Moreover, obliged entities sometimes provide more information than they are obliged. Because of this development, the citizens are more informed about activities of these bodies, and they are able to participate easier in public life.

The beneficiary of access to information can be everyone (natural legal person or legal entity) because in Czech FOIA there are no requirements of a requester to specify their reasons for requesting information because it's done on a non-discriminatory basis. The obliged entities can be divided into two categories. The first category is a category of authorities involved in the conduct of public administration. The second category is connected with public institutions. If some doubts occur, the Czech courts judge a potential obliged entity from a material point of view (not formal point of view).

The request for access can be quite informal. There are no formal procedures in the Czech Republic. However, the requesting party has to fulfill some basic requirements. The request does not have to have any specific form, it can be even sent by e-mail without a recognized electronic signature or other similar requirements (even normal e-mail is a duly and properly submitted request for information).

There are a number of ways in which responses can be made. If the requests are responded to by sending the information, a transmittal note may be included with a general description of what is being provided. The obliged entity can also solve the request by sending a link to previously published information. These processes are quite informal. On the other hand, when the request is rejected at all or partly, the obliged entity has to prepare a formal decision and reject the request very formally. The reason for this is that it should protect the requesting parties' rights against unreasonable rejections.

The requesting party has some instruments of protection in their right to access to information. The Czech FOIA works with two instruments, appeal and complaint. After that it is possible to use the court system. In this hearing, the court examines if the rejection was legal and the reason was legitimate.

The obliged entities also have a general obligation to make information on the scope of their activities, their procedural processes, organizational

Table 12.6 Requests for information, rejections, appeals, complaints and court proceedings. Statistics of selected obliged entities[a]

	2016	*2015*	*2014*	*2013*	*2012*
Requests	9235	7675	6599	6562	6709
Rejections	1624	1068	910	867	687
Appeals	505	349	322	350	248
Complaints	511	382	227	408	416
Court proceedings	51	32	25	40	30

[a]All ministries, selected other central government authorities (except the Office for Personal Data Protection and Council for Radio and Television Broadcasting), capital city Prague, all regions, selected statutory cities (Brno, České Budějovice, Hradec Králové, Jihlava, Karlovy Vary, Liberec, Olomouc, Ostrava, Pardubice, Plzeň, Ústí nad Labem and Zlín)

structure, relevant laws and processed concepts freely accessible to the public via the internet and at their offices. Some of this kind of information is called "Solving Life Situations".

The Czech FOIA works also with some exceptions, for example, nonexistence of the information, protection of personal information and privacy, protection of commercial interest/business secrets. In the Czech Republic, there is also a special regime for the access of mass media, as mass media has privilege access to information due to the "reporting license".

The Czech right of access to information is not usually connected with fees and costs. However, in some situations the obliged entity can (but does not have to) charge costs for an exceptionally extensive search for information. On the other hand, in situations in which costs are to be charged, the obliged entity is required to have a published list of charges reflecting such costs. The obliged entity has to ask the requesting party if he or she pays the costs. If requesting party rejects paying the costs, the obliged entity does not provide the information (Table 12.6).

To sum up, transparency and connected access to information are developing in the Czech Republic. However, there are still many issues which should be definitely better. There are some questions which still have not been solved at all, such as the relationship between protection of personality and free access to information.

Today, the problem of the abuse of right to access information is also discussed. For example, for small municipalities without sufficient administration, it could be real problem to solve abuse of right to access information. On the other hand, although many obliged entities voluntarily

and actively publish information about their activities, there is still room for improvement. In this context, the role of administrative courts and many non-profit organizations is of unquestionable significance.

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CHAPTER 13

Free Access to Information in Serbia

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1 Introduction

1.1 FOIA Enactment

Serbia introduced the Free Access to Information of Public Importance Act (FOIA) (*Official Gazette of the Republic of Serbia, no. 120/2004, 54/2007, 104/2009 and 36/2010*) in 2004. The right to free access to information in public authorities' possession has been elevated to a constitutional rank in 2006 (Art. 51, par. 2 of the Constitution) (*Official Gazette of the Republic of Serbia, no. 98/2006*). Transparency legislation has been completed by enactment of the Personal Data Protection Act (*Official Gazette of the Republic of Serbia, no. 97/2008, 104/2009, 68/2012 and 107/2012*) and the Secret Data Act (*Official Gazette of the Republic of Serbia, no. 104/2009*).[1] This also rounded up the competence of the

[1] Principles of openness and transparency have two main objectives in all democratic societies, especially regarding public administration. "On the one hand, they protect the public interest as they reduce the likelihood of maladministration and corruption. On the other

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_13

national access to information authority—the Commissioner for Free Access to Information of Public Importance and Personal Data Protection (hereinafter: Commissioner).

The Serbian FOIA was rated as the world's best access to information law in the Global Right to Information Rating. The mentioned ranking rated legislation in seven categories—right of access, its scope, requesting procedures, exceptions, appeals, sanctions and promotional measures.[2] However, it has been noticed that "on paper, Serbia's access to information legislation is liberal, but in practice requests are often subject to lengthy delays and rules are hard to enforce."[3] The Commissioner was also aware of this potential discrepancy at the very beginning of his mandate. In his words, "it is the practice, the application of the Law in the real world, as opposed to the normative one, that would be the ultimate judge not only of the quality of certain norms and laws on free access to information of public importance, but, more importantly, of the government's sincerity, willingness and ability to ensure that civil rights exist both on the pages of the Official Gazette and in reality, where they actually belong."[4]

In addition to presenting and commenting normative regulation of free access to information, the conducted research has included comments of the Commissioner, contained in its annual report and a questionnaire sent to the Ministry of Interior, which is the public authority that received the largest number of requests for access to public information in 2015, and the Administrative Inspectorate, which is the public authority in charge of submitting lawsuits to the courts of misdemeanor if a public authority does not comply with the Commissioner's decision. The questions were answered by the persons in charge for information of public importance and personal data protection within these authorities. The questions were as follows: (1) Are there problems in application of FOIA? (2) Do you think that the problems can be eliminated by amendment of FOIA and in

hand, they are essential for protecting individual rights, as they provide the reasons for the administrative decision and consequently help the interested party to exercise the right to redress through appeal" (SIGMA Papers (1999), p. 12). It is also emphasized that "democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information (…) and be able to scrutinize the policy process in its various stages." *European Governance-A White Paper* (2001), p. 11; see also Milenković (2010).

[2] Accessed July 21, 2016. http://www.rti-rating.org/.

[3] Djereg (2013).

[4] Accessed July 22, 2016. http://www.poverenik.rs/images/stories/Dokumentacija/eng_22_ldok.pdf

what regard? (3) Do you think that the problems can be eliminated by change in the practice of the Commissioner and/or the Administrative Court? (4) Do you think that there is another way for elimination of the problems?

1.2 Information of Public Importance and the Contents of the Right to Access

According to FOIA, information of public importance is information held by a public authority, created during or relating to the operation of a public authority, which is contained in a document and concerns anything the public has a justified interest to know (Art. 2, par. 1). A justified public interest to know exists whenever information held by a public authority concerns a threat to or protection of public health and the environment,[5] while regarding other information held by a public authority, justified public interest to know exists unless the public authority concerned proves otherwise (Art. 4).[6]

There are several implications of the mentioned legal norms. Firstly, regarding information concerning a threat to or protection of public health and the environment, a public authority is not entitled to prove that justified public interest to know does not exist. This interpretation has been confirmed by the Commissioner in the early stages of his first mandate.[7] Furthermore, it is not the obligation of the applicant to prove that

[5] For example, information relating to the purchase of vaccines for mandatory public immunization (case 07-00-32/2010-03), *Excerpt from the practice of the Commissioner* (2012), pp. 20–21.

[6] For example, information of public importance are draft laws (case 011-00-258/2013-03), school administration records (case 011-00-269/2012-03), biding documents (cases 011-00-00341/2011-03, 07-00-297/2011-03), tender documents (case 011-00-200/2009-03), the minutes of disciplinary proceedings (case 011-00-52/2008-03), expert opinions of the authorities (case 011-00-7/2006-03), all disposals of budgetary funds (case 07-00-342/2011-03), including funds spent for official trips (case 06-00-29/2006-04), numbers of business cell phones (case 011-00-00570/2011-03), EU letter addressed to the Ministry of Justice on the evaluation of judicial reform and the election and re-election of judges and prosecutors (case 07-00-342/2011-03), public enterprise's contract on procurement of trains (case 07-00-00317/2005-03), *Excerpt from the practice of the Commissioner* (2012), pp. 123–148; *The views and opinions of the Commissioner* (2013), pp. 30–43; *The views and opinions of the Commissioner* (2014), pp. 25–32.

[7] *Press release of the Commissioner from the 4. 7. 2005, The views and opinions of the Commissioner* (2014), p. 17.

justified public interest to know exists, but the public authority concerned should prove it otherwise.[8] Finally, it is the public interest that lies at the very core of the right to access information, and not the interests of particular individuals who just apply on behalf of the public.

For the information to be considered information of public importance, it is irrelevant whether the source of information is a public authority or another legal person, which medium carries the document containing the information (paper, tape, film, electronic media, etc.), on which date the information was created or in which way the information was obtained, nor any other similar properties of such information bear any relevance for this purpose (Art. 2, par. 2).

The Ministry of Interior pointed out that they encounter difficulties in practice due to vagueness in the notion of "public information" set by FOIA. Specifically, they think that the law should spell out whether public information is a document or only one or more of the information contained therein and whether a beneficiary should specify the exact information he or she seeks is enough to specify a document.

Regarding what comes under the scope of the right to access information of public importance, one can differentiate three separate entitlements: the right to examine a document containing information of public importance, to make a copy of that document and to receive a copy of such a document on request, by mail, fax, electronic mail or otherwise (Art. 5).

Access to a document containing requested information shall be made using the equipment available to the public authority, unless the applicant requests access to a document using his/her own equipment.

A public authority shall issue a copy of the document (photo, audio, video, digital copy, etc.) containing the information requested in the form in which such information is stored and in the requested form where possible. If a public authority does not have the technical means to make a copy of the document in the abovementioned terms, it shall make a copy of the document in another form. Finally, if a public authority holds a document containing the information requested in the language in which the request was submitted, it shall have a duty to grant the applicant access and make a copy of the document in the language in which the request was submitted (Art. 18).

[8] See, for example, case 07-00-02225/2010-03, *Excerpt from the practice of the Commissioner* (2012), pp. 13–15.

2 Beneficiaries of Access to Information

The rights prescribed by FOIA can be exercised by everyone, which means any natural or legal person. These rights belong to everyone under the principle of equality, which means that everyone is under equal conditions, regardless of their nationality, temporary or permanent residence, place of establishment or any personal characteristics such as race, religion, national or ethnic background, gender and so on (Art. 6).

On the other hand, taking into account the specifics of performing tasks of journalists and the media, and the necessity to provide their equal treatment on the market, FOIA prescribes that a public authority shall not give preference to any journalist or media outlet in cases where more than one applicant applies for the same information by singling out one of them or by allowing one of them to exercise the right to access information of public importance before other journalists or media outlets (Art. 7). FOIA, furthermore, prescribes that a public authority shall be held liable for any damage caused by the inability of a media outlet to publish information because that public authority had unjustifiably denied or limited its rights to access information and/or because that public authority gave preference to other journalists or media outlets (Art. 44).

Although each public authority has the obligation to publish information on the number of requests, beneficiaries and the way requests have been dealt with, this data is not collected anywhere. Hence, the conclusion on the structure of beneficiaries has to be made on the basis of the number of appeals submitted to the Commissioner, that is, on the assumption that the relation between the number of appeals submitted by a certain group of beneficiaries is proportionate to the number of requests for access to information they filed and the assumption that this ratio is approximately the same across all of these groups. Graphic overview of appellants/beneficiaries is presented in Table 13.1.

Over the course of three years, the structure and order of beneficiaries appears to be consistent. The majority of appeals was filed by citizens, followed by NGOs, journalists, state authorities, political parties, trade unions and others.

The role of NGOs in increasing transparency of the administration should not be underestimated due to the fact that they requested information three times less frequently than citizens. NGOs requested information in some of the most important cases, where the value of public expenditure and the significance of the pertinent governmental work for

Table 13.1 Participants in the FOIA procedures

Year	*Citizens*	*NGOs*	*Journalists*	*State authorities*	*Political parties*	*Trade unions*	*Others*
2014	2471 – 62.89%	796 – 20.26%	251 – 6.39%	81 – 2.06%	98 – 2.49%	172 – 4.38%	60 – 1.53%
2015	2483 – 64.98%	716 – 18.74%	268 – 7.01%	123 – 3.22%	89 – 2.33%	46 – 1.20%	96 – 2.51%
2016	2056 – 63.22%	548 – 16.85%	357 – 11%	102 – 3.13%	55 – 1.7%	44 – 1.35%	90 – 2.76%

Source: Commissioner's annual reports

society were the greatest. For instance, the NGO Transparency Serbia requested information on the contract concluded between the Government and the expert team that was engaged to run one of the biggest publicly owned companies envisaged for privatization—Smederevo Steel Factory.[9] This example also shows that NGOs were the most persistent in obtaining data, despite the Government's strong resistance (several fines were rendered, and the Citizens' Protector (ombudsman) was obliged to help the Commissioner in obtaining the information). The same NGO requested access to information in the investment that was announced as a state priority—Belgrade Waterfront, the building of a new, elite residential and business premises in the capital city (Transparency Serbia, 11). Furthermore, NGOs have been the most active in requesting documents related to environmental protection (e.g. environmental assessment of various plans/programs) which is of crucial importance for every society.[10]

Another peculiarity, pointed out by the Commissioner as well,[11] derives from the data presented. This is the fact that there are a number of instances in which public authorities seek information from another public authority through a request for access to information under FOIA, instead of using official channels of communication. This shows a lack of intra-administration communication and failure of the government to eliminate silos within it.

Finally, the types of information requested can also give us a better understanding of the beneficiaries' interests. Again, types of requested information and the frequency of these requests are determined indirectly, on the basis of appeals that have been submitted to the Commissioner. Graphic overview of the types of requested information is presented in Table 13.2.

As can be seen from Table 13.2, the order of requested information from year to year is also constant—information concerning exercise of powers and competences by public authorities, budget and usage of public funds, cases and work of public prosecutors and courts, the work of the Ministry of Interior and the intelligence services, public procurements, animal protection, environment protection, restitution and registering of public property, privatization and human health endangerment and protection.

[9] *Commissioner's Rep*ort (2015), pp. 26–27.
[10] Djereg (2013).
[11] *Commissioner's Report* (2016), p. 38.

A correlation between the structure of beneficiaries and the types of requested information can be established. Namely, there is approximately the same percentage of appeals filed by citizens (63%) and the information of public importance that, in general, relate to private interests—information concerning exercise of powers and competences by public authorities (meaning here, deciding in individual cases), the cases and work of public prosecutors and courts, the work of the Ministry of Interior and the intelligence services and information on proceedings of restitution and registering of public property (60%). On the other hand, the percentage of beneficiaries, whose task is to protect public or certain wider group interests—NGOs, journalists, state authorities, political parties and trade unions (34%)—correlates to information concerning protection of public interests (information concerning the budget and usage of public funds, public procurements, environment protection, privatization and human health endangerment and protection) or wider group interests (animal

Table 13.2 Types of requested information

Type of information requested	*% and no. of appeals concerning certain type of information requested*		
	2014	*2015*	*2016*
Exercise of powers and competences by public authorities	38.94% (1530)	39.31% (1502)	40% (1301)
Budget and usage of public funds	23.87% (938)	27.92% (1067)	23.1% (752)
Cases and work of public prosecutors and courts	16.85% (662)	11.44% (437)	12.7% (414)
Work of the Ministry of Interior and the intelligence services	5.93% (233)	5.44% (208)	5.8% (189)
Public procurements	5.17% (203)	4.16% (159)	3.4% (111)
Animal protection	2.32% (91)	3.95% (151)	3.96% (129)
Environment protection	1.86% (73)	2.09% (80)	3.47% (113)
Proceedings of restitution and registering of public property	1.68% (66)	2.07% (79)	1.56% (51)
Privatization of public property and public enterprises	0.92% (36)	1.83% (70)	0.7% (22)
Human health endangerment and protection	2.01% (79)	1.33% (51)	1.72% (56)
Other information	0.46% (18)	0.44% (17)	3.5% (114)

Source: Commissioner's annual reports

protection) (36%).[12] Hence, the request for access to information is an equally useful tool for protection of public and private interests.

3 Entities Bound by FOIA

Entities bound by FOIA are public authorities. A public authority is defined in FOIA in the broadest possible manner. Besides central government bodies (which include state authorities of all branches of power), it also covers other parts of public administration, besides state administration: territorially autonomous units' bodies, local self-government bodies or organizations vested with public powers. On the other hand, it includes as well legal entities founded by or fully or predominantly funded by a government body (Art. 3). Graphic overview of entities bound by FOIA is presented in Table 13.3.

The order and structure of entities against which appeals are submitted are relatively stable over the years. However, there is an increase, both in absolute numbers and percentage of appeals filed against public enterprises. This is even more problematic when contextualized. Namely, a lot of state-owned public enterprises have state-protected monopolies or dominant positions in their respective markets. A number of them made serious economic loses and are increasing public debt. Their employees, on average, for the same type of work get higher salaries than employees

Table 13.3 Entities bound by FOIA

Entities	*% and no. of appeals concerning certain type of information requested*		
	2014	*2015*	*2016*
(Central) State authorities	46.1% (1811)	48.18% (1841)	48.92% (1591)
Local government authorities	22.83% (897)	23.53% (899)	21% (684)
Courts and public prosecutors	17.28% (697)	13.69% (523)	13.3% (432)
Public enterprises	11.38% (447)	12.30% (470)	15.11% (491)
Autonomous province authorities	0.81% (32)	0.52% (20)	0.5% (16)
Other public authorities	1.6% (63)	1.78% (68)	1.16% (38)

Source: Commissioner's annual reports

[12] Compared for the year 2016.

in public authorities. This also makes them more prone to political pray, political employment and partocracy. Unfortunately, given the mentioned risks, instead of making their own action more open, they are constantly decreasing transparency. This is further proven by the fact that the percentage of cases in which they did not abide by the Commissioner's decision—22.74%[13]—is almost 50% higher than the number of appeals submitted against their decisions or inactions, 15.11%.[14]

In each public authority, the responsible person is obliged to appoint one or more officials as authorized persons to respond to requests for access to information. The authorized person's main duty is to receive requests, inform applicants whether the requested information is held by the authority and grant access to documents containing the requested information or provide the information by appropriate means. On the other hand, he/she should also render decisions rejecting requests and provide necessary assistance to applicants in the exercise of their rights. If an authorized person has not been appointed, the duties of the authorized person shall be performed by the responsible person of the public authority (Art. 38, par. 1–3).

Moreover, for the purpose of effective implementation of FOIA, a public authority is obliged to train its staff and advise its employees on their duties regarding the rights provided in FOIA. The staff training must cover in particular: "the content, scope and importance of the right to access information of public importance, the procedure for exercising those rights, the procedure for managing, maintaining, and safeguarding information mediums and types of data which the public authority is required to publish" (Art. 42).

FOIA prescribes legal protection for public servants who provide information in accordance with the law. Particularly, a public servant who has provided access to information to which access cannot be restricted under law, as well as to any information to which access has already been granted by a public authority, cannot be held liable or suffer consequences on that account, providing that such information reveals corruption, malfeasance in office, wasteful disposal of public funds and illegal action or proceedings

[13] *Commissioner's Report* (2016), p. 41.

[14] For instance, the authorities have made unavailable to the public the information on the management of Smederevo Steel Factory (which was public enterprise until recently), its sales agreements and purchase of raw materials on the pretext that those were "classified data." See *Commissioner's Report* (2016), pp. 17–18.

of a public authority. This protection is granted if a public servant had reasonable cause to believe the truthfulness of the information, if he/she neither sought nor obtained any benefit with regard to allowing access to information and if, prior to allowing access to such information, he/she had notified the matter to a competent person in the public authority, who failed to act with an intention to rectify any such irregularities. A public servant who is held liable or suffers any damage has the right to indemnification by the public authority in which he/she works (Art. 38, par. 4–6). A public servant who provides access to information of public importance in the abovementioned circumstances may be rewarded by the public authority (Art. 38, par. 7). FOIA extends mentioned legal protection to public officials, to contracted persons as well as to persons receiving services from a public authority or persons having the status of a party in a procedure before a public authority (Art. 38, par. 8).

4 The Request for Access

There is a growing trend in the number of requests by which citizens require information from different authorities, with a large number of complaints lodged to the Commissioner due to the difficulties in obtaining such information. The average of 3000 to 4000 formally lodged complaints a year (in the past four years) is a confirmation that the information is still in many cases hard to obtain without the intervention of the Commissioner and that citizens have confidence in the work of this independent state body when they turn to it for the protection of their rights.[15]

FOIA does not regulate the proceedings for access to information in detail, but only its most important aspects due to subsidiary application of the General Administrative Procedure Act (GAPA) (*Official Gazette of FR Yugoslavia no. 33/97 i 31/2001 and Official Gazette of the Republic of Serbia no. 30/2010*).

The proceedings for access to information are initiated by a request either submitted in written form or submitted verbally and entered into record (Art. 15, par. 1 and 7).

A request is submitted to the authority from which the information is sought (Art. 15, par. 1). FOIA prescribes that if a public authority does not hold a document containing the requested information, it shall refer the request to the Commissioner and inform the Commissioner and the

[15] *Summary of Commissioner's Report* (2016), p. 2.

applicant who, to its knowledge, possesses the document (Art. 19). The Commissioner shall then forward the request to the competent public authority (Art. 20). This represents an alteration to the general regime. Namely, GAPA prescribes that a public authority, upon receiving a request for which it is not competent, has to inform the applicant that it is not competent and who is competent or, if the request is received via mail, it has to send it to the competent authority. It is questionable whether this provision of FOIA is the most efficient solution. It could be considered more appropriate if FOIA left the general rule to apply, that is, the obligation to inform an applicant on who is competent or to send the request to the competent authority and prescribe the obligation to send the request to the Commissioner only if the authority does not know who possesses the requested information. This could have reduced the workload of the Commissioner.

A request for access to information has to contain the name of the public authority; the full name, surname and address of the applicant; and as many specifics as possible of the requested information (Art. 15, par. 2). The request may also contain other details which could facilitate the search for the requested information (Art. 15, par. 3). As previously explained, an applicant shall not be required to specify the reasons for the request (Art. 15, par. 4). A public authority may prescribe a sample request form, but applicants are not obliged to use it (Art. 15, par. 8).

5 The Response to a Request

If a request is deficient, the public authority has to instruct the applicant on ways of rectifying the deficiencies in the request. If an applicant fails to rectify the deficiencies by the specific deadline and if the deficiencies are such that they prevent deciding on the request, the public authority shall dismiss the request (Art. 15, par. 5 and 6).

If the authority approves the request, it shall not render a decision, but only provide access to information (Art. 16, par. 9). A public authority shall provide to the applicant details concerning the time, place and manner in which such information shall be made available for examination and the necessary costs of producing a copy of the document. Access to information is provided on the official premises of the public authority (Art. 16, par. 6). An applicant may, for justified reasons, ask to be given access to information at a time different from the one set by the authority (Art. 16, par. 7). A person unable to access a document containing the requested

information without an escort shall be allowed access to such a document with the attendance of an escort (Art. 16, par. 8).

If a public authority rejects the request entirely or partially, it does so by rendering a decision (Art. 16, par. 10).

6 Re-use of Information

Re-use of public information in Serbia is not regulated by FOIA or any other law. The Commissioner has been lobbying for amendments of FOIA since 2011.[16] As one of the reasons for FOIA amendments, the Commissioner lists implementation of the Directive 2013/37/EU on the re-use of information.

There are examples of the re-use of information (e.g. an application on available medicines in drugstores, using information of the Health Insurance Directorate on the list of medicines covered by the public health insurance). The re-use is not prohibited, but it is fraught with serious obstacles originating from the fact that it is not legally regulated. For instance, the lack of procedure for obtaining a permit to re-use publicized information prevents the administration from having an overview of the number and purpose of re-use of public information. Additionally, the issue of remuneration for commercial re-use of information is not regulated. Finally, and most importantly, the lack of obligation of authorities to enable re-use of information on a larger scale, especially for creation of online applications, enables authorities to set technical obstacles for the re-use of information. They do that with the aim of preventing open data market from being developed in their respective fields, so as not to lose revenues. Unfortunately, this is the case with commercially the most valuable public data, such as cadaster registers.

7 Providing Public Information Ex Officio

FOIA stipulates the obligation of public authorities to publish certain information of public importance ex officio. Namely, a public authority is obliged to publish a directory containing key facts about its operations at least once a year, in particular: (1) a description of its powers, duties

[16] *Commissioner's Report* (2016), p. 12.

and internal organization; (2) information on the budget and means of work; (3) information on the types of services it directly provides to interested parties; (4) procedure for submitting a request to the government body concerned or for lodging a complaint against its decisions, actions or omissions; (5) review of requests, complaints and other direct measures taken by interested parties, as well as of decisions made by the government body concerned upon received requests and complaints and/or responses to other direct measures taken by interested parties; (6) information on the manner and place of storing information mediums, the types of information it holds, types of information it grants access to and the description of the procedure for submitting a request; (7) names of the government body heads, a description of their authorizations, duties and procedures for their decision-making; (8) rules and decisions of the government body concerning the transparency of its operations (working hours, address, contact phones, logo, accessibility for persons with special needs, access to sessions, permissibility of audio and video recording, etc.), as well as any authentic interpretation of these decisions; (9) regulations and decisions on exemptions or limitations of the transparency of the work by the government body, with relevant rationale. A government body shall grant an interested party access to its directory free of charge or issue such a party a copy of the directory, against the reimbursement of necessary costs (Art. 39). The Commissioner prescribes instructions for compiling and publishing the directories and has the obligation to offer upon request advice to public authorities to ensure correct, complete and timely compliance with the duty to publish a directory (Art. 40).

In the Commissioner's 2015 Report, it was indicated that the situation with publishing directories is improving, but that there are still authorities that are not obliged to publish them (e.g. local government public enterprises, state-owned enterprises that are not entrusted with public powers, health institutions, preschool institutions) and that there are groups of authorities that are obliged to publish them but frequently disregard this duty or do not comply with the law or the directives of the Commissioner (state-owned public enterprises entrusted with public powers, local government authorities, special state organizations).[17]

[17] *Commissioner's Report* (2015), pp. 32–35.

8 Excepted Information

8.1 Normative Regulation

As previously noted, the scope of information of public importance available to the public and the public authorities that are obliged to comply with FOIA is as broad as possible. However, FOIA introduces certain reasonable cases when public authorities will exclude or limit free access to this type of information.

Article 8 of FOIA sets a general option to restrict the right of free access to information, but stipulates that the limitation of the rights guaranteed by it can be only to the extent necessary in a democratic society to prevent a serious violation of an overriding interest based on the Constitution or law. Hence, it is not enough that the information is excepted under the law, but the public interest test (three-part test) has to be applied as well, so as to determine whether overriding interest in public disclosure exists or not. The public interest test has three main segments (questions): (1) whether access is denied in order to protect any of the other interests set out in the law (Arts. 9, 13 and 14) and, if so, (2) whether granting of access to information would constitute a serious violation of that other interest in that specific case and (3) whether the need to protect the conflicting interest is overriding in relation to the need to protect the applicant's interest to know, it being understood that the necessity to deny access is weighed in accordance with the criteria of a democratic society.[18]

This general rule is later specified for the issues or fields of life, health, security, judiciary, national defense, national and public safety, national economic welfare and classified information, where a public authority shall not allow an applicant to exercise the right to access information of public importance. Namely, pursuant to Art. 9 FOIA, a public authority shall not allow an applicant to exercise the right to access information of public importance if it would thereby (1) expose to risk the life, health, safety or another vital interest of a person; (2) jeopardize, obstruct or impede the prevention or detection of a criminal offense, indictment of a criminal offense, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial; (3) seriously threaten national defense, national and public safety

[18] *A Guide to the Law on Free Access to Information*, pp. 8–9.

or international relations; (4) substantially undermine the government's ability to manage the national economic processes or significantly impede the achievement of justified economic interests; (5) make available information or a document qualified by regulation or an official document based on the law as state, official, commercial or other secret, that is, if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interest.

Further to the last point, the Secret Data Act (Art. 8, par. 1) prescribes the public interest test as well, stipulating that information can be classified as secret if by disclosing it to an unauthorized person it could cause harm and provided that protecting the interests of the Republic of Serbia overrides the interest to access public information. Hence, the very classification of certain information as secret "is not sufficient for restriction of access, but only a 'warning', that is a presumption which imperatively requires application of the three-part test."[19] Furthermore, the Secret Data Act prescribes an additional test to be conducted—the test of harm. Harm is defined in the Secret Data Act as disruption of interests of the Republic of Serbia caused by unauthorized access, disclosure, destruction and abuse of secret data or by other actions of processing secret data (Art. 2, par. 1, subpar. 9). Finally, FOIA and the Secret Data Act do not allow the authority to refuse to confirm, deny the existence of or non-existence of requested information, even in the case of secret data (Glomar doctrine). In the interview with Mr. Goran Matić, head of the Office of the National Security Council, who was a member of the working group that drafted the Secret Data Act, authors were told that BIA, the Serbian intelligence agency, pushed for introduction of the Glomar doctrine, but the request was rejected.

Taking into consideration other provisions of FOIA and the Secret Data Act, especially those prescribing that secrecy cannot be used for concealing crime or other illegalities, Matić offers a more complete test. The test is composed of the following questions: (1) Is requested secret data or information in possession of a public authority? (2) Is secrecy of data used for concealment of a serious breach of basic human rights? (3) Is secrecy of data used for concealment of a threat to the constitutional system or security of Serbia? (4) Is secrecy of data used for concealment of a committed crime for which punishment of five years of imprisonment can be ren-

[19] Šabić (2012), p. 25.

dered? (5) Is secrecy of data used for concealment of a crime? (6) Is secrecy of data used for concealment of overstepping of one's competence? (7) Is secrecy of data used for concealment of abuse of office? (8) Is secrecy of data used for concealment of other illegal acts? (9) Is the need for protection of interests of the Republic of Serbia greater than the interest to access public information? (10) Is one of the grounds for limitation of access to information listed in FOIA confronted with the interest of the public to access information? (11) Would access to this information impede an opposing interest (matter of evaluation of consequences and balances of rights)? (12) Does the need to protect opposing interests outweigh the interests of the person requesting the information to access it, by judging the need to deny access to information on the basis of criteria of a democratic society?[20]

In 2016, the referral of the authorities to confidentiality (secrecy) as a reason for denying access was very often, as well as in previous years. In such cases, public authorities as a rule do not even provide evidence that documents or information are actually properly classified as confidential, in accordance with the Secret Data Act, and the essential reasons and evidence in support of decisions to deny access to information are even rarer. A request of an applicant is rejected a priori, without the use of the prescribed harm test in case of the publication of information and the public interest test on the assessment of the prevalence of interests involved. The cause of such behavior is an intention to cover up the illegal disposal of public funds, abuse of positions, or another form of corruption.[21]

Besides protection of the above-specified public interest, a public authority shall not approve access to information in order to protect the right to privacy, the right to protection of reputation or any other right of a person who is the subject of information.[22] On the other hand, FOIA prescribes exceptions from that rule in cases where (1) the person concerned has given his/her consent; (2) such information relates to a person, event or occurrence of public interest, especially in the case of a holder of public office or political figures, insofar as the information bears relevance to the duties performed by that person; (3) a person's behavior, in particular

[20] Matić (2014), p. 37; see also Matić (2013), pp. 11–16.

[21] *Commissioner's Report* (2016), p. 16.

[22] About the collision between public's right to know and the right to privacy, see in detail Davinić (2016), pp. 165–180.

concerning his/her private life, has provided sufficient justification for a request of such information (Art. 14).

Sometimes it is very difficult to make a distinction between information of public importance and private data. In other words, it is not easy to say whether some data belongs to the first or the second mentioned group, and what interest should prevail, the right of the general public to know or the right to privacy.[23] Furthermore, it is important both for authorities and parties to know whether the FOIA or the Personal Data Protection Act will apply.[24]

[23] Especially two cases before the ECtHR brought the attention of the broader public. In September 2004, the German tabloid published a front-page article about a well-known television actor, being arrested at a beer festival for possessing cocaine. The article also mentioned that actor had previously been given a suspended prison sentence for possession of drugs. The actor brought injunction proceedings against Axel Springer AG, publisher of the tabloid. The German courts held that actor's right to privacy prevailed over the public interest to know. Axel Springer complained to the ECtHR that the injunction prohibiting any further publication of the articles violated their rights under Art. 10 of the ECHR (freedom of expression). ECtHR concluded, among other things, that the published articles had not revealed details about the actor's private life, but had mainly concerned the circumstances of his arrest and the outcome of the criminal proceedings against him. There had accordingly been a violation of Art. 10 of the ECHR by German courts. In another case, two German newspapers published photographs depicting members of Monaco royal family on holiday. They sued newspapers for an injunction on further publication of those photographs claiming that there was violation of their right to privacy. The German courts found that, although two of the photographs violated the right to privacy because they did not match any public concern illustrated in the accompanying text, the third photograph was different. This picture was showing the royal couple walking during a skiing holiday in St. Moritz and was accompanied by an article reporting on the poor health of Prince Rainier of Monaco which was a matter of public concern. In conclusion, the ECtHR found that German courts had carefully balanced the right of the publishing company's freedom of expression against the right of the applicants to respect for their private life. Thus, the ECtHR found no violation of the Art. 8 of ECHR (right to respect for private and family life). See ECtHR (GC), *Axel Springer AG v. Germany*, application no. 39954/08, judgment of 7 February 2012; *Von Hannover v. Germany* (no. 2), applications nos. 40660/08 and 60641/08, judgment of 7 February 2012; https://globalfreedomofexpression.columbia.edu/cases/von-hannover-v-germany-no-2/, visited on July 25, 2016; *Case Law of the European Convention on Human Rights Concerning the Protection of Personal Data*, Strasbourg, 30 January 2013: https://www.coe.int/t/dghl/standardsetting/dataprotection/Judgments/DP%202013%20Case%20Law_Eng_FINAL.pdf, accessed on July 28, 2016; see also Urošević (2006).

[24] In case 07-00-02216/2014-06, the Commissioner rejected the appeal, since party previously did not submit request regarding personal data protection, but request for access to public information, *Commissioner's Report* (2015), pp. 19–20.

In case 07-00-02665/2014-03 regarding availability of competition documents for the selection of the Director of the Anti-Corruption Agency, the Commissioner took the view that this information should be made available to the public, to the extent that it was relevant to the discussion on the procedure of selection, as well as the discussion about whether the competent committee of the Agency chose the candidate with the best references. The Commissioner took this position bearing in mind that the election of the Director of the Anti-corruption Agency was an event of special interest for the public so that the expectations of participants in the competition that their participation should remain in the private sphere were unrealistic.[25] However, not all data from the competition documentation will be available to the public. Thus, for example, the results of psychological tests seriously encroach on the privacy of personality and as such cannot be information of public importance.[26]

In case 07-00-02272/2016-03 that caused great attention of the public and the media, the Commissioner annulled the decision of the Higher Public Prosecution in Belgrade and ordered this authority to promptly deliver the copies of the documents from which one can find out the number of the case, as well as the name of the acting prosecutor conducting the proceedings regarding the demolition of facilities in Hercegovacka street in Belgrade (the "Savamala" case). The Commissioner's explanation of the decision pointed out that in this case, the Citizens' Protector (the Ombudsman) found serious omissions in the work of the competent authorities, which further enhanced the interest of the public for information regarding this event, as evidenced by numerous media articles and public protests of citizens. Based on all the circumstances, the Commissioner found that in this particular case the public interest to know outweighed the interest of the privacy of an acting prosecutor.[27]

[25] *The views and opinions of the Commissioner*, Vol. 4, pp. 46–47; see also similar case (011-00-00691/2013-02) on the election of the Director of Historical Museum. *The views and opinions of the Commissioner*, Vol. 3, pp. 78–80.

[26] Case 07-00-00922/2013-03, *The views and opinions of the Commissioner*, Vol. 4, pp. 66–68.

[27] See http://www.poverenik.org.rs/yu/saopstenja-i-aktuelnosti/2445-pismo-poverenika-republickom-javnom-tuziocu-povodom-slucaja-qsavamalaq.html. Accessed 11 June 2017. The Commissioner acted differently in the case 07-00-03519/2014-03 when the information on passed exams of the person now performing a judicial function and being the deputy president of the court was requested from the Faculty of Law. The Commissioner rejected the appeal of information seeker as unfounded, since in his opinion the protection of privacy outweighed the public's right to know in this case. *The views and opinions of the*

Overall, the officials (e.g. judges, prosecutors, lawyers, and experts) enjoy a lesser degree of privacy protection in relation to other persons, and their names should be made public since it is the information concerning the exercise of public functions. However, the Administrative Court prevented the Commissioner from extending the exception relating to a holder of official or political figures (Art. 14 par. 2) to all civil servants. It considered that it is not enough to be a civil servant to fall within the scope of the aforementioned provision, but that a person has to be (obviously, for some other, additional reasons) in the public interest (AC Judgment no. 9 U. 11765/13).

The Commissioner will always reject the appeal which concerns particularly sensitive personal data. In case 07-00-02058/2010-03, the Citizens' Association requested the Center for Social Work to submit copies of the decisions about persons who are the beneficiaries of financial assistance. The public authority rejected the request, after which the seeker appealed to the Commissioner. He rejected the appeal as unfounded considering that this was particularly sensitive data, whose availability to the public would seriously jeopardize the right to privacy of the person to whom the information related. Also, the Commissioner determined that there were no conditions for the application of exceptions to the right to privacy, given that the Association did not provide any evidence of the existence of such circumstances.[28] Similarly, the Commissioner rejected the appeal of a person who requested access to the case file concerning an anonymous report of violence in the family of his daughter and the name of the person who reported it because this was also particularly sensitive data. The Commissioner stressed that the availability of such information

Commissioner, Vol. 4, pp. 64–65; see similar case (07-00-01006/2013-03), in which the Commissioner rejected appeal which was about the education of the local chief of the police. *The views and opinions of the Commissioner*, Vol. 4, pp. 68–69. However, we cannot agree with the position of the Commissioner in these cases, bearing in mind that the grades and the length of studies can be very important information for appointments of judges and members of law enforcement and their career advancement.

[28] *Excerpt from the practice of the Commissioner*, pp. 90–91. For the same reason, information on whether certain individuals use some form of social assistance, disability allowance or soup kitchens may not be available to the general public as information of public importance. Case 07-00-02894/2014-03, *The views and opinions of the Commissioner*, Vol. 4, p. 70; case 07–00–00264/2010–03, *The views and opinions of the Commissioner*, Vol. 2, pp. 76–77.

could seriously undermine the right to privacy, whereby conditions for the application of exceptions were not met.[29]

The clash between these two rights—the right of the public to know and the right to privacy—is especially visible and important in the field of public access to court decisions. According to a study conducted in 2016, both the rules and practice of data anonymization contained in court decisions in Serbia are not harmonized. Thus, the rules of anonymization should be adopted and implemented throughout all the courts in Serbia. "This endeavor should ensure an adequate balance between the right of the public to inspect court decisions and the right to privacy of persons whose data is contained in these decisions."[30] However, it has been emphasized "that even in the case of the adoption of uniform rules in this field, the decision on whether a particular piece of information will be made available to the public or be anonymized will have to be made by the court in each specific case."[31] This is just an additional sign of the fragile and sometimes invisible border between these two rights.

Another situation in which there is no obligation for a public authority to allow an applicant to exercise his/her right to access information is if such information has already been published and made accessible in the country or on the Internet. A public authority shall instruct the applicant in its response on the information medium containing such information (number of an official medium, title of a publication, etc.) and indicate where and when the requested information was published, unless such information is common knowledge (Art. 10).

Finally, the right of access to information shall be limited if an applicant tries to abuse these rights. The abuse of rights under FOIA means, in particular, that a request is unreasonable, frequent, that an applicant repeatedly requires the same information or information already obtained, or when too much information is requested (Art. 13). In essence it is the discretion of the public authority to disable individual applicants who jeopardize the basic objectives of this institute, which is connected with the intention of not hindering the realization of the rights of other appli-

[29] Case 07-00-02818/2013-03, *The views and opinions of the Commissioner*, Vol. 3, pp. 73–74.

[30] Mišljenovic, Toskic (2016), p. 63.

[31] Ibid.

Table 13.4 Reason for denial of access to information

Reasons for denial of access to information	*%*		
	2014	*2015*	*2016*
Secret data and secret documents	48%	24.08%	27.75%
Abuse of right	20.80%	22.99%	37.80%
Personal data protection	14.50%	19.96%	13.20%
Other reasons	16.60%	32.97%	21.20%

Source: Commissioner's annual reports

cants and not to unnecessary burden public authorities. Similar powers are given to public administration bodies in the field of inspection supervision, where they can refuse to act on petitions of subjects who are trying to abuse this right in order to initiate an inspection procedure.

On the other hand, the right to access information of public importance can be partially excluded if this type of information can be extracted from other information contained within a document which a public authority has the duty to disclose to the applicant. Namely, in that case, the public authority shall allow the applicant access only to the part of the document which contains the extracted information and advise him/her that the remainder of the document is not available (Art. 12). However, it is noticed that partial access to documents represents great burden for public authorities (Table 13.4).[32]

The order of the most common reasons put forward by public authorities as a basis for denial of access to certain information varies from year to year. There are, nevertheless, two clear tendencies—decline in the invocation of protection of secret data and secret documents, on the one hand, and increase of the abuse of right as a reason for denial, on the other. This might be a consequence of consistent practice by the Commissioner requesting public authorities that invoke secrecy as the reason for denial, to balance the interest of keeping certain data and documents secret with the interest of the public to have access to requested information. It might be that public authorities find the abuse of the right as a ground for denial easier to justify before the Commissioner.

[32] Theofilaktou (2011), p. 111.

8.2 Critical Considerations

The Commissioner made critical remarks on the following most common reasons for denying of access to information.

The Commissioner criticizes denial of information by reference to data secrecy on two accounts. Firstly, criticizing the practice of stipulation of confidentiality clauses in investment agreements and other forms of business cooperation between the state and private entities.[33] Secondly, reproaching the practice of authorities to deny access on this ground without providing actual evidence that the requested information is classified as secret and without conducting the harm test and the public interest test *(ibid.)*.

As to the latter remark, we agree that the classification of certain information or documents as secret has to be made in some decisions. However, as to conducting the harm test and the public interest test, a counter-remark has been made by the people working in practice, specifically, persons working in the Ministry of Interior, an authority which often deals with secret data. To be precise, FOIA prescribes subsidiary application of the GAPA (Arts. 21 and 23). GAPA, in turn, stipulates that all decisions rendered in the administrative proceeding must be motivated. The justification of a decision has to contain the determined facts of the case, reasons why certain requests of a party were not accepted, pertinent legal regulations and the reasons which, taking into consideration determined facts of the case, led to that decision being made (Art. 199). FOIA reaffirms this obligation by prescribing that if a public authority refuses a request made by a party, it shall have the duty to pass a decision rejecting the request and provide rationale for such a decision in writing (Art. 16, par. 10). The problem that appears in practice is how to reason a decision on denial, along with the harm test and the public interest test, without disclosing information which ought to remain secret.[34] If a decision does not contain such justification, it can be quashed by the Commissioner or the Administrative Court.

We would agree that public authorities find themselves between a rock and a hard place in this situation. Where is this thin line between satisfying the party and the Commissioner and not revealing the information you are obliged to keep secret under the law? Confronted with the same problem,

[33] *Commissioner's Report* (2015), p. 25.
[34] Vasiljević (2014), pp. 80–82.

the Secret Data Act offered another option. This law regulates the issuance of certificates for access to secret data by natural and legal persons. In case the competent authority, the Office of the National Security Council, denies a request for issuance of the certificate or in case it revokes it due to breach of duty to keep this information secret, its decision shall not contain secret data or the source of security check (Arts. 69 and 77). This solution, however, leaves the party without a good chance, if any, to successfully challenge such a decision. That might be appropriate in cases of access to secret data, but it could hardly be justified in cases of access to public information, which is a constitutionally guaranteed right.

The solution could be found on middle ground. A public authority could be authorized to leave out secret information from the motivation of its decisions, so as to avoid their illegal disclosure to the party. On the other hand, a party could file an appeal to the Commissioner, to whom the public authority would be obliged to provide the case file and detailed explanation of its decision. The Commissioner could then decide whether denial was justified or not. If it was justified, the Commissioner would keep the information, the case file and the justification of the challenged decision secret.

The Commissioner criticized the practice of public authorities to deny information with reference to personal data protection. Noticing that public authorities do this even in cases in which requested information relates to public officials and concern or is important for performance of their function and official work, including information of their remunerations from public funds, despite the fact that this cannot be a sound legal ground for denial of such information.[35]

Finally, the Commissioner also remarks the practice of denying information due to alleged abuse of right to access, stating that the authorities act in that way when there is a big volume of requested information or when one party submits a big number of requests. The Commissioner finds this provision to be very wide and recommends that it should be narrowed. On the other hand, the Commissioner stated that the said provision does not encompass certain situations that represent right abuse, like situations in which an authority copies a large number of requested documents and then the party does not reimburse the expenses thereof or does not even take the copies.[36] The problem with failure of a beneficiary to

[35] *Commissioner's Report* (2015), p. 27.
[36] *Commissioner's Report* (2015), p. 28.

reimburse the cost of copying was also noticed by the Administrative Inspectorate. The Administrative Inspectorate suggested that the Decree regulating this issue should be amended so as to prescribe that beneficiaries should be given copies only once they submit a proof of payment of the cost thereof.

However, one of the problems indicated in the answers to the questionnaire sent to the Ministry of Interior opposed the Commissioner's comments. The Ministry stated that the Commissioner almost never accepts a denial of access to information on the ground of abuse, in the sense of the volume of information or multitude of requests submitted by the same person. The Ministry asks for this ground to be changed so as to enable easier denial in these cases. The same statement was found in the answers of the Administrative Inspectorate.

Evidently, the abuse ground for denial is not regulated precisely enough. It would be beneficiary for all the stakeholders, primarily the Commissioner and the public authorities, to open a public debate on this topic and to suggest its future normative regulation.

9 Timeframes for Answering the Requests

A public authority shall, without delay and within 15 days of receipt of a request at latest, inform an applicant whether it holds the requested information, grant him/her access to the document containing the requested information or issue or send to the applicant a copy of the document, if the case may be. A copy of a document shall be deemed to be sent to an applicant on the day it leaves the office of the public authority from which the information was requested (Art. 16, par. 1).

This provision of FOIA departs from relevant provisions of GAPA in two ways. The first, which should certainly be commended, is that it shortens the time period for rendering a decision. Had the pertinent provision of GAPA been applied, the deadline would be twice as long—a month (Art. 208 GAPA). However, the other departure reduces, at least to a certain extent, the benefits brought on by the first one. The general rule is that the time period for rendering a decision in GAPA is counted from the day of submission of a request to the day of delivery of the decision to the party (Art. 208 GAPA), that is, the date the party actually received the decision (with certain exceptions—Art. 76 GAPA). FOIA, on the other hand, equates the date of transmission of the public authorities' response ("leaving the office") to the beneficiary with the date of its deliv-

ery. This means that the decision can actually be delivered to the party later, thus prolonging the shortened 15-day deadline for a response.

The time period for deciding is considerably shorter if a request relates to information which can reasonably be assumed to be significant for the protection of a person's life or freedom and/or the protection of public health and the environment. In such a case, a public authority must inform the applicant it holds such information, grant access to the document containing the requested information or issue a copy of the document to the applicant, within 48 hours of receiving the request (Art. 16, par. 2).

If a public authority is justifiably prevented from deciding within 15 days, the public authority shall, within seven days of receiving the request at latest, inform the applicant thereof and set another deadline, which shall not be longer than 40 days of receiving the request (Art. 16, par. 3). It should be noted that this possibility for extension does not apply to the abovementioned 48-hour deadline.

If a public authority does not respond to a request within the specified deadline, an applicant may lodge an appeal with the Commissioner (Art. 16, par. 4).

10 Administrative and Judicial Remedies

10.1 Normative Regulation

There are two pathways of legal protection against decisions or silence of public authorities, which possess requested information. The regular path is submission of an appeal to the Commissioner (Art. 22, par. 1), whose decisions can later be challenged before the Administrative Court (Art. 27, par. 1). The other path is to challenge the decision/silence directly before the Administrative Court. This is done in cases in which information was requested from the National Assembly, the President of the Republic, the Government of the Republic of Serbia, the Supreme Court of Cassation, the Constitutional Court and the State Public Prosecutor (Art. 22, par. 3). Obviously, decisions/silence of mentioned, highest public authorities cannot be appealed before the Commissioner, who is, at best, the same rank as these authorities. Consequently, decisions/silence of such authorities can be challenged only directly before the Administrative Court, given that the courts can evaluate legality of anyone's work.

A dissatisfied applicant may lodge an appeal with the Commissioner if a public authority (1) dismisses or rejects his/her request, (2) fails to reply

to a submitted request within the statutory time limit (administrative silence), (3) makes the issuance of a copy of a document containing the requested information conditional on the payment of a fee exceeding the necessary reproduction costs, (4) does not grant access to a document containing the requested information in the manner set forth by the law or (6) otherwise obstructs or prevents an applicant from exercising his/her freedom of access to information of public importance (Art. 22, par. 1).

The Commissioner has to decide on the appeal within 30 days of submission, having first given the public authority, and where appropriate also the applicant, an opportunity to reply in writing (Art. 24, par. 1). The Commissioner dismisses an appeal for procedural flaws (inadmissible, untimely or filed by a person not authorized to do so). If it does not dismiss the appeal, the Commissioner either approves it as justified or rejects it as unjustified (Art. 24, par. 2–4). As in the first-instance proceeding, the burden of proof to demonstrate compliance with the duties set forth in the law rests with the public authority whose decision/silence is appealed (Art. 24, par. 3). If it finds the appeal justified, the Commissioner passes a decision ordering a public authority to grant free access to information of public importance to the applicant (Art. 24, par. 4). This is an important difference with respect to the general rules of administrative procedure. Namely, in accordance with the devolutionary effect of the administrative appeal, the second-instance (appellate) authority is authorized to decide on the merits of the case, that is, to decide on the case without referring it back to the first-instance authority.[37] Generally, in such cases, the party does not have to go to the first-instance authority in order to have the decision enforced and legal rights realized. However, given that it does not possess the requested information, the Commissioner cannot provide the appellant with above-stated information. The Commissioner does legally resolve the case, that is, it determines that the applicant has the right to access to certain information, but the applicant still has to go to the first-instance authority to get the information.

The Commissioner's decisions are binding and enforceable (Art. 28, par. 1). The Commissioner shall enforce the decision with fines. FOIA, once again, favoring the Commissioner's position in the proceeding, changes the general rules of administrative procedure, prescribing that in the procedure of administrative enforcement of the Commissioner's decisions, appeals

[37] Cucić (2011), pp. 66–69.

against the enforcement shall not be admissible (Art. 28, par. 2 and 3). If the Commissioner is unable to execute the decisions, they shall be enforced by the Government (Art. 28, par. 4). The Commissioner was critical of the mechanism of enforcement of the decisions, including the role of the Government, and in that sense the Commissioner made one of the key recommendations. The Commissioner asked the Government to ensure enforcement of the decisions and to initiate proceedings against public authorities, which fail to abide by the relevant transparency legislation.[38]

In 2016 alone the Commissioner was forced to demand from the Government an enforcement of his decisions in much more cases (61) than in previous years, and the Government did not do so in any of them.[39] Although the percentage of unsuccessful interventions of the Commissioner in which he was unable to execute his decisions is not big (8%), it is alarming that the denied pieces of information include the ones that cause more than a justified public interest, for example, failure of competent authorities to undertake statutory measures, large investment projects of the government and the spending of public money and so on.[40]

For instance, the information on what measures have been taken or failed to be taken by the competent national authorities regarding the incident of 25 April 2016 when buildings were demolished in Hercegovacka street in Belgrade, the so-called "Savamala" case, remained inaccessible to the public, despite all the measures and formal decisions taken by the Commissioner pursuant to citizens' grievances and complaints.[41] Another case concerns the crash of a military helicopter in March 2015, in which seven people were killed. Namely, the official note with the reasoning for the decision of the prosecutor's office not to initiate proceedings in this case is still unavailable.[42] Finally, the authorities have made unavailable to the public the information regarding the mentioned case of Smederevo Steel Factory.[43] Unwillingness of the Government to enforce the Commissioner's decisions in any of those cases is an obvious indication that the system does not function properly and that the highest representatives of the Government are not ready to assist the Commissioner in the exercise of his functions.

[38] *Commissioner's Report* (2015), p. 96; see also Ivanović (2007), pp. 684–692.
[39] *Summary of Commissioner's Report* (2016), p. 5.
[40] *Summary of Commissioner's Report* (2016), pp. 5–6.
[41] See in detail: *Commissioner's Report* (2016), pp. 14–15.
[42] See: *Commissioner's Report* (2016), pp. 15–16.
[43] See: *Commissioner's Report* (2016), pp. 17–18.

10.2 Critical Considerations

The system of legal protection in the field of access to information can be reproached for few inconsistencies.

We have to emphasize one significant difference between the administrative appeal lodged with the Commissioner and the administrative appeal submitted to other second-instance authorities in administrative proceedings. Specifically, the administrative appeal is a means of internal control of administration. Both the authority whose decision is appealed and the (higher) authority deciding on the appeal are part of the administration,[44] that is, in the final instance, they are accountable for its work to the Government (or other common higher authorities, e.g. provincial authorities to the provincial government or local authorities to the executive authorities of local self-government units). Hence, it is logical that the first-instance authority cannot challenge the decision of the higher, appellate authority's decision before the Administrative Court, given that they belong to the same branch of power, that they are supposed to implement public policies formulated by the same authority, the Government, and that they are in a hierarchical relationship.

However, the case with the Commissioner is different. The Commissioner is elected by the National Assembly, as an independent state authority, independent from the Government and in charge of controlling the work of the administration particularly in this domain. Despite having procedural features of the administrative appeal, proceedings before the Commissioner represent a type of external control of the administration. One of the procedural features of the administrative appeal, which has been replicated in the proceedings before the Commissioner, is that the decisions cannot be challenged by the first-instance authorities before the Administrative Court. It is questionable whether this is a good solution given that these authorities do not belong to the same branch of power, are not supposed to implement public policies formulated by the same authority and are not in a hierarchical relationship. Why shouldn't the administration as a whole, as well as other authorities bound by the law (e.g. courts), be authorized to challenge the

[44] Cucić (2011), p. 58.

decisions of the Commissioner in this field before the judiciary? Why should the Commissioner be in a position that shields him from any legal criticism of other state authorities? The problem originates from this inherent, structural mistake embodied in FOIA. Namely, if only the appellants can challenge the decisions of the Commissioner, while public authorities are not allowed to do so, the Commissioner might have an incentive to approve the appeals and quash decisions of public authorities. Moreover, empirical research showed that the Commissioner is among the appellate authorities whose decisions are the least challenged before the Administrative Court.[45] It would be more appropriate for legal practice if middle ground was found, allowing both appellants and the public authorities to challenge the decisions of the Commissioner before the Administrative Court. This would have been a better alternative for the development of the Administrative Court's case law in this domain. This was also the opinion of the Administrative Inspectorate expressed in its answers to the questionnaire.[46]

Furthermore, the case law of the Administrative Court can shed additional light on this issue. Namely, between 2005 and 2016, a total of 775 lawsuits have been submitted to the Administrative Court against the decisions of the Commissioner. Only in 20 cases the court found the lawsuit to be grounded and subsequently annulled the decision of the Commissioner.[47]

We were able to find and analyze ten judgments in which the Administrative Court found the lawsuit to be grounded. These are, actually, all the judgments accessible. They were rendered by the Administrative Court after its creation in 2010. Before 2010, competent for judging administrative disputes was the (then) Supreme Court of Serbia, to whose case law we had no access. The judgments in which the Administrative Court rejected or dismissed lawsuits and upheld the decision of the Commissioner were not analyzed because there the Administrative Court followed the Commissioner's practice.

In these ten judgments, the Administrative Court, however, did not extend the scope of the right to access to information. In eight out ten judgments, the Administrative Court either dealt with personal data protection (15 U 8/15, 9 U 356/17, 5 U 15084/13 and 17 U 11274/12)

[45] Milovanović et al. (2012), p. 104.
[46] See also Šuput (2015), pp. 81–88.
[47] *Commissioner's Report* (2016), pp. 43–44.

or annulled Commissioner's decisions for formal reasons, in particular, breach of the rules of procedure (III-5 U 10405/14 and 17 U 11777/10 [2009]), deficiencies in the form of challenged act (I-1 U 11007/15) and inconsistencies between the decision and its motivation (justification) (II/9 U 15458/15).

Only in two judgments the Administrative Court, essentially, overturned the Commissioner's interpretation of relevant legislation and limited the scope of the right to access information. It did that cautiously first in 2011 (AC Judgment no. 2 U 2765/11), when it held that the Commissioner should have provided justification in his decision for his stance that video and audio materials containing footage of judges and court staff should be provided to the party without blurring their images and changing their voices. Hence, the Administrative Court prevented the Commissioner from taking the position that judges and court staff are holders of public office or political figures (Art. 14 par. 2 FOIA), who do not enjoy any protection of personal data when acting in their official capacities. However, the Administrative Court did not go all the way to annul the Commissioner's decision on the basis of misapplication or misinterpretation of the law, but annulled it for inadequate motivation (justification) of its decision, that is, flaws in the form of the act. Two years later, the Administrative Court did go all the way. Namely, it prevented the Commissioner from extending the exception relating to a holder of official or political figures (Art. 14 par. 2) to all civil servants. It considered that it is not enough to be a civil servant to fall within the scope of aforementioned provision, but that a person has to be (obviously, for some other, additional reasons) interesting for the public (AC Judgment no. 9 U 11765/13). In that case the party requested the name of the person working in the Citizens' Protector's (ombudsman) office, who made an official notice that was part of the records of the case. The Citizens' Protector did send the party the requested official notice, but rejected to send the name of the employee who wrote it. Despite a different opinion of the Commissioner, the Administrative Court upheld the view of the Citizens' Protector.

The issue is aggravated by inequality in legal protection depending on the authority from which the information is sought. If information is sought from the six enumerated highest state authorities (National Parliament, Government, Supreme Court of Cassation, etc.), the legal protection is provided before the Administrative Court directly, and there are no restrictions on the side of potentially dissatisfied defendants, in this

case highest state authorities, to challenge the decision of the Administrative Court before the Supreme Court of Cassation (Art. 49 of the Administrative Disputes Act) (Official Gazette of the Republic of Serbia, no. 111/2009). Therefore, these public authorities are allowed to challenge decisions rendered on legal remedies against their decisions to deny access to information—and these are judicial decisions, while the decisions of the Commissioner are unchallengeable by public authorities.

There have, however, been cases where the authorities have challenged decisions of the Commissioner before the Administrative Court.[48] In all these cases, the lawsuits were dismissed. The Commissioner criticized this practice and directed authorities to challenge its decisions by applying to the State Public Prosecutor, who is pursuant to Art. 11, par. 3, of the Administrative Disputes Act authorized to submit a lawsuit if he/she finds that the law has been breached by the decision of the Commissioner at the expense of public interest.[49] It is, again, questionable whether this is a feasible option for authorities. First of all, this is less efficient than allowing pertinent public authorities to challenge the decisions of the Commissioner themselves because it engages another authority—the State Public Prosecutor. More importantly, public prosecutors rarely challenge any administrative act before the Administrative Court. They are occupied with their basic function—initiating criminal proceedings. They neither have the necessary capacity nor do they have the necessary specialized knowledge in the field of access to information.

In total, there have been 26 lawsuits submitted by the Public Prosecutor since 2005.[50] In certain cases, the Public Prosecutor used the position not to protect public interest in cases in which the information was sought from another public authority, but actually challenged the decisions in which the Commissioner ordered the Public Prosecutor to provide information that parties requested.

Nonetheless, in spite of being so rare, lawsuits of the Public Prosecutor did help the Administrative Court to set at least one alternation to the Commissioner's interpretation of FOIA—in the above-described cases concerning access to personal data of civil servants (2 U 2765/11, 9 U

[48] *Commissioner's Report* (2015), p. 40.

[49] Ibid.

[50] In 2016 alone the Public Prosecutor's Office filed 15 lawsuits against the Commissioner's decisions, with reference to the protection of public interest. This is more than the total number of complaints in the course of the past 11 years when the same Office filed 11 lawsuits against the Commissioner's decisions, *Summary of Commissioner's Report* (2016), p. 4.

11765/13). If we take into account that since the establishment of the Administrative Court in 2010, the Public Prosecutor filed 21 lawsuits, out of which 15 were filed in 2016 and are still to be decided upon, we can see that out of six remaining lawsuits, the Administrative Court did accept two. It is important to emphasize that these were the only cases in which public authorities were able to challenge the Commissioner's practice. We can only assume that the Administrative Court would have been more active in developing transparency legislation and striking a better balance between the right to access to information and the right to protection of personal or secret data, as well as other competing public interests, had public authorities been able to challenge the Commissioner's decisions by themselves.

Finally, the normative regulation of the legal protection suffers from other deficiencies. In some parts, it contravenes the hierarchy and logic of relationship between the executive and the judiciary. Namely, three examples display this. If a citizen or an organization approaches the Administrative Court with a request to access public information it possesses, an appeal against its decision would be submitted to the Commissioner. In case the Commissioner rejects the appeal, the dissatisfied appellant would challenge stated decision before the Administrative Court, the institution that rejected his/her request in the first place. The same problem appears in case access to information is requested from the Supreme Court of Cassation, whose decision on rejection of the request is to be challenged before the Administrative Court, as a lower court, whose decision, in turn, is challengeable before the Supreme Court of Cassation. Paradoxically, in such a case, the Supreme Court of Cassation would be both the plaintiff and the judge at the same time. The third example concerns the fact that the decisions rejecting access to information of all the courts, except the Supreme Court of Cassation, are challenged before the Commissioner, that is, a non-judicial authority. It is true that the courts do not perform their judicial function in cases in which they decide on access to information. Still, the roles of the executive and the judiciary in these instances seem to be reversed.

An option to solve these issues would be to add all the courts, not only the Supreme Court of Cassation, to the list of authorities whose decisions on access to information are challenged directly before the Administrative Court, while the decisions of the Administrative Court in this matter would be challenged directly before the Supreme Court of Cassation. The decisions of the Supreme Court of Cassation could be challenged before

the Constitutional Court, given that the right to access information in possession of public authorities is a constitutionally guaranteed right. In this way, the decisions of the courts would not be challenged before non-judicial authorities, and the decisions of lower courts would be challenged before higher courts.

Finally, the Ministry of Interior made a remark about the appeal procedure before the Commissioner. The Ministry indicated that the Commissioner leaves between three and five days to the public authority to answer to the appeal. They consider this timeframe as insufficient and suggest that FOIA should be amended so as to prescribe a longer minimum period for answering appeals.

11 Fees and Costs

One of the key requirements for effective use of the right to free access to information is the manner of regulation, type, amount and reimbursement of expenses related to access and copy of documents containing requested information. It seems that FOIA set the proper balance between efforts not to restrict the right to free access to information and guidance of the applicants to seek the information in a manner without undue cost increases for the budget. According to FOIA, access to a document shall be granted free of charge. However, a copy of a document shall be issued with the obligation of an applicant to reimburse the necessary costs of reproduction, while if such a copy is sent to the applicant, he/she shall also be required to reimburse any costs associated with such forwarding. The Government shall pass a list of reimbursable expenses on the basis of which public authorities shall calculate these costs. The Commissioner shall follow the practice of reimbursement of costs, exemption from reimbursement and issue recommendations to public authorities with the aim of standardizing the practice (Art. 17).

Journalists who request a copy of a document for professional purposes and nongovernmental organizations focusing on human rights, requesting a copy of a document for the purpose of carrying out their registered activities, as well as all persons requesting information regarding a threat to, or protection of, public health and environment, shall be exempted from the duty to reimburse the abovementioned expense, exception being made if such information has already been published and made accessible in the country or on the Internet (Art. 17, par. 4).

12 Special Regime for Access of Mass Media and to Environmental Information

FOIA does prescribe two preferences in access to information mentioned in this subtitle, one subjective, concerning mass media, the other one objective—relating to the type of information sought, namely, environmental information.

As was mentioned, taking into account the specifics of performing tasks of journalists and the media, and the necessity to provide their equal treatment on the market, FOIA prescribes that a public authority shall not give preference to any journalist or media outlet in cases where more than one applicant applies for the same information by singling out one of them or by allowing one of them to exercise the right to access information of public importance before other journalists or media outlets (Art. 7). FOIA, furthermore, prescribes that a public authority shall be held liable for any damage caused by the inability of a media outlet to publish information because that public authority had unjustifiably denied or limited its right to access information and/or because the stated public authority gave preference to other journalists or media outlets (Art. 44).

If a request relates to environmental information, as was previously mentioned, information which can reasonably be assumed to be significant for the protection of, inter alia, the environment, the deadline for responding is significantly shortened (48 hours as of submission of the request), and it cannot be prolonged under any circumstances (Art. 16, par. 2). Furthermore, in the case of environmental information, there is an irrevocable legal presumption that the justified public interest to know exists and that public authorities do not have the right to prove otherwise (Art. 4).

Finally, both journalists who request a copy of a document for professional purposes and those seeking environmental information are exempted from the duty to pay costs for access (Art. 17, par. 4).

13 An Overall Assessment of the Effectiveness of FOIA

Each institution publishes a range of information either under obligation, or as it believes that it is necessary and useful for citizens. On the other hand, for reasons of secrecy or privacy, certain information must be kept out of reach of the public. However, most information does not fall into

any of these categories, and they are made available at the request of interested persons.[51] In the last 12 years, the Commissioner for Free Access to Information of Public Importance and Personal Data Protection has proven to be a real champion of openness and transparency in Serbian society. The growing trend in the number of complaints lodged to the Commissioner due to the difficulties in obtaining information from different authorities is a confirmation that such information is still in many cases hard to obtain without the intervention of the Commissioner and that citizens have confidence in the work of this independent state body when they turn to it for the protection of their rights. However, in the eyes of those who are under his supervision, his success is sometimes seen not as an asset or virtue, but as a shortcoming. Their main criticism goes to his excessive interpretation of the right to access to public information. They think that a better balance between this right and the need to protect other public interests, for example, state secrets, official secrets and personal data, should be struck.

When it comes to the categories of the most frequent information seekers in Serbia, the role of NGOs in increasing the transparency of the administration should not be underestimated, despite the fact that they requested information three times less frequently than citizens. Namely, NGOs requested information in some of the most important cases, where the value of public expenditures and the significance of the pertinent governmental work for society were greatest. In addition, there are a number of instances in which public authorities seek information from another public authority through the request to access information under FOIA, instead of using official channels of communication, which shows a lack of intra-administration communication within the government.

Regarding the types of requested information, the analysis shows that the most frequent are those which concern the exercise of powers and competences by public authorities, usage of public funds, activities of public prosecutors and courts, the work of the Ministry of Interior and the intelligence services, as well as information on public procurements. Analysis also demonstrates a problematic increase in appeals filed against state-owned public enterprises which have dominant positions in their respective markets and which are prone to political influence. Instead of making their own action more open, they are constantly decreasing trans-

[51] Harden (2001), pp. 174–175; Davinić (2013), p. 124.

parency, probably supported by members of the ruling political parties who consider them as political pray.

Re-use of public information is not regulated in the Serbian legal system, and the Commissioner has been lobbying for amendments of FOIA in order to harmonize it with respective *acquis communautaire* among other reasons.

The referral of authorities to confidentiality (secrecy) as a reason for denying access to information is very common in recent years. Although such exemptions are legal and legitimate, the problem lies in the fact that public authorities as a rule do not provide evidence that documents or information are properly classified as confidential, as well as essential reasons and evidence in support of their decisions. Namely, a request of an applicant is rejected a priori, without the use of the prescribed harm test and the public interest test.

Protection of personal data is also a very important exemption from the right of the public to information. In general, the Commissioner has taken the stance in his decisions that officials (e.g. judges, prosecutors, lawyers, and experts) enjoy a lesser degree of privacy protection in relation to other persons and their names should be made public since it is the information concerning the exercise of public functions. However, the Administrative Court prevented the Commissioner from extending the exception relating to holder of an official or political figures to all civil servants. It considered that it is not enough to be a civil servant to fall within the scope of aforementioned provision, but that a person has to be, for additional reasons, interesting for the public.

The system of legal protection against the Commissioner's decisions suffers from few deficiencies. The most important one is the fact that the Commissioner's decisions cannot be challenged before the Administrative Court by the public authority whose work it controls, but only by the parties. The Public Prosecutor has the possibility to challenge the Commissioner's decisions before the Administrative Court if he/she finds the law to be breached to the expense of public interest, but it almost never uses this authorization. This leads to a perceivable misbalance in the Prosecutor's practice. Namely, more than 80% of all appeals submitted to the Commissioner are accepted as well-grounded. In addition, this prevents the Administrative Court from controlling the Commissioner's decisions in most cases and disables it from giving its opinion on how and where the balance should be struck between the right to access informa-

tion and protection of other legitimate interests, such as privacy, personal data and secret data.

The Commissioner's decisions are binding and enforceable, and if he is unable to execute the decisions, they should be enforced by the Government. However, contrary to its legal obligation, the Government has not provided any assistance to enforce any of his decisions. Unwillingness of political elites to enforce his decisions is an obvious indication that they are not ready to assist the Commissioner in the exercise of his function and in strengthening his authority.

Despite deficiencies analyzed in this chapter, the legal framework concerning free access to information, particularly FOIA, has proven to be a solid basis for transparency enhancement in the Republic of Serbia. However, the problem arises in the phase of implementation of legal norms (the so-called implementation gap), which needs to be addressed in the years to come.[52]

As is the case for all independent control institutions, the authority of the person who carries out this function is of the utmost importance for its success. Rodoljub Šabić, whose enthusiasm, energy and perseverance have made this institution visible and important in Serbian society, is near to completing his second and final term. Taking into account the "problems" that his office has created for government agencies and public officials, one logical question arises: Will the Assembly, controlled by the ruling majority, elect as the next Commissioner a person of similar qualities, or will they choose a less intrusive and more cooperative candidate?

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[52] On this issue in the South East Europe region, see Kovač (2015).

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CHAPTER 14

Special Report: Access to Information Held by Public Authorities—Austria

Alexander Balthasar

1 Overview of the Different Types of Access to Information

1.1 The General Provision (Article 20 Section 4 of the Federal Constitution): Current Content, Genesis and Prospect

1.1.1 The Nucleus: Paragraph 3 (5) of the Federal Act on the Organization of Federal Ministries

The earliest nucleus of general legislation granting access to information held by public authorities to the general public was a small provision—paragraph 3 point 5 and paragraph 4 section 3 of the Federal Act on the organization of federal ministries of 7 July 1973[1]—*obliging federal*

[1] Federal Law Gazette (BGBl) No 389. Cf Perthold-Stoitzner (1998), p. 4, with references to literature and case-law in fn 13.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_14

ministries (§ 3 point 5 Bundesministeriengesetz, BMG, 1973) and their subordinate offices and agencies (§ 4 (3) BMG 1973) to provide information related to their remit insofar as this information was not protected by the constitutional obligation to confidentiality.[2] This provision did not yet form part of the governmental draft bill (RV 483 Blg NR XIII. GP) but was only inserted during parliamentary deliberation; unfortunately, the—as usual, very brief—report of the Parliamentary Committee (AB 863 Blg NR XIII. GP) does not refer to this amendment, so we lack any official motivation of this insertion. At any rate, the Austrian Supreme Administrative Court (Verwaltungsgerichtshof—VwGH) ruled only a few years later that the obligation stated in this provision was completed by a *corresponding individual right to information*—which, however, could, in conformity with traditional Austrian administrative justice (see infra sec. 2.1.3), *not be enforced directly* in case of failure to act (Judgement of 14 October 1976, 722/76, Official Collection [VwSlg] No 9151 A).

1.1.2 The General Constitutional Provision Still in Force: Article 20 (4) B-VG

Only 15 years later, however, this provision was *generalized* and accorded even *constitutional* rank: In closest vicinity to the confidentiality provision (Article 20 section 3), *section 4* of Article 20 of the Federal Constitution, then newly inserted (amendment of the Constitution of 15 May 1987, BGBl No 285) and still in force, *obliges* the federal legislator as well as the nine regional[3] legislators[4] to provide access to non-confidential information held by *all parts of public administration*. In a famous Judgement (of 3 October 1991, Official Collection [VfSlg] No 12.838), however, the Constitutional

[2] Pursuant to Article 20 (3) of the Federal Constitution (Bundes-Verfassungsgesetz; B-VG) of the time (for the current version of this provision, see infra main text after fn 5), state administration of all levels (federal, regional and municipal) was bound to keep information gathered by official activities confidential insofar as disclosure could harm interests of the state or of one of its parts or of individuals.

[3] In the meantime, one region, *Carinthia*, had adopted a provision similar to the federal nucleus (§ 3 (4) of the Act No 19/1982 on the organization of district authorities), whereas another region, *Styria*, had even established a predecessor to Article 20 (4) B-VG in its own regional constitution of the time (§ 47 [1], inserted by amendment of 9 July 1986); see Schwaighofer (1988), p. 267.

[4] Sufficient conformity of regional legislation was to be secured by a separate federal directive; so in sum we have now 11 acts: one federal act, one federal directive and nine implementing regional acts (!); see Wieser (2001b), points 3 ff. A simpler, but more centralistic, solution had in fact initially been proposed by the Federal Government (RV 838 Blg NR XVI. GP; RV 840 Blg NR XVI. GP) but did not get the assent of Parliament, cf Perthold-Stoitzner (1998), p. 2 f.

Court (Verfassungsgerichtshof—VfGH) denied that Article 20 (4) B-VG contained a constitutional (i.e. fundamental) right but held that there was only a constitutional obligation for the ordinary legislator to establish an individual right. The main practical difference of this finding (the tendency of which is the very opposite of the aforementioned ruling of the VwGH of 14 October 1976) is that, therefore, judicial review of this right remains mainly the task (since 1 January 2014) of the administrative courts (before that date: of the Supreme Administrative Court), whereas Constitutional Court comes only into play when denial of this right amounts to arbitrariness.

Moreover, at the same occasion also the constitutional provision on *confidentiality*[5] was *restricted to* what was then considered as the *absolute minimum*: Since then, confidentiality in the interest of individuals needs to be balanced against the interest of access to information, whereas public interest is defined as (i) public order and security, (ii) defense, (iii) foreign relations, (iv) economic interest of a public body, (v) preparation of a decision.[6] Ordinary legislation[7] may specify but *not enlarge*.[8]

The motivation given in the governmental draft bill (RV 39 Blg NR XVII. GP, 3) referred explicitly to *Council of Europe's Recommendation* of 25 November 1981, *No R (81) 19* (on "Access of Information held by public authorities"); jurisprudence of the time suggests that also other international developments—in particular the Scandinavian and French legislation but also the US "Freedom of Information Act"—had been taken into account.[9]

Immediate trigger for this reform was, however, the dispute on a hydroelectric power station at the Danube river near *Hainburg* planned by the Federal Government which caused *severe protest by civil society* and led to a significant *loss of credit of the Government*.[10] Only a few years before,[11] however, already the federal *Board of Ombudsmen* had been established, its remit, it is true, being restricted to (alleged or supposed) maladministra-

[5] For the status quo ante, see supra fn 2.

[6] See in more detail Feik (2007), points 9 ff; Perthold-Stoitzner (1998), p. 149 ff.

[7] For examples cf Wieser (2001b), point 42.

[8] Cf Constitutional Court's Judgement of 16 October 1970, Official Collecton No 6288/1970, with regard to the previous version; nevertheless, this rule is still considered as valid, cf Perthold-Stoitzner (1998), p. 52 ff; Feik (2007), point 15; Mayer and Muzak (2015), p. 160 f; somewhat critical only Wieser (2001a), points 9 ff.

[9] Cf Schwaighofer (1988), p. 269 ff.

[10] Cf Schwaighofer (1988), p. 264; Perthold-Stoitzner (1998), p. 1 f. Note that already in 1978 the Government had lost a referendum on a nuclear power plant (Zwentendorf) which was more due to the general dissatisfaction with the Government than to the specific question at issue.

[11] First, tentatively, by Federal Act of 24 February 1977, BGBl No 121 (limited to six years) and then by amendment of the Federal Constitution of 1 July 1981, BGBl No 350.

tion, but for *this* (nevertheless very wide) *purpose* equipped with an even *farer reaching right of access* to public information (confidentiality does not hinder disclosure to the Ombudsmen).

This provision (Article 148b B-VG) is quite remarkable, because—although the Board of Ombudsmen being just an auxiliary institution to Parliament (cf Constitutional Court's Judgement of 11 March 1998, VfSlg 15.127)—it *exceeds up to now*:

(i) not only the *rights of members of Parliament* when asking an ordinary *parliamentary question* (which, in turn, may be caused by a citizen's petition)[12]
(ii) but even the rights of parliamentary investigation committees (Article 53 sections 3 and 4 B-VG still stating some, although narrow, restrictions).[13]

1.1.3 The Failed Reform

The previous Federal Government (in office from 2013 to 2017[14]) had expressed in its program[15] the aim to *radically reform* this set of rules by *abolishing confidentiality altogether* and *replacing it* (and the current system of access to public information) *by* "Freedom of Information".[16] In

[12] Although originally, when confidentiality on constitutional level had been introduced, an exception with regard to this specific relationship had deliberately been made (Article 20 section 3 last sentence B-VG [original version] stating that there is no confidentiality to be observed when Parliament, or a regional or local assembly, asks a functionary elected by itself) this provision lost its applicability in the relationship between Federal Parliament and Federal Government when the 1929 amendment of the Federal Constitution (BGBl No 392) conferred appointment of the Federal Government to the Federal President. Since then, confidentiality even prevails in parliamentary questions.

[13] Hence, it could be quite convenient that Article 53 (5) B-VG explicitly allows cooperation with the Board of Ombudsmen; however, up to now Article 53 of the Rules of Procedures (= Annex to the Parliament's Rules of Procedures Act, BGBl 1975/410) calls the Board of Ombudsmen only to serve as an arbitrage tribunal.

[14] The regular term of legislation lasting five years in the meantime (spring 2017) all political parties represented in Parliament agreed on calling premature elections in autumn 2017 on the basis of which a new Government was formed in December 2017.

[15] Arbeitsprogramm der österreichischen Bundesregierung 2013–2018 (accessible via: https://www.bka.gv.at/DocView.axd?CobId=53264), p. 91.

[16] Already 12 years earlier, the Social Democrats, major party of the previous government (in office until December 2017), then major opposition party, had tabled a motion (of 6 July 2001, 498/A[E] XXI.GP; still accessible via: https://www.parlament.gv.at/PAKT/VHG/XXI/A/A_00498/fname_600359.pdf) aiming at strengthening the role of media and access to information, and, also, restricting the role of confidentiality. With regard to the latter, it is most interesting, however, that already then the motion conceded (ib, 5) that the problem was *not* so much *the wording of the constitutional provision itself* (i.e. of Article 20 (3) B-VG) but rather rooted in an *extensive way of implementing it*.

the meantime, a governmental draft bill (RV 395 Blg NR XXV. GP[17]) and two concurring motions of members of Parliament of the opposition[18] (on the necessary amendment of the Constitution) as well as a third motion of members of Parliament belonging to the governmental coalition (on an implementing bill, 1/AUA XXV. GP, of 9 November 2015[19]) have been produced, but *no substantial progress* was made *during the following years*.

This standstill is also reflected in:

(i) the *relaunch of the governmental program* 2017 (after a considerable personal change in the Social Democrats' part of the Federal Government, to begin with the chancellor himself): the new version[20] didn't even allude any more to the topic "Freedom of Information", nor does the current Program of the new Government formed in December 2017.[21]
(ii) the *lack of civil society pressure* (the main initiative "transparenzgesetz-at"[22] started in 2013 gained support of not more than 13,000 signatures and didn't launch any remarkable activities during the last two years any more).
(iii) *the fading interest of academia*.[23]

Apart from other reasons (in times of migration crisis, Brexit and IS terrorism political attention is less focused on issues merely related to democracy and good governance), this block is due to the fact that it became quite obvious that the initial aim ("abolishing confidentiality")

[17] See https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00395/index.shtml.

[18] See (i) 6/A XXV. GP, of 29 October 2013 (https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_00006/imfname_329768.pdf);
(ii) 18/A XXV. GP, of 29 October 2013 (https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_00018/imfname_329811.pdf).

[19] See https://www.parlament.gv.at/PAKT/VHG/XXV/AUA/AUA_00001/imfname_483720.pdf.

[20] Für Österreich. Arbeitsprogramm der Bundesregierung 20172018, accessible via: http://archiv.bundeskanzleramt.at/DocView.axd?CobId=65201

[21] See https://www.wienerzeitung.at/_em_daten/_wzo/2017/12/16/171216_1614_regierungsprogramm.pdf..

[22] See https://www.informationsfreiheit.at/transparenzgesetz-at/.

[23] The governmental project raised considerable, although *only short-term attention of academia*; even the distinguished Austrian Commission of Lawyers dedicated a publication (based on a symposium) to this issue (Österreichischer Juristentag [2015]). Cf also: Tretter (2014), p. 381 ff; Parycek et al. (2015), 197 ff; Lenzbauer (2015), 108 ff; Gartner-Müller (2015), p. 169 ff; Lehne (2015), p. 365 ff; Balthasar (2016), p. 203 ff.

was rather an illusion[24]—in particular the government's draft bills would result in even more *restrictions* than in a more "open government".[25] So this reform project will be left aside for the purpose of this contribution.

1.2 Data Protection

The fundamental right to *protection* of personal data seems to be the natural *antipode* to disclosure of information to the general public, and in fact it is. Nevertheless, this fundamental right is not limited to prohibition of disclosure but *entails also* a right to rectification[26] (even to complete erasure; in some cases, as the famous "right to be forgotten"[27] shows, also of fully correct data) and, as a necessary *precondition* therefore, a *specific right to information*, that is, of *access to one's "own" personal data* stored ("collected") by someone else.

In Austria, this specific right to information was first established in 1978, on constitutional level, with regard to automatically processed data[28] and thus even a few years before the general provision on access to information came into force. This *fundamental* right to information[29] has even been horizontally applicable from the beginning (Article 1 section 1

[24] In sharp contrast to this aim, Parliament itself recently adopted *rules on confidentiality* applying to its *members* (Article 30a B-VG, and the implementing Information Order Act, both BGBl I 2014/102) which were considered as so important that a *breach* of them even *triggers loss of immunity* (amendment of Article 57 section 1 B-VG by BGBl I 2014/101).

[25] Cf Balthasar (2016), p. 207 ff, 211; cf also http://www.ots.at/presseaussendung/OTS_20161007_OTS0132/journalisten-fordern-klarstellung-zur-informationsfreiheit

[26] Cf now also Article 8 (2) EUCFR: "Everyone has the right of access to data which has been collected concerning him or her *and the right of having it rectified*."

[27] Cf Article 17 and recitals 65 f of the General Data Protection Regulation (EU) 2016/679, OJ L 119/1, and CJEU's Judgement of 13 May 2014, C-131/12 (*Google*), points 92 ff.

[28] Article 1 section 1 subsection 3 of the Data Protection Act (DSG) of 18 August 1978, BGBl No 565, of *constitutional* rank. See now Article 1 section 1 subsection 3 point 1 of the current Data Protection Act (DSG 2000). BGBl I 1999/165 (now also applicable to non-automatically processed files) and, likewise, § 1 (1) of the governmental draft bill (see infra fn 70).

[29] In its aforementioned Judgement VfSlg 12.838/1991, the Constitutional Court even referred to this data protection information right as an argument why the significantly differently construed Article 20 section 4 B-VG did not contain a fundamental right.

subsection 6 DSG) but, of course, mainly meant to *provide "glasnost" with regard to state-owned databases* and worked, insofar, in the *same direction* as the general provision on access to information. The numbers provided by the Legal Information System RIS (see infra) seem to indicate that the number of claims for providing this specific information has been fairly equivalent to that of claims for general information (see infra): about 570 decisions since 1990 would mean an *average files arise* of about *21* per annum.

1.3 Information Proactively Provided by the State

1.3.1 Registries

Since decades, in fact often even since more than one century, *state-owned registries* have been established, not only for collecting information for the benefit of the Government but also *with the specific purpose of providing information* to the general public or, at least, to everyone who has a legitimate interest in obtaining that information: Cadastre,[30] Business Registry,[31] Residence Registry,[32] but also criminal records[33] and, more

[30] The modern Austrian cadastre dates back to the General Cadastre Act of 25 July 1871, RGBl No 95; the legislation currently in force is the Federal Act of 2 February 1955, BGBl No 39, read in conjunction with the Federal Act of 27 November 1980, BGBl No 550. The information stored there is *accessible for the general public* (§ 7 of the Act BGBl 1955/39) and *available electronically* (§ 6 of the Act BGBl 1980/550).

[31] The modern Austrian business registry was established by joint Ordinance of the ministers for Commerce, for Justice and for Finance of 9 March 1863, RGBl No 27; the current legislation is the Federal Act of 11 January 1991, BGBl No 10. The information stored there is *accessible for the general public* and *available electronically* (§ 34 [1] leg cit).

[32] The current legal basis is the federal "Meldegesetz 1991", BGBl 1992/9. The information stored there is in principle also *accessible for the general public, although not without any restrictions, and available electronically* (cf §§ 16 ff leg cit). The service as such dates back to the last decade of the nineteenth century, at least in Vienna (cf https://www.wien.gv.at/wiki/index.php?title=Meldewesen).

[33] The current legal basis is the Federal Act of 3 July 1968, BGBl No 277. The information stored there is *accessible only for public authorities and the individual concerned* (§§ 9 ff, 10 ff leg cit). Former legislation, however, dates back to at least the early nineteenth century (cf the Ordinance of the minister of Justice of 5 March 1853, RGBl No 44, republishing an Ordinance of 30 November 1821, Official Collection of Legislation relating to the Judiciary [JGS] No 1818).

recently, triggered by the EU, for example, the national Pollutant Release and Transfer Register[34] and INSPIRE.[35]

1.3.2 Statistics

In addition, *general* information (i.e. *not containing personal data*, except when the individual concerned (i) has given his explicit consent or (ii) the personal data do not merit protection) collected by the *Central Agency for Statistics* ("Statistik Austria") on the "economic, demographic, social, environmental and cultural situation" in Austria, has (since 2000) to be made *accessible* for the general public (paragraph 1 read in conjunction with paragraph 19 of the Federal Act on Statistics—Bundesstatistikgesetz 2000, BGBl I No 163/1999). The motivation given in the governmental draft bill (RV 1830 Blg NR XX. GP, 41[36]) admits that also this element of "open government"[37] was triggered by the EU, here by the need to comply with Article 11 of the Regulation (EC) No 322/97.

1.3.3 Legal Information

Moreover, a *Legal Information System* (Rechtsinformationssystem—RIS[38]) provides (since June 1997 at the latest)[39] information on:

(i) current *legislation* (both of the federal and of the regional levels), of previous versions,[40] of governmental draft bills, of parliamentary motions and of opinions delivered during a consultation;

[34] Cf the Regulation (EC) No 166/2006 in conjunction with the Austrian joint Ordinance of the ministers for Economy and Labour and for Agriculture and Environment, BGBl II 2007/380. The information stored there *is accessible for the general public electronically* either via the European Commission (Article 10 reg cit) or, in addition, via the Austrian Federal Environment Agency (http://www.umweltbundesamt.at/umweltsituation/industrie/daten_industrie/prtr/), pursuant to § 9a of the Federal Act on access to environmental information (Umweltinformationsgesetz—UIG), BGBl 1993/495.

[35] Cf Directive 2007/2/EC, implemented by the Federal Act on establishing infrastructure for spatial information (Geodateninfrastrukturgesetz (GeoDIG) BGBl I 2010/14) providing broad (electronical) access to the data stored in this database.

[36] See https://www.parlament.gv.at/PAKT/VHG/XX/I/I_01830/fname_140758.pdf.

[37] For other parts of Austrian "open data" policies cf (i) www.digitales.oesterreich.gv.at/open-government-data2 and (ii) www.opendataportal.at/ueber-odp/.

[38] See https://www.google.at/search?q=RIS&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&ei=R2HaWPmoN-aA8Qf6zZa4CQ.

[39] The first steps of the RIS date back to the 1980s, since June 1997 RIS is available via the internet; see in more detail Weichsel (2014), p. 185 ff.

[40] Via link to the National Library (Österreichische Nationalbibliothek—ÖNB) even legislation of the late eighteenth century is accessible.

(ii) *case-law* of all branches of the judiciary (Constitutional Court, administrative courts, "ordinary" judiciary).

1.3.4 General E-Government

This dissemination of information is completed by other flagships of e-Government like "Help-GV" (tailored for individuals[41]) and "USP" (tailored for enterprises[42]), annual reports of important public institutions (like supreme courts of Justice, the Court of Auditors, the Board of Ombudsmen), websites of more and more public bodies and a multitude of citizens' services in almost every public body.[43] This already *widespread practice* is the *background* against which the aforementioned governmental draft bill on "Freedom of Information"[44] could quite easily (non-contestedly) propose, in *first* line, a *constitutional obligation* incumbent on *all state institutions and public bodies* (Parliament, Government and administration, law courts as well as courts of auditors and ombudsmen, on federal as well as on regional level) to *disseminate proactively* information of *general* interest within their respective remit.

1.4 Aarhus and PSI

1.4.1 Environmental Information

Implementation of the *Aarhus* Convention (and of EU Directive 2003/4/EC) required also on national Austrian level legislation providing *specific* access to *environmental* information, not only proactively but also by conferring far-reaching *rights* to individuals (on national level, see paragraphs 4 ff of the Federal Act on Environmental Information, Umweltinformationsgesetz, UIG, BGBl No 493/1993), which was accepted at least by the case-law of the *Supreme* Administrative Court without any difficulties.[45]

[41] See https://www.help.gv.at/Portal.Node/hlpd/public.

[42] https://www.usp.gv.at/Portal.Node/usp/public .

[43] Already Schwaighofer (1988) referred to them in p. 263, with further reference in fn 5.

[44] See supra Sect. 1.1.3.

[45] Cf its most recent Judgement of 16 March 2016, Ra 2015/10/0113 (annulling a more restrictive approach of a regional administrative court, thereby referring to its own well-established case-law); cf also the Judgement of 26 November 2015, Ra 2015/07/0123 (annulling a Judgement of the same regional administrative court). Cf also the Judgements of 8 April 2014, 2012/05/0061, and of 24 October 2013, 2013/07/0081; more restrictive, but still fully in line with ECJ's (CJEU's) case-law, was only the Judgement of 28 September 2011, 2009/04/0205 (Official Collection No 18. 223 A).

1.4.2 Re-use of Public Sector Information

Since the coming into force of Directive 2003/98/EC, (what is now) the EU has been eager to promote access to information stored by public bodies not only but also for private *commercial* purpose[46]; in particular, the amended Directive 2013/37/EU aims at motivating public bodies to release this information *free of charge* (see in particular Article 6 (1) of the amended version, according to which "charges" if ever made "shall be limited to the marginal costs"). Not surprisingly, it was not the general aim of dissemination as such, but this request *for fiscal altruism* which upset Austrian authorities most and indeed led even to a Judgement of CJEU of 12 July 2012, C-138/11 (*Compass-Datenbank GmbH v Republik Österreich*) which in the end supported Austria's view.[47]

1.5 Access to Files

Just for the sake of completeness it has to be mentioned that the right of access to *one's own file* (cf now Article 41 (2) (b) EUCFR[48]) has always been enshrined in all codes of procedure (of civil, penal and administrative law).[49] While purpose and, thus, also the range of authorization of this procedural right differ widely from the general right to information, case-law[50] made clear that—provided that confidentiality does not require otherwise—access to information *may* also be satisfactorily provided by simply granting access to a specific file (instead of circumscribing the information contained in the file by the public body's own words).

[46] Article 3 of Directive 2003/98/EC (now, after amendment, Article 3 [1]) clearly states the "general principle": "Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable *for commercial or non-commercial purposes…*".

[47] See in more detail the contributions assembled in Balthasar and Sully (2014); Balthasar and Prosser (2013), p. 295 ff.

[48] When referring to this Charter provision, we do not overlook the fact that this provision explicitly refrains from binding member states.

[49] Civil: § 219 (1) of the Civil Procedures Code (Zivilprozeßordnung (ZPO), RGBl 1895/113), also applicable to uncontested proceedings (cf § 22 of the Federal Act governing this type of proceedings, i.e. Außerstreitgesetz (AußStrG), BGBl I 2003/111). Penal: §§ 51 ff, 64 (1), 68 of the Penal Procedures Code (Strafprozeßordnung (StPO), BGBl 1975/631). Administrative: § 17 of the Code of General Administrative Procedures (Allgemeines Verwaltungsverfahrensgesetz (AVG)), original version BGBl 1925/274); § 90 of the Federal Code of Tax Procedures (Bundesabgabenordnung (BAO), BGBl 1961/149).

[50] Cf Wieser (2001b), point 29.

And it is also obvious that granting formal participatory rights in administrative proceedings to civil society—as is in particular required by the Aarhus convention and its implementing Directive[51]—may amount to satisfy the desire for information of relevant parts of the general public by procedural instruments. Most interestingly, however, the Codes of Procedure of Civil and of Penal Law provide, in principle, even *access to third parties' files.*[52]

2 Further Discussion

2.1 General Legislation on Access to Information

2.1.1 Administration, Not All Public Authorities

As already stated supra, Article 20 (4) B-VG contains only obligations for (and corresponding rights against) the *administration*—this is still in line with the European *minimum* standard (Article I of Council of Europe Recommendation No R (81) 19 applying only to "information held by *public authorities other than legislative and judicial authorities*"; nevertheless, already Article II (1) of Recommendation (2002) 2 suggests application also to information held by these branches of Government. When asking why this recommendation has not yet been implemented we touch on a quite peculiar but apparently deeply rooted feature of Austrian State Law: the conviction that it is mainly the administration which needs control; hence also:

- the remit of the Board of Ombudsmen is still, with very few exceptions (since BGBl I 2012/51 the Ombudsmen are also competent in court cases, but only with regard to *failure to act* (Article 148a [4] B-VG)), restricted to mal*administration* (taken literally), as well as
- the remit of the data protection supervisory authority (this is, obviously, a clear breach of Article 8 (3) EUCFR insofar as the scope of EU law is concerned[53]); more generally,

[51] See Article 10a of Directive 85/337/EEC and Article 15a of Directive 96/61/EC, as both amended by Directive 2003/35/EC (cf in particular the sixth recital to the preamble of this Directive).

[52] § 77 (1StPO *obliges* public prosecutors as well as courts to grant access also to third parties, if they show a legitimate interest and if there is no predominant public or private interest speaking against disclosure. § 219 (2) second sentence ZPO stipulates the same for civil procedural files.

[53] Most interestingly this breach would not even have come to an end by adopting the most recent governmental draft bill triggered by the General Data Protection Regulation (see infra fn 69), its § 7 (3) (of constitutional rank) only vesting the national Data Protection authority with competences on administration.

- effective *legal remedies against* (non-legislative)[54] acts of *Parliament* (and of its auxiliaries: *Court of Auditors* (Judgement of 12 March 1998, VfSlg 15.130), *Board of Ombudsmen*; VfSlg 15.127/1998) are still rare; quite recently, a new Article 138b was inserted into the Constitution; its scope, however, remains restricted to parliamentary investigation committees.

With regard to "access to information", the drafts elaborated under the previous Government[55] *aimed* (in principle[56]) at *including all parts of Government*; however, as already mentioned, it is not very likely that this project will be accomplished in near future.

2.1.2 Information, Not Documents

Another particularity of the Austrian access to information law is that only access to one's own file means access to documents, whereas the *general right entitles to receive information as such*, that is, disclosure of (well-established) *knowledge*[57] (of facts as well as of law[58]) already *available* at the public body (administration is, when receiving a request for information, not under an obligation to do research work in order to establish facts not yet at hand[59]).

It is true that exactly at the borderline between administrative procedures, access to environmental information and general access to information the Supreme Administrative Court indeed ruled once that also documents *had* to be released (Judgement of 26 November 2015, Ra 2015/07/0123). In general, however, the obligation to release "information" seems to be *more flexible and citizens-friendly*, although *more cumbersome for the administration* (because it always involves an additional act

[54] Legislation may be contested before the Constitutional Court already since 1920 (as it is well-known, Austria was the first country to provide such an instrument); against this specific background, the finding in the text is still more striking.

[55] See supra Sec. 1.1.3.

[56] When looking closer, one could still find much caution with regard to the judiciary. And also with regard to Parliament, the draft bill for the implementing act proposed that there should be *no legal remedy against denial of access to information by Parliament*, cf Balthasar (2016), p. 210 f.

[57] Cf *Perthold-Stoitzner* (1998),18 f; *Wieser* (2001b), point 30. This focus on "information" as such is fully in line with Recommendation R (81) 19, whereas the more recent Recommendation (2002) 2 focuses on "access to documents".

[58] Cf *Perthold-Stoitzner* (1998), 19 ff; *Wieser* (2001b), point 32.

[59] Cf Perthold-Stoitzner (1998), 25, 175 ff; Wieser (2001b), point 31. In particular, granting access to public information may not infringe compliance with "other", that is, priority duties (Perthold-Stoitzner, ibid., 180 ff; *Wieser*, ibid., points 43 ff).

of comprehension and wording, although there are limits as to the overall effort needed): Whereas a document more often than not contains personal data and other kinds of sensitive information to an extent that its disclosure is barred completely (or the necessary canceling amounts almost to a full denial), the public body *may always find a wording* which is general enough in order not to compromise interests protected by confidentiality but nevertheless provides useful information to the general public.

Against this background not everyone might feel obliged to praise the recent tendency of the draft project[60] to follow the EU model (Article 15 (3) TFEU; Article 42 EUCFR; also common in other member states[61]) granting access to documents instead of information as such.

2.1.3 Effective Legal Remedies? Alternatives?

Again another Austrian particularity is that *administrative justice is limited to rendering decisions* (judgements) but *not able to provide enforcement* when an administrative body fails to act otherwise. So also the failure to provide access to information is not directly enforceable before administrative courts. The Supreme Administrative Court made this clear right in its first Judgement on the issue.[62]

The Federal Constitution having offered, however, since 1 January 2014 to the legislator the option to *replace* the judicial review provided by administrative courts—not generally, but in specific fields—by an appeal to the ordinary judiciary (Article 94 (2) B-VG in the version of amendment BGBl I 2012/51), and *these* courts, according to the law applicable to *their* proceedings, indeed being able to provide enforcement of their judgements, there would be even a solution for this very well-known and general problem: legislation had only to *shift judicial review* in the field of access to information from administrative courts *to the ordinary judiciary.*[63]

Apparently, however, there is *no real need* for such a reform: *case numbers* before the administrative courts in this field have always been *very low*.

On the level of the *Supreme* Administrative Court, *since* the coming into force of the ten directly applicable access to information acts in *1987*[64]

[60] See supra Sect. 1.1.3; this tendency was even clearer in the draft implementing bill than in the draft constitutional provision, cf Balthasar (2016), 210, fn 64.

[61] Cf Schwaighofer (1988), 271. See also supra fn 57 for CoR's Rec (2002) 2.

[62] See supra Sec. 1.1.1. For subsequent case-law, see Wieser (2001b), point 59, fn 180. Cf also Raschauer (2011), p. 273 f.

[63] Cf, in general, Balthasar (2014a), 57.

[64] See supra Sect. 1.1.2.

178 complaints have been decided on, which means an *average files arise* of about *six* per annum. *Since 2014*, also the quantities on the level of the newly established administrative courts of first instance are available: here, we find (i) 25 complaints before the Federal Administrative Court (*eight* per annum), (ii) nine complaints before the Federal Tax Court (*three* per annum) and (iii) 30 complaints before all nine regional administrative courts together (*ten* per annum); if we sum up, we have even on the level of the administrative courts of *first* instance not more than *21 complaints* per annum in Austria.

In principle, this *might* be due to the lack of enforceability of access fact just pointed out supra, perhaps even aggravated by the *length of the overall proceedings*.

In particular before the administrative courts of first instance had been established, it was not uncommon that proceedings before the Supreme Administrative Court could last more than one year, sometimes even longer (e.g. the Judgement of 23 July 2013, 2010/05/0230, even took *almost three years*). But also proceedings before the administrative courts of first instance may *still* last *more than one year*.[65]

In conjunction with the *complete lack of any public discussion on this issue* (even during the debate on the envisaged reform, this lack was not highlighted as a problem), however, it is *much more likely* that Austria disposes of *sufficient alternatives*: ombudsmen, parliamentary questions, e-Government and other forms of proactive information management, but also, mainly for the *media*, *informal access even to confidential information* (in the end this specific access is protected by Article 10 ECHR read in conjunction with § 31 of the Austrian Act on Media[66]).

2.1.4 Status as a Fundamental Right: Constitutional Court Did Not Yet Take into Account ECtHR's Recent Case-Law on Article 10 ECHR

As already mentioned supra, Constitutional Court *denied* that Article 20 (4) contained a *fundamental* right; of course, the Court also referred to

[65] Cf, for example, the Judgements (i) of the regional administrative court of Lower Austria of 15 February 2017, LVwG-AV-1283/001-2015, or (ii) of the Federal Administrative Court of 10 November 2016, W127 2007978-1.

[66] BGBl 1981/314; cf the Judgement of the Austrian Supreme Court in private and penal law matters (Oberster Gerichtshof—OGH) of 16 December 2010, 13Os130/10 g et al.

jurisprudence and case-law on Article 10 ECHR[67]—not yet, however, to the most recent ones. In the meantime, ECtHR ruled that *Article 10 ECHR* indeed *comprises* also *a right to access* to information held by public bodies.[68] When taking this jurisprudence into account, it seems that the approach of our Constitutional Court would need revision. This revision need not necessarily mean full acceptance of the position of ECtHR (which *may indeed be disputed*), but at least finding more convincing arguments.

2.2 Confidentiality

2.2.1 Data Protection

Protection of personal data being a fundamental right does not only mean that public authorities tend to rather invoke this right as a better-sounding barrier against disclosure of information than public interests.[69] In addition, the individual (or legal person[70]) concerned is entitled to lodge a complaint before the data protection authority against unlawful disclosure

[67] In VfSlg No 12.838/1991 the Court referred to its own Judgement of 16 March 1987, VfSlg 11.297, where it had accepted what then had been a "broad approach". Still in its Judgement of 2 December 2011, VfSlg 19.571 (in the very case which led to ECtHR's Judgement of 28 November 2013, see next fn) the Constitutional Court upheld its opinion (referring only to ECtHR's Judgement of 19 February 1998, ANo 14.967/89, *Guerra v. Italy*, not, however, to the rulings mentioned in next fn).

[68] See (i) Decision of 10 July 2006, ANo 19101/03, *Sdružžv. Czechia*, (ii) Judgement of 14 April 2009, ANo 37374/05, *Társaság v. Hungary* (point 35), (iii) Judgement of 26 August 2009, ANo 31475/05, *Kenedi v. Hungary* (point 43); (iv) Judgement of 28 November 2013, ANo 39543/07, *Österreichische Vereinigung v. Austria* (point 41) and, recently, (v) Judgement (Grand Chamber) of 8 November 2016, ANo 18030/11, *Magyar Helsinki Bizottág v. Hungary*, in particular points 117–180. Cf for the rulings (i)–(iv) already Balthasar (2014b), 19 f, fn 16; see also, with regard to ruling (iv), Gartner-Müller (2015), p. 180.

[69] Cf *Feik* (2007), point 3.

[70] In Austria, also personal data of legal persons have been protected (§ 4 point 3 DSG 2000); cf Öhlinger and Eberhard (2016), point 829. This might change in the future taking into account that the General Data Protection Regulation (EU/2016/679), applicable from 25 May 2018, only protects data of natural persons (cf recitals 12, 14; Articles 1, 4 (1)). Hence, a governmental draft bill (of 7 June 2017, https://www.ris.bka.gv.at/Dokumente/RegV/REGV_COO_2026_100_2_1367515/REGV_COO_2026_100_2_1367515.pdf) proposed to restrict also national protection to natural persons. A formal repeal would be necessary, given that (i) the Regulation does not prohibit protection of data of legal persons and (ii) Article 53 EUCFR explicitly allows higher or larger protection of fundamental rights on national level.

of personal data.[71] So in fact administration (as well as the judiciary when dealing with cases where access to information was denied) has always also to take due account of the complementary data protection case-law—which is by no means negligible, compared with the access to information case-law: When looking into the collection stored in the RIS (see supra), we find, since 1990, about 400 hints for "claim to confidentiality"; this would amount to an average files arise of about *15* per annum, which is, as such, *fairly low*, but *not much less than* that one in the field of *general access to information* (for these numbers, see supra).

2.2.2 Information Classified by the EU

As may be inferred by the motivations of the Federal Information Security Act[72] and, more recently, of the Parliament's Information Order (IA 720/A XXV. GP), the impetus to reinforce confidentiality rules has been triggered in particular by the need to guarantee sufficient protection for information forwarded by EU institutions (but also by the NATO). This finding would imply that the *appropriate level to define the correct balance* between the need to safeguard confidentiality of and open access to information is not so much anymore the national level but the *common level of the European Union*.

3 Final Assessment

"Freedom of Information" has, up to now, and apart from a very ephemeral "hype" in 2013 ff, *never been a major topic in Austria*. This finding does, however, *not mean at all* that there is no *legal framework* for grant-

[71] By virtue of this, the Constitutional Court's finding that Article 20 (3) B-VG does not contain a right for individuals to keep information confidential in their interest (cf Feik [2007], point 14) has in fact been overruled. For a *paradigmatic case* (where a regional government was found guilty of having violated data protection rights of an individual *by dissemination of information to the general public, although explicitly invoking the "legitimate interest of the general public of being informed about possible maladministration"*), see the Decision of the Data Protection Authority of the time ("Datenschutzkommission") of 27 February 2004, K120.867/0001-DSK/2004.

[72] The Government's draft bill (RV 753 Blg NR XXI. GP, 5) starts with the exposition of the problem: "*Aktuelle Entwicklungen im Rahmen der Europäischen Union sowie andere internationale Verpflichtungen Österreichs im Bereich der Sicherheitszusammenarbeit* erfordern die Schaffung einer gesetzlichen Regelung über den Zugang zu klassifizierten Informationen und deren sichere Verwendung." Cf also § 1 (1) of this Act (BGBl I 2002/23).

ing *individual rights* to accessing information. Right to the contrary, such a framework *has already been established decades ago*, at least with regard to administration, but it *is seldom used*—mainly due to the *advanced level of proactive information policy by public bodies.*

Against this background recent rankings—where Austria holds the very least position worldwide (!)[73]—may indeed be *doubted* and, very likely, just be the result of a *double misunderstanding*, due to the facts that:

(i) the principle of confidentiality holds constitutional rank (which is indeed a singularity[74]; *Gartner-Müller* [2015], 169 f, mentioned this fact explicitly as one reason for the deplorable ranking position) and
(ii) the legal framework of *granting access* to information—although likewise founded in the Constitution!—is *not perceived as a "Freedom of Information Act"*, perhaps because:
  – the Austrian *term* is not "information", but (in German language) "Auskunft", and/or,
  – the Austrian system is *not* focused on the delivery of *documents*, but of *information as such*, and/or,
  – as stated, the system *needs not to be used too much.*

[73] See Gartner-Müller (2015), p. 169. Such a ranking is, furthermore, in sharp contrast to the *positions* Austria continues to hold in *e-Government* (15th position worldwide in the 2016 UN-E-Government Development Index [https://publicadministration.un.org/egovkb/en-us/Data/Compare-Countries]).

[74] See Balthasar (2016), fn 24, the reason therefore is again twofold:

(i) On the one hand, "constitution" means, in Austrian law, less than in other countries: not only fundamental provisions, but every provision *which should not be amended in the future by a simple majority* has been very likely to be accorded constitutional rank—a custom which led to a multitude of "constitutional provisions" (cf Öhlinger and Eberhard [2016], points 8, 18).
(ii) On the other hand, the revolutionary change of 1918 required establishing the principle of confidentiality on constitutional level not so much with regard to the relationship of the bureaucracy to the general public but with regard to the *relationship of the new members of Government to their respective political parties* (cf Balthasar, ibid).

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CHAPTER 15

Special Report: Transparency on a Bumpy Road—Denmark

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1 Introduction

1.1 State of the Nation: A Growing Freudian Slip

The Nordic countries are often inherently associated with openness and transparency as far as public administration is concerned. Openness is part of the stereotype Nordic "brand". The brand is not surprisingly promoted by Danes with a tendency to take credit for being a pioneer within the field of open administration although history does not fully confirm that claim.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_15

Actually, the world's first Freedom of Information Act is the Swedish one. Even when confronted with historical facts, however, Danes continue to claim that Denmark is a frontrunner in the battle against closed doors within the administrative house. In this respect, Danes suffer from not only from an occasional Freudian slip but from recurrent Freudian slips.

As far as the facts are concerned, Sweden introduced in 1766 the right to public access to official documents as part of its Freedom of the Press Act ("Tryckfrihetsfördningen"). Thus in 2016, Sweden celebrated an impressive 250-year anniversary of access to documents. The basic rules on public access in Sweden are still to be found in the Freedom of the Press Act, while restrictions and exceptions are contained in the Public Access to Information and Secrecy Act ("Offentlighets- og sekretesslagen").

The other countries within the Nordic family, like many parts of the rest of the world, followed a couple of hundred years later. Finland adopted a law on access to information in 1951, Denmark and Norway in 1970 and Iceland in 1996. The Finnish act on access to information was thoroughly revised in 1999, the Norwegian act in 2006 and Icelandic act in 2010. Provisions in the constitutions of Finland, Norway and Sweden emphasize that access to information is of fundamental importance to democracy. In Denmark and in Iceland, the right to access to information on administrative authority does not have a constitutional basis, though a new constitution is being prepared in Iceland.

Zooming in on Denmark, the Danish Freedom of Information Act, the Danish FOIA ("Offentlighedsloven"), from 1970 has been revised on a number of occasions, most recently in 2013. The revised and current act is still young, but it has nevertheless been intensely criticized for containing major setbacks to the actual state of transparent public administration, and we will return to this later on in this chapter.

For the time being, Denmark is facing a paradox in so far as being a well-developed public law system that is—at least when seen from the outside—still associated with a high degree of substantial openness but also a system that is conversely moving towards a weakened access to information within public administration. As to the diagnosis of the state of the nation, it may be shifting from the mentioned tendency to Freudian slips to a state of schizophrenia.

In legal terms, the current Danish FOIA reinforces the secrecy of documents that are important to the political decision-making process. After its amendment in 2013, the Danish law on access has both a broad exception

for ministerial advice and a special exception for documents exchanged between government ministers and individual members of parliament. We will shed light on these parts of the act in the following. The high-pitched debate has as a positive side effect released a basis of empirical insights into the practical processes of the provisions of the act that we draw upon in the following, in particular a report issued by the Danish Ministry of Justice, May 2017.[1]

We take off by outlining the big picture in the form of the discussions on the current Danish FOIA, and we dig in the subsequent sections deeper into the pivotal provisions of the act and the current discussions of transparency in a Danish context (Sects. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13).

1.2 The Big Picture: Strong Danish Cabinet Ministers and Ministerial Departments

When the first Danish Constitution came into force in 1849, it represented a change in political system from absolute monarchy to democracy, even though parliamentarism (the principle of ministerial responsibility) was not instituted until 1901. The change in 1849 was accompanied by the introduction of a hierarchical model of ministerial government inspired by the French system. This specific organization of the state administration has remained ever since despite of the fact that the public sector has undergone severe changes in that long period. The Danish system signifies a concentration of power and responsibility with the minister. In addition to the minister's political role as a member of the Cabinet, he or she has a comprehensive authority as administrative head of the ministry. The portfolio of the minister includes the ministerial department as well as the subordinated agencies. Even though the typical organization resembles the "agency model" with several agencies entrusted with different tasks of both political and technical nature, the administrative leaders of the agencies act in all respects on behalf of the minister and the agencies do not have independent authority as such.[2]

Consequently, the ministers' position as administrative head of the ministry implies a wide authority to direct any business falling within his/

[1] Justitsministeriet (The Ministry of Justice). (2017). Redegørelse om offentlighedsloven (2017-report on the Danish FOIA), hereafter "the 2017-report".

[2] Knudsen 2007.

her portfolio and to intervene personally in decisions related to it. Additionally the minister has the power to issue instructions to civil servants under his/her leadership. However, the minister is in any respect heavily dependent on support from the parliament, while he or she can be held politically responsible for any decision or problem arising within his or her portfolio. In Denmark where minority governments are the norm rather than the exception, this is a crucial condition for the activities of the ministers.[3]

As the organization of the state administration resembles the agency model, the ministerial department serves as the secretariat to the minister and has the prime responsibility to advice and inform the minister in his/her capacity as a member of government. The agencies are subordinated authorities, assigned to implementation of policies and concrete handling of cases. However, this traditional distribution of powers and tasks between the department and the agency has undergone changes that in some extent blur the distinction. Studies from 2006 show that some Danish ministries are organized less hierarchical with large agencies involved much more in not only technical matters but also in policy analysis.[4] Thus the current organizational landscape is varied when it comes to the specific allocation of tasks and the size of the department compared to the subordinated agencies.

The Danish civil service is a classical merit bureaucracy with neutrality as an essential value, as the civil servants are not substituted with others when a new government takes power.[5] Even though the permanent civil service thus comprises the predominant part of the central administration, there is also a small group of special advisers. These special advisers (one or two for each minister depending on field of responsibility) are recruited politically and were introduced in the Danish ministries as late as in the 1990s.[6] They assist with (party-)political and tactical advice, and they are not obliged to follow the principle of neutrality since their employment expires when a new government comes into office.[7] The introduction of special advisers has, however, not altered the fundamental feature of the Danish civil service as being a classical meritocratic system.

[3] Koch and Knudsen 2014, pp. 57 et seq.
[4] Finansministeriet 2006.
[5] White paper no. 1354/1998.
[6] White paper no. 1537/2013.
[7] White paper no. 1443/2004 and White paper no. 1537/2013.

In the wake of several Danish political scandals involving both ministers and civil servants,[8] it has been discussed whether the absence of politically recruited staff of a significant size is a problem, because the permanent civil service need to be more involved in the political and tactical tasks in the department and in the efforts to brand the minister. The question is whether this increased focus on political advice and the "game on politics" downplay classical civil servant norms as legality, truthfulness and professional standards.[9] Even though this debate is still ongoing and no clear conclusions have been drawn, the documented maladministration in the aforementioned political scandals has reinforced the public discussions on the need for transparency in the ministries and the role of the Freedom of Information Act in uncovering potential abuse of power.

1.3 The Current Freedom of Information Act: On a Bumpy Road

As mentioned above, Denmark has had a Freedom of Information Act since 1970,[10] and rules existed even before that time granting some degree of openness in the public administration.[11] Besides the essential national regulation, Denmark has ratified the Aarhus Convention on access to information, public participation and access to justice in environmental issues.[12]

The work on reforming the previous Danish Access to Information Act from 1985 was initiated in 2002 when the government set up a Commission consisting of both representatives from the state administration, the parties involved and independent experts.[13] The establishment of the Commission was substantiated by the fact that the existing law has been in force for 15 years unchanged and there seemed to be a need for revising and adjusting the law to meet the new conditions in public administration, especially relating to contracting out, digitalizing and changed modes of collaboration in the public sector. It was an express intention, though, that the reform, generally seen, should increase the level of transparency.

[8] Koch and Knudsen (2014).

[9] Ibid.

[10] Access to Public Administration Files Act 1970 and White paper no. 1510/2009.

[11] Andersen 2013.

[12] The United Nations Economic Commission for Europe (UNECE) convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention), 1998.

[13] White paper no. 1510/2009.

In 2009 the Commission finally submitted its white paper consisting of the Commission's deliberations and proposals and a resulting draft of a new, comprehensive Access to Public Administration Files Act.[14] Despite the by and large unanimity in the Commission on the key questions, the draft wasn't that easily implemented. When the then Conservative minister of Justice presented the Bill in parliament,[15] it ran into troubles during the legislative process as the political parties traditionally supporting the minority government as well as the opposition were sceptical about the projected restrictions of transparency. Therefore the draft was initially shelved.

After a general election in 2011, a new government came into power headed by a Social Democrat and former leader of the opposition. Shortly after the new government commenced its second term in autumn 2012, it unexpectedly announced that a political agreement has been closed concerning a new Bill on Access to Information Act.[16] For the public as well as for the parties concerned, it came out of the blue, since there haven't been any discussions or debate since 2010. The agreement in question included all the political parties in parliament except the extreme left and the extreme right.

Despite the fixed and firm political agreement, the road to a final passage of the Bill turned out to be much more troubled than expected. An intense public debate revealing a widespread critique of the planned restrictions broke out in the wake of the news about the political agreement. In the following months, demonstrations and petitions involving thousands of people took place.[17] The most remarkable aspect of the protests was the fact that they did not only involve journalists and media organizations. The movement against the new Access to Information Act also engaged concerned citizens from various backgrounds and living in different areas of Denmark. In spite of the heavy public debate and criticism, the new Bill was passed in June 2013 with only minor changes.[18]

However, the public debate has continued ever since, and it even seems to be reinforced as the effects of the new regulation are now beginning to show. In 2016 the Ombudsman accomplished a legal evaluation of the

[14] Ibid.

[15] Bill no. 90, 2010.

[16] Politisk aftale mellem regeringen, Venstre og Konservative om en ny offentlighedslov, 2012.

[17] Politiken May 2013, Kristeligt Dagblad May 2013 and Jyllands-Posten May 2013.

[18] Danmarks Radio June 2016a.

new and most contested parts of the new Access to Information Act based on the first three years of its practical implementation.[19] This report confirms, generally seen, the widespread critique as the Ombudsman assessed the new exemption for documents related to assistance of the minister to have "a wide and almost all-embracing scope in practice". Concurrently, several political parties publicly regret their unconditional political support to the Access to Information Act.[20] In consequence, the reconstructed government from December 2016 in their coalition agreement promised an amendment to the Access to Information Act,[21] namely, a softening of the most disputed rule about concealing ministerial documents. At this writing, however, political negotiations are still taking place, for which reason we do not know exactly how the precise state of the law to conclude.

2 Beneficiaries of Access to Information

We now move on to scrutinize important parts of the Danish FOIA. The point of departure in the legal framework as to the beneficiaries of access to information is and has consistently been an *actio popularis* model.[22] Everyone has right to access to information and this goes for both physical and legal persons. The door is open as far as the right to apply for access is concerned. There is neither a nationality condition nor an age requirement in the Danish FOIA. Even young persons between the age of 12 and 15 can obtain a right to access to document if the applicant is considered sufficiently mature.

Importantly, there is no requirement that the applicant justifies an interest, a legal interest, in the required the documents or piece of information. There are no formal requirements in this regard under the act, and a citizen is not necessarily required to submit a written application even though this will normally be the case. Consequently, the public authority is not permitted to ask for the motives of the applicants. As to journalists, however, the public authority can ask for documentation if the journalist claims to be associated with a mass media and if the journalist implicitly emphasizes his or her privileged status. Thus, the right of a

[19] The Danish Parliamentary Ombudsman 2016.
[20] Danmarks Radio June 2016a.
[21] Danmarks Radio November 2016b.
[22] Cp. Danish FOIA section 7 (1).

public authority to reject applications, for example, on the basis on an estimated disproportionate usage of resources is this more narrow when it comes to journalists. It can be added that there is a special regime in the Danish FOIA as to applicants that wish access to information concerning themselves. In that case, there is a wider possibility of obtaining access in the autobiographical part(s) of the document.

The provisions of the beneficiaries under the Danish FOIA have not given rise to much practice in Danish administrative law, but there are a number of Ombudsman reports on the status of young applicants and on various aspects of the formality requirements as outlined here. There is no available collective data in Danish law as to the frequency of citizens, journalists and/or NGOs activating the Danish FOIA. Thus, the persons and beneficiaries to access to documents remain a rather faceless group under Danish law, and, for example, NGOs do not normally play a vital role. Although no exact empirical data exists as to who the beneficiaries of access to information are, there is no doubt that the primary beneficiary is the press. The current discussion on the Danish FOIA has to a large degree demonstrated how crucial the right to access is considered among Danish journalists, and they have actively taken part in the debates. Consequently, transparency in legal terms is less than before a matter of legal technicalities for legal experts to dissect, and one might say that the subject matter has developed into a more popular and more value-based subject than before 2013.

3 The Public-Private Divide: Entities Bound by the FOIA

The rules on freedom of information cover all administrative levels in Denmark, that is, state, regional and municipal authorities.[23] They apply equally to political leadership and to the administration. The administrative functions of the Danish parliament and of the Danish courts are not bound by the Danish FOIA, and the act is thus based on a relatively clear-cut coverage of bodies that are public from a formal point of view. That is the explicit ambition of the act. Conversely, the act is not based on a substantial or functional concept of public administration.

However, the range of public-private entities and the outsourcing of public tasks present a challenge to legislators to prevent a weakening of

[23] Cp. sections 3, 4, 5 and 6.

public access. This grey area has grown in recent years as mentioned above. The current Danish act stipulates that companies, where the public sector owns more than 75% of the shares, are covered. In addition, the act covers certain private law bodies, typically semi-public institutions, such as Local Government Denmark ("Kommunernes Landsforening") and Danish Regions ("Danske Regioner") as well as companies, institutions, personally owned businesses and associations in so far as they have been authorized, by or in accordance with legislation, to take decisions on behalf of the relevant public author. Thus, the principle of the current FOIA is that rules, or the most important part of the rules of transparency, apply to outsourced tasks where the entities take legally binding administrative decisions.

There is a relatively comprehensive case law on the scope of application of the Danish FOIA, predominantly originating the Danish Parliamentary Ombudsman. The Danish General Administrative Procedures Act ("Forvaltningsloven") and the Danish Parliamentary Ombudsman Act ("Ombudsmandsloven") are based on equivalent distinctions as to, for example, the private-public divide.

It is stated in the 2017-report[24] that most of the entities that are required to comply with the majority of provisions on transparency in the Danish FOIA receive only a limited number of applications under the act except notably the Danish Railway Company ("DSB") which are quite frequently exposed to requests for openness (50 requests a year).

4 An Informal Approach to the Request for Access

It is fundamental feature in the Danish FOIA that the person or the NGO requesting access to public administration files are not required to give reasons or state his or her motives/motivation behind the request as already mentioned. If the application is addressed to a non-competent public authority, the authority is bound to forward the application ex officio to the competent authority. This is part of the standard duty of advice and guidance of public authorities. If the application is received in time by the non-competent authority, the application cannot be dismissed on time limit grounds even if the competent authority subsequently receives the application later on. In this respect, the Danish FOIA reflects an informal and quite citizen-friendly approach.

[24] Op. cit.

In spite of these regulatory points of departure, there is an indirect test, however, as to the seriousness of the application in the requirement that the applicant must be able to identify the documents or case with which he or she wishes to become acquainted.[25] There is an explicit identification requirement under the Danish FOIA, but the identification can be a rather broad one, a thematic identification, and there is no requirement that the applicant can refer to a specific file number or the like. The public authority must be willing to assist a potential applicant in the sense that an applicant is entitled to guidance by the public administration as to how to identify the document or case. Normally, there is quite a low barrier for applying for access to document from a formal point of view.

On the other hand, the public authority is permitted—irrespective of whether the identification requirement has been met—to refrain from accommodating a request for file access if it would necessitate a disproportionate use of resources.[26] Moreover, the public authority has the right to deny access if the application has a vexatious or unlawful purpose. In this way, there might be quantitative barriers for openness. We now move into one of the areas where one can detect an element of a somewhat split personality in the substance of the Danish FOIA. The quantitative barrier, allowing authorities to refuse a request purely because it will necessitate a substantial use of resources, is new, originating from the revision of the Danish FOIA in 2013.

In a few cases the Danish Parliamentary Ombudsman has taken administrative resources into consideration when evaluating cases concerning access to information after the previous FOIA, even though resources was not an explicit legal factor when considering applications after the previous act. In a case from 1991, the Ombudsman found that the applicant had a right to partial disclosure, but some information could be kept secret due to an exemption protecting the public's economic interest.[27] The Ombudsman did not criticize a refusal to disclose all the material because the separation of information would require considerable resources. He found a disproportion between the substantial resources and the potential payoff for the applicant. In another Ombudsman case, a journalist applied for access to information from the Danish Immigration Service relating to

[25] Cp. section 9 (1).
[26] Cp. section 9 (2).
[27] Ombudsman Statement from 1991 in case no. 1991-244-512.

a specific company.[28] Due to the electronic record system the Immigration Service had at the time, it was not possible to search for a company name. If the documents were to be found manually, it was estimated to take a person a year to go through all the cases. The Ombudsman, mainly because of the extraordinary resources it would require to fulfil the application, did not criticize rejection of the application. Considerations for public resources have thus been seen under the previous Freedom of Information Act, but rarely and only in cases where applications for access to information require the public administration to use a very large amount of resources.

In the current Danish FOIA, public administration resources constitute a legitimate element in the considerations as to transparency. The political motivation is said to be the connection with the new criteria for identification of the case or document. As it is no longer a requirement that the applicant has a prior knowledge of the case/document, but only needs to address a theme of the case/document, the authorities need to be able to reject applications, when they are comprehensive and are expected to require substantial resources. In the 2017-FOIA report, it is, however, concluded that the new identification rule and the removal of the requirement of prior knowledge have not led to more applications of access to information.[29]

What amounts to a disproportionate use of resources was not explicit in the Commission's white paper. In the preparatory works, it is stated that more than 25-hour work (three working days) is to be considered a disproportionate use of resources. Why or how it ended up being 25 hours is unclear. An important element of the "disproportionate use of resource rule" is the authorities' obligation to arrange dialogue with and give guidance to the person seeking access to information before rejecting an application. This may help the applicant specify the request for information, thereby making it less resourceful for the authority to process the application. The lack of dialogue and guidance from the public authority has been criticized, when a rejection of access to information has been tried. However, it is difficult for an appeal board, the Ombudsman or the courts to question the assessment made by the public author as to the amount of resources needed to process an application.

[28] Ombudsman Statement from 18 February 2011 in case no. 2010-3082-601.
[29] The 2017-Report, op. cit., p. 228.

In the preparatory works, it is emphasized that the rule on disproportionate resources should not be used if the considerable resources are due to lack of journalizing or if the person seeking access to information has a special interest in the information/documents. It is mentioned that mass media and researchers from research institutes are considered having a special interest. Rejection on the grounds of considerable resources has however been used in connection with mass media. As mentioned a fundamental feature of the Danish openness principle is that the person requesting access is not required to give reasons or state his/her motives/motivation behind the request. This has partly been changed with the current FOIA. Now one must justify a special interest if an application is estimated to require more three working days to process. This is an important change in the approach to access to information, which might be even more important in the future.[30] The rule in article 9 (2) has been used both in relation to people with and without special interest. When the rule has been applied to people with a special interest in the case, the application for access to information is typically estimated to require many hours to process (often more than 100 hours, but in some cases 50–60 hours).

In 2016 the Ombudsman commented on the question of whether the "disproportionate use of resource rule" could be used, when journalists apply for public files.[31] The Ombudsman finds that the use of the rule is not precluded just because the applicant is a journalist. In the case a journalist requested access to Danish Security and Intelligence Service/Center for Terror Analysis evaluations concerning the threat of terrorism against Denmark in the period 2012 to 4 November 2015. The Justice Department estimated it would take more than 60 hours to process the request, which was therefore rejected on the grounds of considerable resources. The Ombudsman stated with reference to the preparatory work that a request cannot be rejected on grounds of considerable resources if the applicant has a special interest in the information. As mass media are mentioned in the preparatory work as having a special interest, the Ombudsman pointed out that an authority in general is obligated to process an application from

[30] In May 2016 the Danish association of the 98 Danish municipalities (Kommunernes Landsforening) recommended in a letter to the Justice Department a change of the Danish FOIA making it possible to reject applications of access to information from people without special interest if the application takes more than ten hours to process and thereby making a justification of a special interest more important when applying for access to information. See 2017 Report op. cit., p. 225.

[31] Ombudsman Statement from 13 July 2016 in case no. 16/00774.

a journalist and only rarely will be able to reject an application from a journalist. This however in the Ombudsman's opinion does not mean that a rejection based on the "disproportionate use of resource rule" is impossible, but it must require that the estimated use of resources is substantially more than the approximately 25 hours, which is the limit for a person without a special interest. The Ombudsman did not find that he had reasons to overrule the discretionary assessment made by the Justice Department as to the time it would take to process the request. The Ombudsman therefore had no reasons to criticize the Justice Department's decision.

For the time being, the amount of resources allocated to dealing with applications on access to documents is growing. The Ministry of Justice, possessing presumptively a comprehensive legal knowledge of the regulation on freedom of information, states in their report that the average time consumption for an application of access to document is 20 work hours.[32]

5 Formal Requirements to Be Met by the Responding Public Authority

In practice, the public authority has four options as to responding to an application of freedom of information: (1) granting fully the required access to information, (2) granting partly the required access to information, (3) rejecting the application and (4) lastly remaining silent and not answering at all. As to option (4), a non-response would be contrary to the FOIA that requires an answer to the application, but the act does not contain any provisions on the consequence of administrative silence in the sense that silence, for example, is tantamount to granting the required access. The act is *lex imperfecta* in this respect. However, the act contains a right to complain if the responsible authority remains passive and has not responded to the application within 14 working days. In that case, the applicant can lodge a complaint on the processing time in itself to the complaint body.

If the public authority does not grant fully the required access to information, it is bound to give reasons in the sense that it is required to refer the applicant to the relevant regulatory provisions and to account for its main considerations behind the decision to reject an application fully or partly. The decision to reject an application is formally an administrative

[32] 2017-report, op. cit.

decision in itself, and the general duty under the Danish General Administrative Procedures Act ("Forvaltningsloven") to give reasons and to provide guidance as to administrative complaint procedures must be complied with.

There is substantive load of Ombudsman reports of these aspects of the Danish FOIA reflecting the fact the Danish FOIA is often reviewed by the Ombudsman from a procedural point of view.

6 More Focus on Access to Registers

The general principle under the Danish FOIA is that the citizen has the right to access to document in the form that the citizen has stated in the application.[33] Thus, if so wished, the Danish FOIA provides citizens and other groups with the right to access to authentic documents.

Consequently, the public administration must register and archive documents with unchanged content and form. According to the Danish FOIA, documents received and sent out must be registered and internal documents in their final form.[34] The register must state the date of receipt or dispatch and a short description of the subject matter of the document.

The right to access as to registers is limited to registers of documents concerning the individual case to which access is sought. If only partly access is given, the public authority can release the open parts of the document with the sensitive parts covered or deleted. Access can be granted by reading at the location of the document, copying, delivery and sending in electronic form.

The current Danish FOIA contains more elaborate provisions on how to register documents and the right of access to registers than the previous acts implying that the internal and systemic aspects of transparency have been given a high priority under the current system of transparency. As to the exact implementation of these provisions, the relevant sources of legal clarification are found in the preparatory works of the Danish FOIA and in Ombudsman practice. The Danish Ombudsman promotes by means of his reports best practices in this field.

[33] Cp. section 40.
[34] Cp. section 15.

7 Small Steps Towards Pro-active Transparency

The current FOIA contains an explicit provision on pro-active transparency in the sense that public authorities must on their own initiative put forward relevant information.[35] Even though pro-activity is not yet a standard concept under Danish administrative law, the concept is gradually evolving. The provision embedded in the Danish FOIA is broad and leaves a good deal of discretion to the public authority as to decide the content of, for example, its website. The duty to inform actively is limited in the sense that confidential information should be maintained within the authority and a policy of full openness and full transparency is thus not a possibility. Transparency is limited by confidentiality.

The case law on pro-active transparency is still in the making, and the Ombudsman has not—yet—been exposed to a complaint pertaining to the described section in the Danish FOIA. So far, the Ombudsman has taken a different approach by addressing the question of the authority's duty to provide information ex officio under the provision to give advice.

The most debated Ombudsman case on this matter is a case from 2008 revolving around EU rights of residence and family reunification. In the wake of the ECJ's decision in the Metock case,[36] the Danish immigration authorities were reproached for not providing correct and updated information to potential applicants for residence in Denmark. The case clarified and extended the rights under the Residence Directive 2004/38 (EC) of third country nationals who are family members to citizens of the Union. Prior and subsequent to Metock, the general practice of the Danish authorities, however, was to inform solely of the—restrictive—national Danish immigration legislation and the extensive list of conditions for obtaining residence but not on the, wider, possibilities of obtaining residence and family reunification on the basis of Metock and the free movement of workers and citizens. In the wake of press coverage in a national Danish newspaper and the ECJ's handing down of Metock, the Danish Ombudsman decided to launch an investigation on his own initiative. In his concluding report, the Ombudsman voiced criticism as to several elements of the case handling by the immigration authorities. A significant part of the criticism is based on principles on the duty to give advice in the Danish General Administrative Procedures Act ("Forvaltningsloven").

[35] Cp. section 17.

[36] Case C-127/08, Balise Metock et al.

The duty of the authorities not only comprises a duty to give advice to citizens on request but also a duty to provide a bulk of information pro-actively on their homepage. In his report the Ombudsman states that:

> … public authorities are obliged to ensure that information is easily accessible, correct and sufficiently detailed in order to inform the individual citizen of the legal possibilities which are relevant to the citizen …[37]

Thus, the Danish Parliamentary Ombudsman emphasizes that authorities are under an obligation to pro-actively and loyally update information on their homepages. If the ECJ clarifies and develops EU rights that render the existing information on the homepage imprecise or incorrect, the authorities must react accordingly and sufficiently promptly.

8 Comprehensive Catalogue of Exceptions to the Principle of Transparency

8.1 The Overall Framework

Although the point of departure of the Danish FOIA is the citizen's right to access to document, almost half of the sections in the act contain exceptions to the point of departure. The catalogue of exceptions is complex and worded in highly legal terms, and the attempts to simplify the technicalities and legalisms of the exceptions to transparency have so far been rather sparse. In the following we outline and discuss the basic framework of the legal labyrinth of exceptions.

As to exceptions to the openness principle in Danish law, they can be broadly divided into three main categories, namely, (1) excepted cases as such a specific subject matter such as criminal cases and employment cases, (2) excepted documents and (3) excepted pieces of information.

The first category excepting the entire case applies only to few case types, criminal cases,[38] cases concerning new legislation until the Bill has been presented in parliament,[39] and personnel and employment-related

[37] The Danish Ombudsman, Annual Report 2008, p. 328 et seq. Our translation of the conclusion on item IV p. 341.

[38] Cp, section 19.

[39] Cp, section 20.

cases,[40] though there is right to access to the top-level management contracts in relation to the information the contract contains regarding the particular authority's overall priorities.[41] Finally, cases concerning the management of diaries are excepted from the right to access to information.[42]

In practice the most important restrictions on the right to access to information relate to categories 2 and 3 with rules excepting documents and piece of information from public disclosure. The exceptions can generally be divided into protection of public and private interests, respectively. Public interests are mainly protection of the internal and political decision-making process, the public's economic interest, investigation of crime, public interest in research, state security and foreign affairs, consideration to the public's inspection and planning activity and the public's interest in the public servant's working conditions and environment. Private interests are primarily protection of privacy and protection of commercial interests of an economic nature.

The second category of exceptions relates to rules excepting certain documents. The right to access to public administration files does not apply to internal documents.[43] A document is defined internal when it has not been submitted to a third party. In the current Danish FOIA, an important addition to the definition of internal documents has been made. There is not a right to access to documents and information in connection with servicing a minister, even though documents are shared between ministries, between agencies, between a ministry and a subordinate agency or between a ministry and an agency under another ministry.[44] These documents are now seen as internal. This is a significant shift in the way of defining internal documents, which we will elaborate below. Regardless of the rule on exception of internal documents, there is a right to access to finalized internal documents in some instances. If the finalized internal documents, for example, contain a systematic reproduction of the authorities' practice in certain areas or if the document contains general

[40] Cp, section 21.

[41] Cp, section 21 (4).

[42] Cp, section 22. This is a new exception, which entered into force with the new Access to Information Act in 2014. See the arguments for this exception White paper no. 1510/2009, p. 443 and p. 486.

[43] Cp, section 23.

[44] Cp, section 24.

instructions on how to handle a specific type of cases, there is a right to access to the document.[45]

In the Danish law some specific documents are excepted from the right to access to information.[46] This exception includes minutes from council of state, documents shared when one authority provides secretariat assistance for another authority, correspondence with experts in connection with litigation and material used for public statistics or scientific studies. Finally there is not a right to access to documents shared between ministers and members of parliament in cases concerning legislation or similar political process.[47] This exception was added in the 2013 and will be discussed more below.

An important limitation to the scope of the exceptions to the openness principle is a duty to extract certain pieces of information from a document and give access to this information though the document as such is excepted from access to information.[48] This partial disclosure concerns information of a factual matter (which describes the actual circumstances of the case) and external professional assessment.[49] The public authorities can however refuse to give this partial disclosure, if it will require considerable resources as mentioned above.

The third category is exception of specific pieces of information. The interests protected are both public and private. The right to access to information does not include information on individual's private and economic situation.[50] The same goes for technical design and business relations and so on, which are of a significant economic importance for the person or business that the information concerns. Access to information can be restricted if it is essential for state security[51] or if it is necessary to protect interest in connection with foreign affairs, for example, the relationship to other countries and international organizations.[52] If EU law or

[45] Cp, sections 26 (4) and 26 (5).

[46] Cp, section 27.

[47] Cp, section 27 (2).

[48] Cp, sections 28 and 29.

[49] Cp, section 28. In some instances there is also a right to access to finalized internal professional assessments if this information is part of a case concerning a Bill, which has been presented in parliament, or a report, plan of action and so on that has been published; see section 29.

[50] Cp, section 30.

[51] Cp, section 31.

[52] Cp, section 32.

international conventions dictate confidentiality, access to information can also be restricted to protect foreign policy interests. Lastly the right to access to information can be reduced in order to protect different interests both private and public such as protection of crime prevention, witnesses, the public's economic interest, original ideas of researchers and artists, and, furthermore, there is finally a general discretionary exception allowing restrictions of the openness principle where secrecy is imperative in the present circumstances to protect vital private or public interests.[53] If the protected interests only apply to part of the document, there is an obligation to give partial disclosure in the rest of the document.[54]

A few of the exceptions in the Danish law are both precise and absolute (e.g. exception of criminal cases and minutes from council of state), but most of the exceptions are relative and of a discretionary nature. All rules on documents excluded from access to information are absolute in the sense that the documents not just can be but are excluded from public disclosure if the document is covered by one of the exceptions. The type of documents mentioned in the exemptions needs however to be clarified and leaves room for interpretation. Most exceptions of specific pieces of information in the law are discretionary and state that access to information *can* be restricted to protect a certain interest. This leaves a margin of appreciation for the authority to assess whether the information should be disclosed or not. There are no statistics as to how the public authorities use the exceptions.

The Danish FOIA does not include a public interest test, which would make it possible to balance interests involved and make documents accessible to the public despite private, commercial or public interests in keeping the document confidential. Normally this test results in extending the scope of access to information. As stated above partial disclosure should be given when possible. Additionally the Danish law has a principle of extended openness stipulating that a public authority in connection with processing a request for access to information is obligated to consider whether wider access can be imparted.[55] This however does not compensate

[53] Cp, section 33.

[54] Cp, section 34. There are exceptions to this obligation, for example, if the partial disclosure entails misleading information.

[55] Cp, section 14. The principle of extended openness also applies to cases that are exempted from the right of access to information in accordance with the exemption provisions in sections 19–22; see section 14 (2).

for the lack of a public interest test, especially not with the introduction of new discretionary exceptions in the 2013-FOIA.

In recent years particularly new controversial exceptions to the right to access to information have been intensively debated, section 24 on ministerial advice and section 27 (2) on information sharing between ministers and members of parliament. Both exceptions were subject to an evaluation by the Danish Ombudsman in 2017.[56]

8.2 Ministerial Advice

Traditionally, the Danish FOIA has included two types of exceptions which aim to protect the internal political lawmaking process. Firstly, a section stating that there is no right of access to *preparatory work* in the central administration before a Bill is presented for parliament.[57] This section occurs in the previous act and it has been included in the new FOIA unchanged. Secondly, the internal deliberation and discussions in the ministries have all along been concealed by a section about *internal documents*. The underlying argument is the idea that it should be possible to exchange preliminary thoughts and solutions within the civil service without risking publicity in the press. However, the definition of internal documents has fundamentally been changed in the new FOIA resulting in significant consequences.

Previously, the crucial criterion was if the relevant document remained in the authority concerned or whether it was sent out of the house to another authority (department, agency, etc.) or to an external stakeholder. As soon as the information "left the building", it could no longer be classified as an internal document. This rather clear-cut definition has now been quitted in favour of a new criterion: ministerial advice.

The official reason for introducing a broader definition of internal documents is as follows: Due to new forms of organizing the state administration and changed working conditions, the old definition of internal documents is too narrow in order to secure the legitimate protection of the informal exchange of political views and ideas on an early stage.[58] Taking the view that good and effective governance requires confidentiality, the main argument is that political-strategic advice does not exclusively

[56] The Danish Ombudsman 2017.
[57] Cp. section 20.
[58] White paper no. 1510/2009.

take place in the departments anymore; agencies and other ministries are increasingly involved in policy development.

On that background, the new decisive factor is whether the document concerned can be related to servicing the minister or not. The substance of the new section in question is as follows:

> Section 24 (1): The right to access to information does not include internal documents and information shared at a time, where there is reason to assume that a minister may need advice on the matter, and the information is shared between ministries, between agencies, between a ministry and a subordinate agency, or between a ministry and an agency under another ministry. (our translation)

Hence, the documents and information are now defined as internal even though they have been shared with various other authorities. It is not a precondition for applying the new exemption that the information *actually* has been used for ministerial advice. As long as there is a slight *opportunity* that the information at a later time could be presented to the minister in connection with a case, it is falling within section 24.[59]

The specific types of information and documents that aim to be covered by the new rule on ministerial advice are explicitly mentioned in the white paper as well as in the explanatory notes. The examples are (a) advice from the civil service to the minister on potential problems in a given case and possible solutions; (b) advice from the civil service in connection with preparation of political negotiations with, for example, other ministries or with the opposition in parliament; (c) advice in connection with the minister's participation in interpellations and inquiries in the parliament; (d) advice in connection with the minister's participation in meetings or telephone conversations with other ministers; (e) the civil servant's preparation and formulation of new Bills; (f) assistance to the minister with answering parliamentary questions; and (g) the advice and assistance in connection with new political initiatives such as policy papers, reform programmes, plans of actions and idea catalogues.

To fully understand the potential wide extent of this new-formulated section on ministerial advice, it is important to bear in mind the distinctive organization of the Danish central administration. As already emphasized, Danish ministers have extensive realms as they are legally and politically

[59] White paper no. 1510/2009 and Bill no. 144, 2013.

responsible for all activities taking place in both departments and subordinating agencies. Therefore, it is certainly not unlikely that also technical and professional issues can be the subject of political interest and hence used for ministerial advice. In a minority government regime as the Danish, the opposition will normally be eager to challenge the government by raising questions and sending interpellations to the minister, thereby making it highly probable "that a minister may need advice on the matter".

In other words, the new requirements for concealing documents as internal are very discretionary and easy to fulfil and correspondingly nearly impossible for control organs such as the courts and the Ombudsman to check and overrule. Illustrating case law will be dealt with below.

Another interesting feature of the new section 24 on ministerial advice is a new principle of *long-lasting protection* of the involved documents. While concealment of preparatory work can only take place until the moment where the internal phase has ended and the Bill is presented in parliament,[60] there is no time limit for the protection of ministerial advice documents. Consequently, as regards ministerial advice documents, it is no longer possible to gain access to these parts of the legislative material, and the secrecy lasts in principle forever, even though there is not any longer a pressing need for protecting political negotiations.

To sum up, the practical implications of the new state of law are that there is no longer access to, for example, professional input and early versions and evaluations from the agencies to the departments in a whole range of situations, whether the information concerns legislation or administrative input to ministerial answers to the parliament and the public.

The empirical material from the first years with the rule coming into force actually confirms the just-presented picture of a wide-ranging new exception to access to information.

In the 2017-report from the Justice Department on act, the ministries inform that the rule has been used by the departments for *rejecting* access to information in approximately 834 cases during 2014, 2015 and 2016.[61] In October 2016, the Danish Ombudsman published a report after having

[60] Cp. section 20.

[61] It is not possible, however, to say in how many of these situations rejections would also have been expected under the former Danish FOIA. See the 2017-Report, op.cit., pp. 118–122.

examined the ministries' use of section 24 by looking at 30 selected cases ex officio and from his additional experiences from reviewing complaints. The Ombudsman concludes that in his opinion the rule in section 24 is used legally correct by the ministries, but article 24 has, however, led to a substantial reduction in the right to access to information.

Two cases reviewed by the Ombudsman can contribute to an illustration of the more practical consequences:

In the first case[62] the Ministry of Defence had rejected a request from a journalist on access to an outline of Norwegian law and Swedish law on Intelligence Services compared with a just-presented new Danish Bill on the same issue. The comparative outline was produced by the Danish Defence Intelligence Service (organized as an agency subordinated to the department) on request from the Ministry of Defence in the expectation that this information would be asked for during the first reading of the Bill in parliament. Even though the specific information was not actually used by the minister during the debates in parliament, the Ombudsman could not criticize the rejection of access to information with reference to section 24. The Ombudsman thereby emphasized that it is not a necessary precondition that the information is actually used for ministerial advice, if there—at the time of the exchange of information[63]—is reason to assume that the minister may need advice on the matter. On that backdrop, the Ombudsman accepted the rejection of access to information.

The second case[64] is about a professional assessment of a potential closure of a controversial mosque in Aarhus, where the religious leader was accused of radicalizing young people and preaching problematic versions of Islam. The specific document was shared between several different ministries, when the minister of Justice hosted a cabinet meeting on the occasion of an interpellation from the parliament concerning the matter. When a journalist then asked for access to this piece of information, his request was rejected by the Ministry with a reference to section 24 on ministerial advice. The Ombudsman could not in his statement criticize this concealment of information. He particularly made a

[62] Ombudsman Statement from 27 October 2014 in case no. 14/03573.
[63] In this case: from the Intelligence Service to the department in the Ministry.
[64] Ombudsman Statement from 19 June 2015 in case no. 15/01675.

reference to the explanatory notes to the Bill, which explicitly mentioned assistance from the civil service to the minister's participation in answering interpellations and questions from parliament as an example of situations covered by section 24. The Ombudsman even accepted the rejection, though the document only contained information which the journalist already was in possession of or which already was made public elsewhere.

8.3 Information Sharing Between Ministers and MPs

The other disputed article in the AIA is the new section 27 (2) stating that there is no access to information in documents and information exchanged between ministries and members of parliament in connection with the lawmaking process or a similar political process. The scope and the objective of this rule resemble the just-examined section 24, namely, the protection of the internal political decision-making processes. However, the pre-history of this so-called politician rule is quite different. The Commission preparing the Access to Information Act was in its mandate explicitly asked to respond to the fact that the central government was facing new forms of working methods, and section 24 on ministerial advice was an attempt to meet that challenge. In that respect the rule on ministerial advice could be seen as solving a given task, even though the solution perhaps went too far. The section 27 (2), on the contrary, came out of the blue. Nothing in the mandate of the Commission prepares the ground for such a rule, and it therefore remains uncertain how it came about.

However, in the white paper as well as in the explanatory notes, the need for ministers to exchange opinions with members of parliament in confidentiality is emphasized, for example, when preparing a Bill. The rule minimizes the access to information concerning lawmaking compared to earlier, because this new section implies a lifelong secrecy, and it is not only applicable on lawmaking in the proper sense of the word but also on other political processes. Thus, ministers can with this new rule send all kinds of information to selected members of parliament without being obliged to share the documents with all MPs and without running the risk that the information is made public. The secrecy is upheld even after the Bill has been presented or the political negotiations or deliberations have ended.

The new rule was in the public debate following the political agreement in the autumn 2012 criticized for implying less access to information about the reasons for significant political decisions and thus hindering

broad political debates in important matters. It was also pointed out that the rule could lead to closed communication where only a few political groups or members of parliament would receive the written background material. A fundamental principle of equal treatment and similar level of information for all MPs could be in danger. However, in the explanatory notes, it is emphasized that the rule is intended to have a narrow field of application.

Although the underlying reasons for introducing this exceptional rule are a bit blurred, it is most likely linked to the Danish tradition of minority governments and the consequent wish for legislative agreements in governing. Living in a country where majority governments are a rarity and the minority government even consists of several small political parties, the challenge of reaching an agreement which can be passed by a majority in parliament is obvious. On that background, it is perhaps understandable that the politicians have been tempted by the thought of lifelong concealment of communication between the minister and single spokespersons from selected political parties, even if the planned political initiative in the end comes to nothing. On the other hand, considering the current Danish tendency towards increased use of political agreements which bind the political parties even before the formal legislative process and public debate have started, the concealment of important background material for the legislation can be said to be of significant importance.

The case law concerning the "politician rule" is rather sparse. There are no court decisions, and the Ombudsman has only reviewed six cases in total where access to information has been rejected with reference to section 27 (2). In only one of these cases, the Ombudsman expressed criticism of the legal adjudication of the authorities. In this case some documents had been exchanged between the Ministry of Justice and some members of parliament. But the documents had also been sent to several other persons whose identity was not revealed nor explained in the rejection or to the Ombudsman. The rule can only be used when documents are exchanged between minister and members of parliament or when civil servants in agreement with the minister send documents to members of parliament or their secretary. As it wasn't possible to see who had received the documents, the Ombudsman found it to be too uncertain whether the requirements in section 27 (2) were fulfilled. The Ombudsman thus held that the documents could not be excluded with reference to section 27 (2).

However, in the Ombudsman's evaluation from March 2017, the Ombudsman concludes that in his opinion the rule in section 27 (2) in general is used legally correct by the ministries.

In the 2017-report by the Justice Department, it is stated that section 27 (2) is often used with reference to "a similar political process", typically in connection with political negotiations. The ministries announce that the rule has been used in 92 situations during 2014, 2015 and 2016. The Danish Union of Journalists has on several occasions stated that in their view the "politician rule" has led to extensive secrecy in the political processes in Denmark.[65]

An illustrative case concerning the scope and consequences of the new rule is the Ombudsman's statement on access to documents in the Ministry of Defence concerning a new Bill on the Danish Defence Intelligence Service.[66] In this situation a package of background material was sent to spokespersons of defence policy along with a comparative outline of the three current Bills concerning Intelligence Services, which according to plan should be debated and passed by the parliament simultaneously. It should be noted that there was no indication that the material included any sensitive information. When a journalist later asked for access to information to the documents, his request was rejected by the Ministry with reference to section 27 (2).

The Ombudsman concludes in his statement that he could not on legal grounds criticize the Ministry's decision on refusing access to information, as the documents were produced by the Ministry of Defence for the use of communication between the minister and members of parliament as a part of the political negotiations concerning the Bill. Hence, the requirements for applying section 27 (2) were fulfilled, and concealment of the material could legally be accepted.

9 Tight Time Limits in the Current FOIA

An important novelty in the 2013-FOIA concerns time limits, and the current act contains shorter deadlines than the previous regulation. Under the current law, decisions must be made with no delay as to individual applications for access to documents. There must be a specific reason for a

[65] 2017-Report p. 233.

[66] Ombudsman Statement from 27 October 2014 in case no. 14/03573.

delay—such as the complexity of the case—of more than seven working days.[67] There are no time limits if the public authority states that the case is complex and cannot meet the seven-day rule but even the most comprehensive application should be dealt with within 40 working days. If the application is not dealt with within the stipulated time limits, the applicant should be notified of this and given an indication as to when the decision will be made.

The practical usage of the various provisions on time limits is described in the 2017-report, and it is interesting that the stipulated deadlines have in practice proved highly difficult to comply with. Most ministerial departments cannot process applications on access to document within seven days, and the main rule in practice is something like 10–20 days according to the data collected by the Ministry of Justice in the 2017-report.[68] As to local public administration such as Danish municipalities, no exact data has been collected, but the municipalities have expressed strong concerns in the 2017-report on the tight time limits and they are considered unrealistic.

10 Review Mechanisms: The Ombudsman as *Primus Inter Partes*

If an application on access to document is fully or partly rejected, the applicant can make an appeal to the highest administrative appeal body for the area in question. In addition, appeals can be reviewed by the Parliamentary Ombudsman and by the ordinary courts. If an appeal is made within the administrative review system, the reviewing body must deal with the compliant within 20 working days. In this way, the review of the transparency is to a large degree constructed as an inherent part of the general review system surrounding the Danish public administration. The system is a multi-level system comprising a wide range of different control mechanisms.

A basic characteristic as to administrative review in Denmark is the existence of sector-specific boards of appeals. Boards of appeal are characterized as being collegiate public authorities whose sole or main purpose is to review administrative acts following an appeal. Characteristic of these

[67] Cp. section 36 (2).
[68] 2017-Report p. 200.

boards is that they fall outside the traditional categories of public authorities as they fall outside both the hierarchically organized machinery of central government and the council of local government, without being courts of law. A number of boards of appeals exist at the local level, too, and the total number of boards of appeal is high. This widespread existence of boards of appeal combined with the free-of-charge access to these complaint bodies implies that in general administrative appeal is in practice the rule and judicial review the exception in Denmark.

The Danish Ombudsman is an important agent in Danish administrative law, and the institution is arguably the most important controller of transparency. Though all review mechanisms at hand are, of course, insignificant, it is a generally acknowledged fact in Danish law that the Parliamentary Ombudsman is *primus inter partes.* The Danish Parliamentary Ombudsman as a person is elected by parliament, and the institution dates back to 1955. In 1997 its powers were extended to cover not only state but also municipal administrative acts. The Parliamentary Ombudsman has arguably had more influence in Denmark than in other European countries due inter alia to the fact that no administrative courts have been set up and to the fact that the Ombudsman institution has been given comprehensive economic and manpower resources that exceed, for example, the resources of the Danish Supreme Court. In contrast to the direct access for citizens to bring administrative matters before the courts, the Parliamentary Ombudsman may deal with administrative matters only when administrative appeal is exhausted. Thus, the Ombudsman is a fallback position. This is also the case when it comes to complaints on transparency.

The ordinary Danish court is rarely involved with transparency cases although the Danish Constitution grants the ordinary courts—that is, the 24 district courts, the 2 high courts and the Supreme Court—the power to pass judgments on any matter relating to the powers of public authorities. The Constitution creates the possibility of direct access for citizens to bring disputes regarding administrative matters, whether at the central or the local level, before the courts, but in practice, only a small selection of transparency cases—promoted, for example, by professional actors such as the press, and not ordinary citizens—are transformed into costly and lengthy court proceedings.

11 Free of Charge: Rare Usage of the "Transparency Metre"

The Danish FOIA does not contain rules on fees and costs. However, there is a specific regulation in this giving public authority the right to charge applicants for fees.[69] If the applicant wishes the document in paper form, the fee is 10 DDK (Danish Kroner), equivalent to approx. 1.5 Euro, for the first page, and 1 DDK for subsequent pages.

Normally, the public authority does not enforce the rules on fee.

12 No Special Regime in the FOIA

The FOIA does not provide for an explicit special regime for the access of mass media to information of public interest. As mentioned above, the media is implicitly given a privileged status.

13 A Wider Transparency in Environmental Cases

Denmark has ratified the Aarhus Convention on access to information, public participation and access to justice in environmental issues. Within this area, there is a somewhat broader access to documents and information, for example, resulting from the fact the range of exceptions are smaller than in the Danish FOIA. There is, for example, no exception on ministerial advice as far as environmental issues are concerned.

14 The Current Danish FOIA: A Step Forwards and Two Steps Backwards

Within the field of public law, the Danish FOIA is an important component of the big picture of and plays an overall role of a guarantee for trust and public insight as to public administration. The Danish FOIA is a result of an immensely thorough preparatory legal process, and the act as a whole tries to strike an appropriate balance between legitimate public interests—on the one hand—in openness, insight and democratic control and legitimate systemic interest, on the other hand, in a space for confidentiality, for internal considerations and for political negotiations.

[69] Bekendtgørelse om betaling for udlevering af dokumenter mv. efter lov om offentlighed i forvaltningen

Various parts of the current FOIA are controversial, nonetheless, and we argue in our analysis that it is possible to experience substantial backlashes regarding access to information even in a Scandinavian country. A tendency to a split personality is evolving as to openness in practice.

An indication that the traditional positive attitude to access to information is under pressure within the administration is the introduction of the new possibility of rejecting access to information solely with reference to the administrative resources connected with handling the request. This is a distinct newcomer in Danish administrative culture, and the initial cases from the Danish Ombudsman on the practical implementation indicate that the authorities are welcoming the opportunity to reject time-consuming applications. In a comparative perspective, it is not unusual to have rules that legitimate consideration of the administrative resources spent on handling the request for insight. However, in most countries this aspect will either be used as a balancing factor in a public interest test or used as a ground for charging the applicant a fee for handling the request. In Denmark, by comparison, the resources spent can result in a total rejection of insight regardless of any other circumstances.

Another controversial question pertains to ministerial advice. The current FOIA arguably reduces the degree of access to information within most central political spheres, and the reduction aims to increase the consideration for confidentiality in internal political decision-making around the minister at the expense of openness. With the new section 24 on ministerial advice and its remarkable new definition of internal documents, Denmark has introduced discretionary standards, which according to the Ombudsman are far-reaching and de facto constitute a "circle of secrecy" around the political interesting part of the central administration. Hence, large amounts of background material and documents revealing professional and technical input to political matters, which previously could be made public, are no longer accessible. Notably, the Danish FOIA does not operate with a public interest test or any other model of balancing the need for confidentiality on the one hand and the public interest in the information on the other hand. The Danish exemptions, on the contrary, are based on a principle of rejection without further consideration, if the information falls within a special category of cases, documents and so on.

Even though the additional reduction as to information sharing between ministers and MPs is not as wide-ranging as section 24 on ministerial advice, the grounds for introducing this exception are nonetheless interesting and perhaps distinctive of the current Danish thinking in the

political establishment. Hence, a general view that the media is behaving still more agressive and often obstruct the chances for acheiving political results has presumeably been advanced. If the Danish politicians are convinced by the argument that access to information is often used by annoying journalists in unimportant matters and risk at hindering political collaboration in a multi-party system as the Danish, the implementation of the new restrictions perhaps makes more sense.

The consequences of the new restrictions for democracy and decision-making might be quite fundamental in the long run. The most far-reaching implication is probably the fact that the background information and specialist knowledge behind important political decisions are no longer accessible in the same extent as previously. This is not just a potential problem for the opposition in parliament and for the media, it can also become a democratic malfunction for all citizens, because the weaker basis for decision-making may result in deficient policy. What is the point in an easier way to political agreements, if the agreements are of poor quality, one could argue.

Despite some signs of regret by the political parties supporting the restrictions in the present, FOIA can be detected at the time of writing, and despite a softening of the approach to, for example, ministerial advice might find way to a future revision of the Danish FOIA, the Danish development is in itself interesting as illustration of a transparency step backwards in a country with an established tradition of transparency and freedom of information.

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PART III

Comparative Summarising Perspectives

CHAPTER 16

A Brief Comparative Outlook on the Regulation of Parties, Procedure, and Exceptions in Different FOIAs

Dacian C. Dragos, Eliška Drapalova, and Albert T. Marseille

1 Introduction

The aim of this chapter is to look at legal systems in this book from the point of view of parties, procedure, and exceptions from free access to information, and summarize the main features from a comparative perspective. The comparative chapter on parties, procedure, and exceptions

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*, Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_16

tries to bring together the main features of these three aspects of the freedom of information laws and how they are dealt with in the jurisdictions covered by this book. Parties relate to who is requesting information and who is bound to provide the information, procedure relates to formalities of requesting information and answering to requests, and the part on exceptions is meant to show similarities and differences among different jurisdictions in terms of types of information that can be kept secret by governments.

2 Parties

The right to information has more substance as a larger group of people has the possibility to request information from the public authorities concerning administrative matters. Also important for the substance of the right to information is how broad or how narrow the definition of "public authority" is. The broader the definition, the more information has to be disclosed.

a. Beneficiaries

In all countries, the right to be informed is assigned to a very large group of persons. As a rule, everyone can submit a request for information. Many Freedom of Information Acts (FOIAs) indicate natural and legal persons as beneficiaries of information. Some countries apply a more detailed description. In Belgium, for example, natural persons, non-profit associations, unincorporated associations, as well as (private or public) corporations are indicated as possible beneficiaries of public sector information.

Not only the size of the group of people that can request information is relevant, but also the extent to which the capacity of the applicant may impose limitations to the information that can be requested. Is the applicant required to demonstrate that he or she has a special interest in disclosure of the information requested? In most countries, the applicant is not required to explain what his or her interest is in disclosure of the information. As the final objective of the principle of transparency is to ensure openness and accountability and thus prevent misuse of authority (maladministration), the applicant is not required to demonstrate legal or justified interest.

For a number of countries, information concerning the capacity of applicants is available. The overall picture is that requests for information are relatively often submitted by legal or natural persons who, on account of their profession, have a special interest in certain public sector informa-

tion, such as journalists. In Croatia, approximately a third part of the applications is submitted by non-governmental organizations (NGOs), in Romania approximately a fifth.

Italy is an exception, where a special interest is required. In Italy, the applicant must have a direct, concrete, and currently existing interest corresponding to a legally protected position in connection with the requested document. According to case law, the explanation of the request must demonstrate that the applicant's interest is legally relevant, serious, real, not emulative, and not only inspired by curiosity. In Italy, the right of legal persons such as NGOs and trade unions to access documents is confined to the interests they represent.

b. Entities Bound by the Law to Disclose Public Sector Information

Most countries apply a very wide definition of entities that are bound to disclose public sector information. In Slovenia, for example, entities that are bound by the law to disclose public sector information include not only state bodies and local government bodies, but also public agencies, public funds, and other entities of public law. There, the concept of public authority refers to entities that fall under the FOIA and is mainly defined functionally, as is the case in many other countries. Not only does it encompass public but also private performers of public tasks, such as business entities that are predominantly state-owned. The Slovene Motorway Company provides an example of this. It is considered a public authority because it provides public services and is financed from public funds. It is not the legal form of an entity that is decisive, but the question whether the entity concerned performs public tasks or not.

The boundary between entities that are considered a public authority and those that are not, and between activities the disclosure of which serves and does not serve a public interest, is not always drawn in a similar manner. In Belgium and in Slovenia, institutions that are entrusted with a public service are only bound by law in so far as they take decisions, which are binding on third parties. For this reason, accredited private schools in the Flemish region fall under the FOIA only if they take decisions that are binding on third parties, but not if they take decisions relating to internal personnel matters. The Czech Republic makes a similar distinction. Case law has determined that public schools, hospitals, and private commercial companies which are majority-owned by a national or local authority are public institutions. However, activities not relating to the management of

a public function or the fulfillment of a public contract are not affected by the statutory obligation to provide information. Hungary applies the same criterion that these entities affiliated to the public authority are required to comply with requests for information in so far as they process data of public interest. It is, however, not always easy to determine when such is the case. A situation in Italy shows that the boundary is sometimes arbitrary. The situation concerns Poste Italiane Spa, a private state-controlled company charged with mail delivery. In a court case following a refusal to disclose documents, the court judged that documents relating to staff enrolment and work organization had to be disclosed because they were instrumental to the provision of a public service. However, the court also judged that the refusal to disclose documents relating to deposit accounts held by Poste Italiane Spa was lawful, banking activities not being part of the postal service.

In Romania, not only the central and regional governments but also state companies, private or non-governmental organizations, which provide services of public utility or public funds, as well as political parties and sports associations are bound by the obligation of transparency. It is often difficult to obtain information, especially from these NGOs, because they do not always realize that they fall under the FOIA and because they are not used to replying to requests for information. Serbia applies a very wide definition, which also includes entities founded or predominantly funded by governmental bodies. In practice, it often appears to be difficult to obtain information from these entities, partly due to the fact that they tend to avoid too much information concerning their performance being disclosed.

The fact that a general legal definition or jurisprudence reveals which entities are bound by the provisions of the FOIA does not mean that those who enjoy the right to be informed also know from which public authorities they can successfully request information. In Croatia, an Information Commissioner manages an unofficial register of public authorities that are bound by the law. The register contains more than 600 entities. More than half of them (approximately 3,300) are public institutions in the education, culture, and health sector, and the register also contains 900 public companies (state and local public enterprises). Slovenia has a public register that is managed by the Agency for Public Legal Record. Although this register is not binding, it offers information so that beneficiaries may assert their rights more easily. By January 2017, the Slovakian register contained 5,733 entities.

3 Procedure

Without exception, by the law, the procedure for obtaining information is simple. In practice, however, obtaining information often appears to be quite difficult.

A first common characteristic of the procedures is that there is no prescribed form for submitting the request. The request can usually be submitted both orally and in writing, but also via e-mail. The rationale behind this is that if the public authority is able to comply with a request in a simple manner, there is no reason to impose all kinds of formal requirements on the applicant. If complying with the request requires little effort from both parties, imposing undue burdens on them should be avoided. The situation in Italy demonstrates that it does not always work like this. There, the rule is that the manner in which the request is submitted is not subject to any requirements, but that, if the information requested cannot be provided immediately, the applicant must be asked to present a formal, written request. In practice, the formal method is nearly always used. This can be attributed to the bureaucratic mentality and to the persistent resistance, especially from lower officers, against citizens' control.

One of the requirements that each request must meet is that it gives a description of the information that the applicant wishes to be made public and, if possible, the relevant administrative documents. It is not required to give a motive for the request. This is in accordance with the assumption that the general interest of disclosure is sufficient motive for a request for disclosure of documents with a public interest. In a court decision it was stated that "It is not the citizen who must attest to his interest in acquiring the information, but it is the public service body that must give reasons (…) for denying the request." In other words, a request does not require any explanation, but a refusal does.

That does not alter the fact that in certain cases further substantiation of the request may be required. In Germany, the administrative body has the right to ask why the request was made, if this will allow it to better comply with the request. In Germany, a substantiation of the request is only required if third parties' interests are involved.

The request for information must in all cases be submitted to the appropriate administrative body, that is, the administrative body that has the information to be made public. If the wrong administrative body is approached, then this body has the obligation to forward the request to the

appropriate administrative body. In Serbia, the rule is that if the applicant has approached the wrong administrative body, then this body will inform both the applicant and the Information Commissioner of this, whereupon the Information Commissioner forwards the request to the appropriate administrative body. Despite the fact that administrative bodies in Croatia are obliged to forward requests that are not intended for them to the appropriate administrative body, this obligation is usually not met in practice. The applicant is simply informed that he or she has approached the wrong body, without telling him or her where to go instead.

What is the object of the request for information? It is often described as a "document". Most statutory provisions give a very wide definition of that term. The Dutch definition is, "A written document or any other material that contains information, which is in the custody of an administrative body." The definition of the term "document" is not as wide everywhere. In Italy, a request for disclosure may not relate to information that has not yet been included in an existing document. This assumption is strictly applied. For this reason, it is possible that information that could be provided easily, such as the name of the official handling the case or the state of a procedure, does not have to be disclosed.

Many statutory provisions offer administrative bodies the possibility to use a form for the purpose of decision-making concerning the request. This is the case in, for example, Croatia and Romania, although in both countries the applicant is not obliged to use the form. Administrative bodies can use forms to create obstructions for applicants, as the aforementioned situation in Italy demonstrates, but forms may also be used to keep the administrative body alert. Romania is a fine example of this. A common problem there is that replies to requests are often incomplete, or that documents other than the ones requested are made public. To solve this kind of problems, forms have been made that force the administrative body, when replying to a request, to explain as clearly as possible which efforts it has made to comply with the request.

The decision periods for administrative bodies differ per country. In Romania, the administrative body must respond to requests within 10 days, in Croatia and Hungary this period is 15 days, in Slovenia it is 20 days, in the Netherlands 4 weeks, in Belgium and Italy 30 days, and in France 1 month. This period can, however, be extended. In many cases, the response time can be doubled. In the Netherlands, the administrative body is allowed to take more time to reply to the request if there is a third party that may have objections against disclosure of the information. The third party must

be given the opportunity to give its view, by telephone or verbally, on the possible disclosure. In Italy, the administrative body is obliged to inform third parties about the request, to which parties then have ten days to react.

Short decision periods do not necessarily result in quick decisions. Long procedures are a common problem. In Slovenia, this was a problem especially in the early days of the FOIA. Illustratively, two-thirds of the administrative appeals were connected with administrative silence. In other countries, the lack of response to requests for information is also a problem. In Croatia, many appeals are connected with administrative silence. In France, administrative bodies often apply the strategy of not replying to a request for information. Only if after expiry of the decision period an administrative appeal is lodged (within the framework of that procedure, the absence of a decision is considered to be a refusal) is the requested information provided.

4 Exceptions

4.1 The Importance of Exceptions for FOIAs

An important aspect of all compared countries' legal framework for providing access to public information is the restrictions or exceptions where the information is not provided to the public. The tendency of keeping secrecy over administration activity is a natural one, taking into account that despite such restrictions, when the actions of public servants are more visible, so are their mistakes. It was argued that the increase in wrongdoing is more a result of a greater transparency than an actual increase in cases dealt by the public authority.[1]

Undeniably, achieving an informed citizenry is a goal often counterpoised against other vital collective aims. Society's strong interest in an open government can conflict with other important interests of the general public—such as public's interests in the effective and efficient operations of government, in the prudent governmental use of limited fiscal resources, and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information. Tensions among these opposite interests are typical of a democratic society; their resolution lies in providing a feasible scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible. FOIA seeks to achieve this accommodation of strongly countervailing public concerns, though with disclosure as the animating objective.

[1] OECD 2001.

4.2 Absolute and Relative Exceptions

Some exceptions are not "absolute", in the sense that public authorities have the discretionary power to allow access to documents even when they are exempted by law from disclosure. This distinction between absolute and relative is present in many Central and Eastern European countries in this volume. Some countries, like Belgium, also have a third category of exemptions linked with administrative reasons. In the context of information that is exempted by law from disclosure, and its disclosure as an expression of public authority's discretionary power, the procedure of imposing *reservations* must also be mentioned. Disclosing information under a reservation means that the applicant cannot freely use the information, meaning he or she may be prohibited from publishing the information or using it for anything other than research purposes. The applicant can then contest the reservation to the superior authority or before a court. Reservations are, for example, contained in Dutch legal system (Article 11 Government Information Act) and must be taken into account together with the exemptions.

At the European Union (EU) level, Regulation No. 1049/2001 provides in principle the widest access possible to documents,[2] while at the same time allowing for a number of exceptions to be defined in quite broad terms. It is no wonder that the very interpretation of these exceptions represents the core of the case law of the Court of Justice and the General Court.[3] Regulation No. 1049/2001 includes the two types of exceptions: absolute and relative.[4] The interests covered by absolute exceptions include public interests such as public security, defense and military matters, international relations, financial, monetary, or economic policy of the Community or a Member State (MS), as well as private interests such as privacy and the integrity of the individual. Interests covered by relative exceptions include the protection of commercial interests; court proceedings; for the purpose of inspections, investigations, and audits; as

[2] CJEU, July 21, 2011, C-506/08 P, *Sweden and MyTravel v Commission*, paragraph 73 and CJEU, October 17, 2013, C-280/11 P, *Council v Access Info Europe*, paragraph 28.

[3] See, for example, CJEU, June 29, 2010, C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, paragraph 51; CJEU, June 28, 2012, C-404/10 P, *Kommission v Éditions Odile Jacob*, paragraph 111, and CJEU, C-477/10 P, *Commission v Agrofert Holding*, paragraph 53; CJEU, September 21, 2010, C-514/07 P, C-528/07 P, and C-532/07 P, *Sweden e. a. v API and Commission*, paragraphs 69 and 70; CJEU, November 14, 2013, C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, paragraph 53.

[4] The absolute exceptions are found in Article 4 (1)(a and b), while the relative ones are found in Article 4 (2) and (3).

well as documents for internal use in ongoing decision-making processes. Different tests and procedures apply to both categories. For absolute exceptions, there is a two-step test and for the relative exceptions, a three-step test is required. The institution carries the burden of proof—it needs to show how and why the protected interest would be undermined.

Similar categories are also applied to most of the European countries. In France, the issues of foreign affairs, national and international security, and state procedures are exempted from the obligation to disclose information. Additionally, France also has a specific list of documents pertaining to core public power and activities ("activités régaliennes") that are automatically excluded from the system by the very sensitive nature of their content.

Other countries analyzed here also distinguish between absolute and relative exemptions. In the Netherlands, the latter are called qualified exceptions. While in the absolute administration has to apply the law, in case of the qualified the application is subjected to a public interest test and administration has some margin for interpretation. Similar is the case in Germany and Belgium. Belgium includes a third group based on administrative reasons such as an unreasonable request or request for the unfinished or incomplete document. In Croatia, the FOIA Law (Article 15) distinguishes between mandatory and relative exemptions that undergo public interest test. Croatia also distinguishes exceptions protected by special laws. In practice, this means that defense or monetary issues of state have to be designed as classified information according to Law on Data Secrecy. In general terms, in Eastern European countries, the information that is not classified enters into the category of relative exception and thus public interest test is used for evaluating whether or not requested document should be disclosed. This is the case of the Czech Republic, Romania, Slovenia, and Serbia. In Serbia, the rule is that the burden of proof is on the person who is opposing disclosure ("reverse FOIA").

4.3 The "No Response" Approach or the "Glomar" Doctrine

Relating to some exempt information, a public authority may refuse to confirm or deny the existence or non-existence of requested information whenever the very fact of their existence or non-existence is itself classified or can jeopardize the secrecy of the information requested.

It is what the American doctrine calls "glomarization" of the response provided upon a request under FOIA. It all started when *Glomar Explorer*, a large salvage ship built by the CIA for its covert "Project Jennifer"—an

attempted salvaging of a sunken Soviet nuclear submarine—was about to be the subject of an article in the *Los Angeles Times*; aware of its imminent publication, CIA sought to stop it, but journalist Harriet Ann Phillippi requested that pursuant to FOIA, the CIA provide disclosure of both the Glomar project and its attempts to censor the story. CIA chose to "neither confirm nor deny" both the project's existence and its attempts to keep the story unpublished. Applicant's case was rejected (Case: *Phillippi v. CIA* 1976),[5] though when the Ford administration was replaced by the Carter administration in 1976, the government position on the particular case was softened and both of Phillippi's claims were confirmed. The "Glomar response" precedent still stood, and has since had bearing in FOIA cases such as in the recent *American Civil Liberties Union v. Department of Defense 2005*,[6] wherein a federal judge rejected the Department of Defense and CIA's use of the Glomar response in refusing to release documents and photos depicting abuse at Abu Ghraib prison in Baghdad.

It is important to specify the subtle but very significant distinction between the "record exclusion" and "glomarization" concepts. That latter term refers to the situation in which an agency expressly *refuses to confirm or deny the existence* of records responsive to a request, while the application of one of the three record exclusions, on the other hand, results in a response to the requester stating that *no records* responsive to his request exist, thus stating that *no record exists*. Providing *no records* responses does not shield the agency from either administrative or judicial review of its action.

The "Glomar" response is not an exclusively American feature; it is permitted also by the 2001 Regulation on access to documents in the EU, which in Article 9 Section 4 provides that "an institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4". Implicitly, this provision allows the institution refusing access to sensitive documents to respond in such a manner that would neither deny nor confirm the existence of the document sought after.

In France, there is no formal ground for public authorities to confirm or deny the existence of a document if this mere confirmation would jeopardize the secrecy of the information requested. In practice, the non-existence of a document as a ground to deny access is relied upon by the Commission

[5] 546 F.2d 1009, 1013 (D.C. Cir. 1976).
[6] 351 F. Supp. 2d 265 (S.D.N.Y. 2005).

d'accès aux documents administratifs (CADA) in ca. 10% of its opinions that conclude to the rejection of an FOI request. Usually, the CADA relies on the good faith of the authority as far as the existence of the document is concerned.[7] In Serbia, FOIA as well as Secret Data Act (SDA) do not allow for Glomar doctrine and thus public authority has to confirm or deny the (non)existence of requested document or information. However, the real practice of Serbian institutions is quite the opposite. In the Czech Republic and Belgium, the administration is not obliged to disclose a document that does not exist. This provision exists also in Germany. In Germany, information exists if it is actually and permanently available, which is determined solely by the fact that the bounded authority can always access the information and has the right to dispense the information.

4.4 Disclosure of Non-Exempted Portion of a Document/ Partial Disclosure

Simply the existence of some exempt information in a document should not impede the applicant to access the other information from the document, information that is not exempted. In all jurisdictions analyzed here, the principle is that disclosable information contained in a document requested under FOIA should be extracted and released to the applicant even though some other parts of the document or other information within it are exempt from disclosure.

Thus, in the EU, the provisions of Article 4 Section 6 of the 2001 Regulation—"if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released"—have been issued in order to put an end (at least theoretically) to the practice of refusing to partially release documents which contain secret information only to a limited extent, practice sanctioned by the Court of First Instance in several cases. Significant progress was also made due to the European Ombudsman who strengthened this approach by requiring institutions to assess whether they could grant the complainant partial access to internal documents pursuant to Article 4(6) of Regulation No. 1049/2001 with failure to do so amounting to maladministration.[8]

[7] See Marique Y. and Slautsky E., Freedom of Information in France: Law and Practice (2018) in this volume.

[8] European Ombudsman Case: 1861/2009/(JF)AN, February 15, 2011; Case: 1403/2012/CK, August 28, 2013.

This trend is also reflected in the Czech, Dutch, Italian, and Hungarian legal procedures that prime the partial disclosure over the refusal always when some meaningful information is left after the non-disclosable data are blanked in the document supplied. In all countries, the total rejections must be duly justified. In the Czech Republic, the administration also has to inform the requesting party why the document is disclosed only partially. Similarly, Belgium, Romania, and Germany use partial disclosure over the denial. The Italian legal framework also gives the option of postponement over total rejection. In Slovenia, the aim is to disclose documents, at least partially balancing the principle of free access with the protected exceptions. For example, the section 7 of the FOIA reads, "If a document or a part of a document contains only a part of the information, which may be excluded from the document without jeopardising its confidentiality, an authorised person of the body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the document to the applicant."[9] The data on partially granted requests reveal wide practice. In Germany, the number grows steadily; in Slovenia up to 15% of applications are partially granted every year, that is, 872 out of 6,071 first instance decisions in 2014, and 103 out of 309 appeal decisions in 2015.[10]

Although in theory the partial disclosure should prevail, in practice the tendency to reject applications for documents partially exempted could be seen in some jurisdictions analyzed here. For example, although **Croatia** has provisions that allow for the partial disclosure of documents, provided that the information that is confidential is blanked, in practice the data show the opposite. Public authorities tend to restrict access to the whole document, disregarding the possibility of partial disclosure or they fail to conduct a public test properly. The reports show that between 2013 and 2016 partial access was granted only in over 2% of cases.[11]

4.5 Protection of Official Secrets

The concept of *secrecy* is understood to mean, first, a *prohibition* for authorities and the public officials on disclosing information and, second, *a restriction on the right of the public* to obtain an official document.

[9] See Kovač P., Slovenia on the Path to Proactive Transparency (2018) in this volume.
[10] Ibidem.
[11] See Musa A., Croatia: The Transparency Landscape (2018) in this volume.

Furthermore, secrecy also means that information may not be made available to *other authorities in cases other* than those stated in the law. Although there are special rules limiting secrecy between authorities (or operational branches within an authority), to a certain extent secrecy still applies within an authority. Secrecy also means that information may not be used outside the activity where it is subject to secrecy (e.g. for stock exchange speculation), but it does not prevent information from being used by the authority in order to perform its own functions.

As opposed to FOIA, there is typically another piece of legislation that counterbalances the principle of freedom of information and poses many threats to its effectiveness. Most of the jurisdictions analyzed here have adopted Official Secrets Acts with the sole purpose of protecting information within the narrow circle of government top officials. In support of such legislation, it has been argued that "any state which upholds its responsibilities to its citizens requires some secrecy laws in order to maintain its capacity to protect its citizens" (White Paper preceding the British 1989 Official Secrets Act[12]).

Usually, this exemption is regulated briefly under FOIA and extensively in Official Secrets Act. The principal point of impact between FOIA and Official Secrets Act concerns the exemption of information whose disclosure is capable of constituting an offense under the Official Secrets Act.

Regarding *Secrecy Act*, a very important aspect is its relation with the *FOIA*. The importance of putting the freedom of information regime in the first place was put bluntly by the Hungarian Constitutional Court's Decision 60/1994: "Laws restricting freedom of information should also be interpreted restrictively, because freedom of information, the openness of exercising public power, transparency and control of the activities of the state and executive power are prerequisites for the right to criticize, the freedom of criticism, the freedom of expression."

At the EU level, a similar debate has arisen in connection with the conflicting scope of the inner provisions of the Regulation 1049/2001 about access to documents. In an independent study focused on the implementation of the Regulation,[13] the most serious problem was considered the manner in which each institution applies the article on exceptions (Article 4) to the citizen's

[12] Commented at http://www.cfoi.org.uk/osareform.html.

[13] Ferguson J., Improving Citizens' Access to Documents: European Citizen Action Service's Recommendations to the European Commission and Other Institutions (2003), available at www.ecas.org.

access to documents. Specifically, in many occasions Article 4 is not being applied in connection with Article 2, which enshrines the *right* to access information, meaning that in many cases Article 4 is treated as a *rule* rather than as an *exception* to the rule. The institutions use Article 4 as a protecting tool against disclosure, almost never applying the "public interest test" in determining whether "there is an overriding public interest in disclosure". Article 4 of Regulation 1049 does not even specify what a public interest test is or how such a test should be applied or performed; therefore, a part of the problem is the lack of procedures or standards in place to assist those working in the institutions to perform public interest tests, resulting in personal interpretations and inconsistency in performance in different institutions. The conclusion of the study was that the Commission should propose to revise Article 4 and allow for guidelines to be developed by each institution, including specific procedures or a concrete framework that those applying public interest tests can use to perform such tests accurately and consistently.

The 2001 Regulation on access to documents in the EU has defined in Article 9 "sensitive documents" as being documents originating from the institutions or the agencies established by them, from the MSs, third countries, or international organizations, classified as "très secret/top secret", "secret", or "confidential" in accordance with the rules of the institution concerned, which protect essential interests of the EU or of one or more of its MSs in the areas covered by Article 4(1)(a), notably public security, defense, and military matters. Access to these documents can still be granted, but only under the procedures laid down in Articles 7 and 8 and shall be handled only by those persons who have right to access those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register. Sensitive documents shall be recorded in the register or released only with the consent of the originator. An institution, which decides to refuse access to a sensitive document, shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

The exception seems to be easily adapted by Central and Eastern European countries, as a heritage of the former communist regimes. All these jurisdictions have special laws on secret information or "classified" information, which make the FOIAs less efficient. In Romania, there is a set of special laws dedicated to "secret information". First, we have the law on classified information No. 182/2002. The responsibility for applying measures of protecting the information stipulated within Paragraph (1) rests upon the public persons and authorities holding the mentioned type

of information, as well as upon the state institutions entrusted by law to ensure the security of information. Similarly, the Czech Republic, Slovenia, Croatia, Serbia, and Hungary have their specific laws on secrecy and "classified" information that limit or provide an additional absolute exception to the FOIA laws. For example, in Slovenia the classified information is regulated according to the Classified Information Act, and in the Croatian case it is the Law on Data Secrecy, which defines authorities and the type of information that can be classified, as well as the levels of classification, and the procedure of declassification.

Until recently, this option was used frequently as a reason for rejection to disclose information. In Serbia, professionals complain about the frequent use of this formula to deny access to documents without any complementary reason, nor evidence. In many cases, public authorities do not even provide evidence that documents or information are actually properly classified as confidential, in accordance with the SDA. This leads experts to conclude that public administration uses SDA for covering up corruption or other illegalities. Fortunately, in other cases, public authorities are ceasing to use this exception so often mainly due to the better enforcement of data secrecy legislation or because they use different categories instead (personal data protection). This is the case of Croatia where the rejections on basis of secrecy dropped to only 3% of cases between 2013 and 2015.[14] In order to prevent the abuse of secrecy for criminal purposes, it applies in all countries (also in Serbia) that the information favoring or hiding the breaking of the law by a public authority or institution cannot be included in the category of classified information and constitute information of public interest. The chapters of this volume present several instructive examples of these cases.

Nevertheless, this exemption can be found also in Western democracies, which have let a broad opportunity for the legislator to declare by the way of special laws some documents or information as "secret" information. Thus, in France, documents regarding secrets protected by the law are excluded from disclosure. The Commission of Access to Administrative Documents considers this exemption as typically making up 1–3% of the total reject decisions.[15] Italy also excludes documents that have a state secrets *status*. Those are regulated by Law No. 124 of August 3, 2007 (also regulates a secret service) that covers documents related to military defense

[14] See Musa A., Croatia: The Transparency Landscape (2018) in this book.
[15] CADA Report 2004, p.16, regarding the period 2001–2004.

or other documents whose disclosure may harm the independence and integrity of the state and its institutions. The prime minister is the only authority entitled to declare the status of a state secret and to remove the requirement of secrecy. The secret is temporary (maximum 30 years).

On the other hand, the Netherlands and Belgium do not have a specific provision on national secrecies or secret information. However, Belgium has provision on how to deal with information that could be considered secret. As such, the Belgian administrative authority can reject a request for access to an administrative document if the interest of disclosure endangers the professional secrecy established by law. Regarding the issue of secrecy, Germany follows the principle of "as much information as possible, as much secrecy as necessary". Section 3 IFG states that the entitlement to access to information shall not apply where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the material and organizational protection of classified information, or where the information is subject to professional or special official secrecy.

4.6 International Relations/Foreign Policy

Another important matter worth protecting under the freedom of information regime is the international relations of the state or, in other words, foreign policy of the state. The exception relating to the protection of international relations and the confidentiality in dealings between governments is intended to ensure the free flow of ideas so that negotiating capabilities of governments are not impaired. The reasoning behind this is that governments need to have the possibility to express themselves freely in bi-lateral or multi-lateral decision-making processes, without being afraid that the internal mechanisms of reaching an agreement are disclosed before a final solution is reached.

At the EU level, the courts and the European Ombudsman hold a similar opinion on the risk of jeopardizing international relations, stating that it must be reasonably foreseeable and not purely hypothetical[16] and that the institution must show that the document requested specifically and actually undermines the interest protected by the exception.[17] However, both

[16] CJEU, July 21, 2011 Case C-506/08 P, *Sweden v My Travel and Commission*.

[17] CJEU, November 28, 2013, Case C-576/12 P, *Ivan Jurasinovic v Council of the European Union*, paragraph 45.

courts and the European Ombudsman showed sensitivity to these claims, acknowledging the discretion of EU bodies in this area. On the other hand, the exception on international relations does not apply simply because the subject matter of a document "concerns" international relations, unless it is showed that, based on the content of a document, its disclosure would undermine the public interest as regards international relations.[18]

Article 4 of the 2001 Regulation only mentions international relations, without further details. Article 5 of the same act, on the other hand, focuses in detail on how MSs should handle documents originating from a European institution, giving MSs two options: (a) to consult with the institution concerned in order to take a decision that does not jeopardize the attainment of the objectives of the 2001 Regulation, or (b) to refer the request to the institution for decision.

The Sison case[19] was the first case where the court had to examine the mandatory exception relating to public security and international relations. The case also made reference to sensitive documents as described in Article 9 of Regulation No. 1049/2001, which should be subject to special treatment. In Sison, the applicant was refused access relating to three successive council decisions implementing a regulation on specific restricting measures directed against persons with a view to combating terrorism. The applicant's name had been included in all three council decisions and his funds and financial assets were frozen. Mr. Sison challenged the legality of the council's decision not to grant him access to the documents that had led the council to adopt Decision 2002/848 as well as the council's refusal to disclose the identity of the states that had provided the council with certain documents in that connection. The applicant argued that the council had never conducted a concrete and individual examination of the documents requested, and therefore the applicant was not able to determine and evaluate the reasons put forward by the council. The council in its turn argued that the existence of a specific procedure dealing with the request for sensitive documents shows that concrete examination had taken place.[20] The court agreed with the council and adopted a very conservative view: the power to review the legality of the institution's decision

[18] European Ombudsman Case: 119/2015/PHP, November 04, 2015; OI/10/2014/RA, January 06, 2015; Case: 689/2014/JAS, September 02, 2015.

[19] ECJ, April 26, 2005, Joined cases T-110/03, T-150/03, and T-405/03, *Jose Maria Sison v Council of the European Union*.

[20] See M. Costa, *The Accountability Gap in the EU: Mind the Gap* (Routledge: 2016), p. 40.

pursuant to Article 4(1)(a) is "limited to verifying whether the procedural rules and the duty to state reason have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers".[21]

Other more recent cases on this matter may throw more light regarding this exception.[22] The *Evropaïki Dynamiki* ruling of December 6, 2012 shows how the commission wrongfully applied this exception. In a tendering procedure giving rise to a request to provide commercial quotations, it claimed that producing these documents relating to a wide range of IT systems would be likely to reveal their "functioning and weaknesses". The General Court held the view that nothing could establish "how access to the documents requested could specifically and actually undermine that objective in a way that is reasonably foreseeable and not purely hypothetical".[23] The order in the Steinberg[24] case is more informative. A refusal to grant access relating to the provision of grants in Palestine on the basis of European program was opposed for fear that detailed information about the relevant projects featuring in the documents might be used to exert pressure on the relevant persons, even to make threats to their physical or moral integrity. Security might then be breached due to the "high" risk hanging over the parties involved. The order of the General Court endorsed this analysis.

France exempts from disclosure administrative documents that might harm France's national interests in foreign policy such as diplomatic mail, inquiries into prisoners, but also relationships with European Commission, MSs, and other international organizations. From the data recorded, the number of requests of this kind of information by CADA had been extremely low, under 1%. Similar exemption is present also in the Hungarian law—"international relations and relations with international organisations", with a specification that "public access to data of public interest may further be restricted by European Union legislation with a view to important financial or economic interests of the European Union, including monetary, budgetary and fiscal interests" (Article19 of the 1992 Act).

In Germany, the law excludes the access to information when disclosure may have a detrimental effect on foreign politics (Section 3 No. 1 IFG). The mere possibility of detrimental effects suffices without the need to

[21] See (note 112), Para 47.
[22] Labayle (note 8) p. 16.
[23] CJEU, December 6, 2012, case T-167/10, *Evropaïki Dynamiki et al. v Commission*.
[24] CJEU, November 27, 2012, case T-17/10, *Steinberg v Commission*.

provide evidence of such damage, nor is it related to the content of the documents. This exception seeks to protect international negotiations and preserve diplomatic relations with states and intergovernmental and supranational organizations.[25] The German federal government has a margin of discretion in this regard, which is only revisable by the courts. Similar provisions are present in Austria and Belgium (and the Flemish community). In Croatia, Serbia, or the Czech Republic, such information is defined as "classified". Also, in Romania, the foreign policy and diplomatic relations are one of the seven categories of information that are exempted from free access of the citizens according to Article 12 of Law No. 544/200. In Italy, the documents whose disclosure might harm the state's independence in relation to other states are declared a state secret by prime minister (Law No. 124 of August 3, 2007).

There are, however, other countries that have a different approach to protection of information and documents related to foreign affairs and international policy. For instance, Slovene FOIA does not provide for absolute exceptions in the field of defense or international relations. In the Netherlands, the external relations with other states or international organizations are one of the grounds for exemption and thus subjected to public interest test (Article 10(2) WOB).

4.7 Protection of Personal Information and Privacy

This is an exception that is common to all jurisdictions analyzed here, and it seems to be the most used one in order to refuse access. For example, in the French case, it constitutes almost 50% of all cases for 2001–2004. The legislators worldwide have been faced with two options regarding the relation between freedom of information and protection of personal privacy. First one is to regulate these two matters separately, so they can receive the proper attention. It was argued that "because the complexity of the subject matter, incorporating provisions relating to personal data protection into freedom of information bill could overload the process of legislative approval".[26] In this case, however, the task is making sure that every piece of legislation is taking into account a possible interpretation of its provisions in a manner

[25] See BT-Drs. 15/4493, p. 9.

[26] Sanchez, A. C., "The right of access to information and public scrutiny: transparency as a democratic control instrument", in OECD, *Public sector transparency and accountability—making it happen* (2002), pp.163–167.

that obstructs the other one. In some jurisdictions (e.g. in Romania), the right of access to public information is being refused in some cases on the basis of personal data protection, even when the document contains the public information requested and it is severable from the protected personal data; in other words, the misinterpretation of the Personal Data Protection Law can lead to refusal of public information access, considering the whole document as exempted from disclosure, not only the personal data that are enclosed in it. The second option—regulating the two matters together, in a single law—has on its side the argument that the two rights—freedom of information and personal data protection—should be synchronized, and a single piece of legislation can do the job better than two.

In some instances, the disclosure of information might involve no invasion of privacy because, fundamentally, the information is of such a nature that no expectation of privacy exists. For example, public functionaries or politicians generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees or regarding the parts of their successful employment applications that show their qualifications for their positions.

All of the jurisdictions analyzed here have special regulations protecting personal data. EU members and candidate countries have implemented the EU Council Directive 95/46 on data protection.

The provisions of FOIAs regarding exemption of personal data from disclosure as public information are still useful, because they deal mostly with the issue of disclosing personal data to third parties, while Data Protection Acts deal mainly with the access of individuals to personal data stored by public entities, the accuracy of such data, and the means to control the use of it. In the most advanced jurisdictions, there is an information commissioner established after the Ombudsman model, which is charged with control over manipulation of personal data (data controllers).

The question that arises in the context of "personal data" is if the term includes only recorded data or also unrecorded data (e.g. an intention to participate in a competition for a public job that the clerk finds out about when the individual asks about conditions for registering). In my opinion, this information is not public information until it is registered in some way, because only then the real intention of the person is exteriorized.

Regarding personal information, some jurisdictions (Romania) regulate the exemption as an absolute one, meaning that no personal information whatsoever can be disclosed. Other jurisdictions though, give public authorities a chance to perform a public interest test. Thus, the test will

determine if disclosure will be detrimental to the person interested in withholding or there is a private interest to protect (e.g. health information could meet the requirement). In principle, personal information can be disclosed if it is already in the public domain. Nevertheless, in this case, the disclosure can also be offensive, if not many people access that public domain, and disclosing the information still has the capability to adversely affect the life of the person involved.

In the **Czech** Republic, the inviolability of the person and of private life is guaranteed in the Charter of Fundamental Rights and Freedoms and Czech Civil Code.[27] Regarding data protection, Article 10(1) provides that everyone has the right to be protected from any unauthorized intrusion into his or her private and family life, or from unauthorized gathering, or misuse of his or her personal data. Yet it is important to note that there are no absolute exemptions as generally some information is disclosed, while strictly personal data are protected. In **Romania**, public institutions are prohibited to disclose or transfer data that would make a person identifiable unless with the consent of the person or in case of civil servants when holding a public position. Public institutions are prohibited to process personal data regarding racial or ethnic origin, and political, religious, philosophical, and trade union affiliation. This information is excluded from free access.

In **France**, the 1978 laws protect the privacy of a person by restricting access to private information such as medical files or personal files whose disclosure would harm privacy. The decision to exempt a document is done upon a test regarding the potential harm that disclosure might produce to the person involved. Finally, as a complementary regulation, the Civil Code states that everyone has the right to respect for his or her private life and the judge has the power to order a wide range of relief measures in order to protect the privacy of a person (Article 9).

In **Hungary**, personal data are protected although the data on civil servants are treated differently as it is expected that some of their personal data might become public. Yet the disclosure is only justified in connection with public services and to an extent that is proportionate. **Serbia**, in line with article 9 FOIA, limits access to information of public importance if it would thereby expose to risk the life, health, safety or another vital interest of a person, unless the person gives consent or the information relates to public official or politicians' duties.

[27] Act No. 89/2012 Coll., the Civil Code.

In the **Czech Republic, Slovenia, and Serbia,** the line that distinguishes between private data and public importance is blurred especially in cases of public job competitions or public contracts. It opens opportunities for misuse by the administration similar to that reported in the case of Romania. Invoking personal data protection might be used as a smoke-screen or substitutive reason to avoid document disclosure. In **Croatia**, personal data protection constitutes the second most frequent exemption to access to information, with more than 100 refusals annually (one-third of all cases in 2015 and 2016).[28] However, it has also been found to be unjustified in 75% of all cases in 2016. This is because public authorities use this method to refuse to disclose information on salaries of public officials or contracts for consultancy services, which are information that are clearly of public interest.

Also in **Slovenia,** personal privacy is the most frequent reason for refusal to disclose information. Slovenia regulates the personal information and privacy matters separately with Personal Data Protection Act and FOIA.[29] In order to effectively balance the personal privacy and protect the right to information, in 2003 Slovenia established the IC as independent, non-governmental institution, which resolves the collision of the RTI and (personal) data protection.

In **Germany,** rules that protect personal data can be found in Sections 5 and 6 IFG and protect personal information concerning the personal or material circumstances that could lead to the identification of an individual. Names, titles, university degrees, designations of professions and functions, official addresses, and official telecommunications numbers of desk officers are accessible where they are an expression and consequence of official activities or public interest. Like in Slovenia, in **Italy**, and in **the Netherlands,** sensitive data are regulated by a separate piece of legislation or Personal Data Protection Act; in **Italy**, concretely by Article 4.1, let. d) of the *Personal Data Protection Code* (Legislative Decree June 30, 2003, No. 196). The special protection of these data is reflected also by the stricter conditions for access (Article 24.7 of Law No. 241). In the **Netherlands**, personal data are not disclosed unless it is apparent that the disclosure of the personal data does not infringe privacy rights (Article 10(1)(d) WOB). In **Belgium**, if the interest of disclosure endangers private life, this constitutes a reason for absolute rejection.

[28] See Musa A., Croatia: The Transparency Landscape (2018) in this volume.

[29] PDPA, *Zakon o varstvu osebnih podatkov, ZVOP-1*, Official Gazette of RS, No. 86/04, based on the Act as of 1999) and amendments up to 2007.

4.8 Formulation of Public Policy: Decision-Making Processes

This exception, present in all jurisdictions, can be divided in fact in three distinct components: (a) advice given to deciding entities or officials, (b) deliberations of public authorities, and (c) internal rules and regulations of public authorities regarding their personnel and functioning. The exemption reflects a "long-standing constitutional practice that advice to government should not be disclosed".[30] The idea behind this is that disclosed information would prejudice the collective responsibility of the ministers or other public officials and would inhibit free and frank provision of advice or the free deliberations. There are three purposes of this exemption: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

In **France,** this exception relates explicitly to the deliberation by government and executive bodies when these are considered acting as political organs and not as administrative body.[31] In this case, the government minutes, opinions to interministerial committees and meetings, and any documents requested by the French president, the prime minister, or ministers to decide on government policy are covered by this exception. Furthermore, relations between different public authorities are not open to access, like documents of the State Audit Office (*Cour des comptes*), recommendations issued by the *Conseil d'État*, and complaints to the Ombudsman of the republic and others.

Similarly, in **Romania**, the information regarding the authorities' debates belongs to the categories of classified information and is excluded from public's access. In the **Czech Republic**, the law states that public entities can restrict providing information if it relates exclusively to internal instructions and personnel rules of a public authority (Section 11 of the 1999 Act). Likewise, **Italian** legislation (Article 24.1 of Law No. 241/1990) excludes the right of access in relation to preparatory documents relating to rule-making and planning procedures. In **Belgium,** administrative authority may reject disclosure of incomplete documents whose disclosure may lead to misunderstandings; an advice or an opinion

[30] Macdonald, J. and Jones, C. (eds), *The Law of Freedom of Information* (Oxford University Press: 2003), p. 283.

[31] http://www.cada.fr/le-secret-des-deliberations-du-gouvernement-et,6099.html.

which is communicated to the authority on a voluntary and confidential basis. For internal administrative consultation and decision-making procedure, Dutch legal framework uses special restrictions to ensure free and independent discussion (Article 11 WOB). This concerns, for example, official recommendations with proposals for administrative decision-making, internal criteria for evaluating decisions, preparatory documents for official meetings, or personal public opinion on proposals unless it cannot reveal any particular individual.

In **Germany,** the law is even more restrictive to access to the decision-making process. Section 3 No. 1 IFG excludes from access information when disclosure may have a detrimental effect on the formulation of public policy. It suffices that detrimental effects are merely possible without the need to provide evidence of such damage. Ongoing negotiations are protected as long as they are not concluded, including European and international negotiations and the (whole process, object, and result of) consultations between authorities. By consultations, the law understands (inter- and intra-administrative) consultations between executive and the legislature, as well as consultations between the administration and other establishments or labor unions.[32] However, conducting a consultation as a closed session or labeling it as confidential does not suffice for confidentiality status.[33]

Likewise, **Hungary** is very restrictive in granting access to data generated during the decision-making. The disclosure might be denied for ten years or be only accessed with the permission of the organ that generated them. The tribunals and experts have criticized this generic formulation as it gives public bodies too much leeway to deny access to data. Furthermore, the recent political developments in Hungary reinforced even more the enclosure of information regarding government meetings and sessions.[34]

In **Croatia**, the 2015 amendment to the RTI included two special exemptions: one concerning information that is not finalized (drafts or parts of a future document), and the other concerning the exchange of views for the purpose of deliberation if there is a reasonable doubt that the disclosure would interfere with any of the principles exposed above. What is more, these exceptions are not time limited, so the access may be

[32] See BT-Drs. 15/4493, p. 10 f.

[33] See BfDI (2016).

[34] The practical method for withholding all documentation that entered the meeting was by marking every single proposal to be discussed as “Strictly Confidential”, “Confidential”, or “Not Public”.

restricted further on. According to the public authorities' reports, these exceptions have constituted the basis for the refusal in 3–5% of cases, ranging from 38 cases in 2014 to 10 in 2016. The decisions led to 14 appeals in these years.

At the EU level, Article 4(3) protects institutions' internal deliberations and workings and the decision-making process or opinions used in deliberation, if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. This article was object of a court ruling (*Council v. Access Info Europe* case)[35] where council opposed a request of access to legislative document by an NGO. The court ruled that the general interest in obtaining access to council documents took precedence. The European Ombudsman has often criticized that the EU bodies frequently withhold the documents and that they should be more proactive in disclosing this information once the decision-making process is over.[36]

4.9 Protection of Business Secret

For some people in countries from Central and Eastern Europe, the market economy and the restitution of private property are strong ideological beliefs, contrasting with the policies of previous regimes characterized by hostility toward the concept of private property. To them, commercial or trade secrets are worthy of protection. This observation, put together with the public authorities' reluctance to disclose information and with public authorities' fear of being sued by persons whose interests are affected, results in a presumption that *any* information relating to a particular company is a protected commercial secret.[37]

In all Central European countries, commercial (business, trade) confidentiality is considered a central piece in the freedom of information regime and it is usually regulated by information laws, company laws, commerce law, or as in Hungary, the principles of civil law. An article dealing with access to information in environmental matters identified certain common features of the trade secret regime in the countries from Central

[35] CJEU, October 17, 2013, Case C-280/11 P, *Council of the European Union v Access Info Europe*.

[36] European Ombudsman Case: 2186/2012/FOR, June16, 2015; Case: OI/8/2015/JAS, July 12, 2016.

[37] Resources for the Future, 2001.

and Eastern Europe: (a) typically, all private companies are bound to submit information to governmental agencies as required by law, whether they consider this information confidential or not; (b) when submitting the information, companies can claim parts of it as confidential; following this claim, the receiving authority examines the company's arguments for classification and either classifies the information or rejects the request for classification; (c) in several countries there is a presumption in favor of openness, so a decision must be made using a balancing test between the commercial interest in withholding and the public interest in disclosure (Belgium). Thus, even if information is regarded as confidential by a business entity, the authority can still release it on grounds of public interest. For instance, the Hungarian Data Protection Commissioner, in a 1996 statement, argued that trade secret exemption cannot be applied to business enterprises that breach the law.[38]

In the EU, the 2001 Regulation states in Article 4, dedicated to exemptions, that institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property. Especially in cases related to mergers or tender procedures, this article led to many problems as the institutions were rather reticent to disclose information. Both Ombudsman and court rulings insist that the institutions provide specific examination on a case-by-case basis to duly establish whether the disclosure would undermine the commercial interest of the company.

The exemption is regulated in the **Croatian, Romanian,** and **Czech** law according to which the obligation to provide information pursuant to freedom of information applications ceases when information is marked as a business secret. In **Hungary**, the FOIA refers to the relevant provisions of the Civil Code, which regulates access to business secrets. In **Romania**, according to Article 12 of Law No. 544/2001, information is exempted from free access information regarding commercial or financial activities, if their publicity infringes the intellectual or industrial property rights and the principle of fair competition.

Authors and experts reported that in Romania, Croatia, Hungary, and the Czech Republic, in the matter of public procurement and contracting, the administration tends to favor companies' interests, defining many contractual relations as commercial secrets. This is, for example, clearly showed in the case of **Croatia** (in this volume) where the large number of refusals on the

[38] Ibidem.

grounds of commercial secret is used as an exemption of last resort, trying to prevent the disclosure, including salaries of board members in public companies or leases with private firms. According to the public authorities' reports, the commercial secret was a reason for refusal in 5–8% of cases between 2013 and 2016.[39] Likewise, in Romania, numerous lawsuits uncovered that public administration had tendency to raise concerns with business secrets and fair competition when refusing to disclose procurement contracts, privatization contracts, concession contract, or contracts for services externalized to private companies. For example, in 2009 the tribunal had to force Metrorex (Bucharest metro company) to disclose a copy of the publicity contract concluded with a private company for the spaces within the metro stations.[40]

Although, in Eastern Europe, in **Slovenia** neither business secrecy nor internal operations are usually successfully established grounds for a refusal, despite being frequently so argued by authorities or third parties. Important exception to business secrecy and key criteria of disclosure is public expenditure, based on the FOIA amendment of 2005. Thus, the RTI represents some kind of control over the accountability of functionaries and officials regarding their lawful and appropriate use of public funds.

In **Italy**, the extent of protection of commercial and business secrets is left to the government to provide, via a regulation, other cases of exclusion in order to protect financial, commercial, or industrial interests of individual, entities, and groups (Law No. 241). Government can delegate this task to the administrative authorities and to the other public and private bodies bounded by the laws on access. In the **Netherlands**, the information that relates to companies and manufacturing processes is one of the four grounds contained in Article 10(1) WOB for exception that is absolute. Nevertheless, accordingly the legal precedents show that this exception was interpreted rather restrictively limited only to "the technical management, production process or the marketing of the products". In **Belgium**, on the other hand, the same information is treated as relative and thus the public authority has a margin of discretion in determining whether public interest prevails.

The **German** federal government has a considerable interest in protecting intellectual property and business or trade secrets.[41] The law stipulates that no entitlement to access to information shall apply where such access compromises the protection of intellectual property (Section 6, sentence 1 IFG).

[39] See Musa A., Croatia: The Transparency Landscape (2018) in this volume.

[40] See Radu B. and Dragoș D., Freedom of Information in Romania—Legal and Empirical Insights (2018) in this volume.

[41] See BT-Drs. 15/4493, p. 11.

Trademark rights, patent rights, utility model rights, and design rights are publicly available.[42] Access to business or trade secrets may only be granted on the data subject's consent (Section 6, sentence 2 IFG). The access to such information is justified as the disclosure is likely to give currently exclusive technical or business knowledge to competitors and therefore negatively affect the holder's competitive position.[43]

In **France,** the law exempts administrative documents whose delivery would be harmful to trade and manufacturing secret, including production process, financial information, and commercial strategies of not only private but also public companies.[44] The decision to consider the documents as exempted under this provision is made upon conducting a test regarding the potential harm that disclosure might produce to the person involved and, above all, to the competitive environment. The CADA and the administrative courts interpret this exemption in an extensive way as the industrial and commercial secrecy applies to any legal person, not-for-profit organizations, and even monopolies where in effect the competition is absent. As in Germany, the information on the commercial strategies of former state monopolies is protected. The Commission of Access to Documents' Reports show that documents exempted from disclosure as commercial or industrial information made up approximately 5% between 2001 and 2004 and grew to 10–15% of the cases of rejections of FOI requests since 2005.

5 Third-Party Consent

This exemption is in a way similar to the previous one, but has still some distinct features. In this case, the exemption tries to protect information the disclosure of which could reasonably be expected to prejudice a third party's competitive position, or interfere with third party's contractual negotiations, or result in material financial loss or gain of a third party. It does not cover though information provided by foreign governments to the government from the applicant's country, because that matter is dealt with by "foreign policy" or "foreign (international) relations" exemption.

After looking at the relevant regulations in a comparative manner, it seems that the best approach is to regulate a method of balancing the interest in withholding and the one in disclosing the information, by

[42] See Mueller Ch. E., Engewald B., and Herr M., Freedom of Information in Germany (2018) in this volume.

[43] See BVerwG, Urt. v. 28.5.2009 – 7 C 18/08, Juris No. 13.

[44] See Marique Y. and Slautsky E., Freedom of Information in France: Law and Practice (2018) in this volume.

means of a public interest test, instead of regulating an absolute exemption. Today's public administration is characterized by public-private partnerships and privatization and more and more public matters are dealt with in the private sector, so it is not wise to encourage secrecy between public officials and private companies. A party that receives information from a public authority knowing that it was provided to the public authority in confidence is obliged to maintain the same regime of the information, so the information will be treated accordingly.

The likelihood of confusing this exemption with the "trade secret" one comes from the fact that in practice, the most frequent case when this exemption is raised is as a result of a contract; nevertheless, there are a lot of other cases where the exemption is invoked: as a result of relations between doctors and patients, employers and employees, banks and customers, or, in the EU, between the Union and its MSs.

The third-party consent in the EU (Article 4(4)) is listed as a possible ground for refusal. This requirement to consult the third party often leads to excessive delays in response time to information request. Trying to remediate this, the European Ombudsman provided practice to deal with third-party consent procedure. Ombudsman suggested that EU institutions should set a reasonable deadline and that only third-party reservations are not sufficient ground for a disclosure refusal.[45] Another controversial issue with third-party consent is related to transparency of Transatlantic Trade Investment Partnership (TTIP). Here, the European Ombudsman issued important recommendations, like the United States should be informed of the requisite condition that common negotiation text should publicly be available before the TTIP agreement is finalized if it is not properly justified.[46] Third-party consent is frequently invoked when limiting the access to documents originating in an MS as the MS can request that the institution should not disclose a document without its prior consent. The MS uses a kind of right to veto, which leads to several disputes (case *Kingdom of Sweden v Commission*[47]). The court held that the MS has to provide a sufficient reason and the EU institution must ensure that such a reason exists.

Looking at specific national regulations, the 1978 law in **France** provides that access to documents can be refused when it targets those documents that are produced under a contract of service provision executed on

[45] European Ombudsman Case: 369/2013/TN, July 28, 2016.
[46] European Ombudsman Case: OI/10/2014/RA, January 06, 2015.
[47] ECJ, December 18, 2007, case C-64/05 P, *Kingdom of Sweden v Commission*.

behalf of one or several specified persons. The FOIA contains a general listing of professional secrets such as dealings between a barrister and his or her clients, data relating to gamete donors, professional secrecy of labor inspectorates, professional secrecy of tax officers acting in tax procedures, and so on.

In the **German** law, a third party must accept limitations on their right to informational self-determination if there is a predominant interest in access to their information[48] and as long as the "inviolable sphere of private life" is not concerned.[49] Access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's interests warranting exclusion of access to the information or where the third party has provided his or her consent, Section 5 (1), sentence 1 IFG. Another type of information that is excluded under the third-party consent is professional secrecy and information that administration obtained in confidence. The latter is done also to protect whistle blowers. As in the French case, German laws provide for a wide range of secrecy: the tax secret, the adoption confidentiality, medical confidentiality, and professional confidentiality of lawyers.[50] **Italian** laws prohibit disclosure of documents of selection procedures, which contain psycho-aptitude information on third parties. Administrative courts favor a strict interpretation of these exclusions.[51]

In the **Czech Republic**, the FOIA states that "the obliged entity will not provide information if it was passed over by a person, to whom the law does not prescribe such obligation unless that person agrees with the disclosure of the information". The law also states that the information that can be provided to the public has to be in direct relation with pursuance of the activities in the contract. Third-party consent in **Croatia** is not a condition for the disclosure of information. However, third-party consent could have weight in the procedure with regard to personal data protection, tax secrets, and commercial or professional secrets. Also, a third party could claim damages before the court that it incurred due to an illegitimate decision.[52] Also, **Belgium** does not have a specific law on secret information; however, it has provision on how to deal with information

[48] See VG Berlin, Urt. v. 7.4.2011 – 2 K 39.10, Juris No. 28; *Schoch (2009b)*, section 5 No. 10.
[49] BT-Drs. 15/4493, p. 13.
[50] See BT-Drs. 15/4493, p. 11.
[51] See, for instance, TAR Campania, Napoli, 7.05.2014, No. 2479.
[52] See Musa A., Croatia: The Transparency Landscape (2018) in this book.

that could be considered secret. As such, the Belgian administrative authority can reject a request for access to an administrative document if the interest of disclosure endangers the professional secrecy established by law. In **Romania,** this exception was frequently invoked together with trade secret in order to concede private companies' contract with administration.

5.1 National Defense and National Security

One of the most important exemptions within the regime of freedom of information is the national defense and national security exemption. The top spot on the scene was acquired by this exemption mostly after the terrorist attacks that started in 2001.[53] Generally, the information pertaining to defense and security needs to be classified first in order to be exempted from disclosure. The 2001 Regulation on access to documents in the EU allows institutions to refuse access to a document where disclosure would undermine the protection of the public interest as regards public security, defense, and military matters.

This is the case in **France** for instance, where Article 6 of the 1978 law as amended in 2000 exempts from disclosure administrative documents (that were previously classified) whose consultation or delivery would be harmful to the national defense secrecy. With increasing threat of terrorism in France, the provision of secrecy tends to increase. As no specific procedure to identify defense secrecy exists, a special commission, "Commission consultative du secret de la défense national", was established to decide whether defense secrecy is justified when invoked in judicial proceedings. Similarly, most of the acts that aim to protect the continuity of institutions are also classified. Adapting to new virtual threats in 2016, an exception protecting the "security of the information systems of administrations" has been added by the French Digital Republic Act (FDRA).[54]

In **Romania, Austria, Serbia,** or **Hungary,** like in most of the countries analyzed in this volume, the information regarding national defense, public security, and order belongs to the category of classified information according to law. Similarly, in **Belgium** and the **Netherlands,** the requested information will not be disclosed if it might damage the security

[53] Christina E. Wells, National Security Information and the Freedom of Information Act, *Administrative Law Review*, Vol. 56, No. 4 (Fall 2004), pp. 1195–1221.

[54] Art. 2, II, 1 FDRA.

of the state (Article 10(1)(b) WOB). This includes, for example, the importance of countering terrorism and guaranteeing military secrets. In the Czech and Hungarian cases, secret services assignments are also included as classified.[55]

In **Germany**, the disclosure of military and other documents that contain security critical interests of Federal Armed Forces (FDA) are excluded from the access to information (Section 3 No. 1 lit b). It suffices that detrimental effects are merely possible without the need to provide evidence of such damage. The justification provided is the protection of democratic order and the existence and security of the federal government and the Länder, including the functionality of the state and its public institutions from external and internal security threats. Covered here are also intelligent services and business secrets that are considered vital to the security interests of the state (viz., Section 24 ff. Security Clearance Check Act[56] (SÜG)). The Bundesregierung has the same margin of discretion as in the case of foreign policy (lit (a)). Like in other countries, the access to information entitlements does not apply where the disclosure would endanger public safety and essential activities of the state.

In the **Italian** case, the military defense is classified as secret and law No. 241 gives the government the power to provide, via regulation, other cases of exclusion in order to protect "public interest" like national security and defense. The determination of most of the limits to the right of access to administrative documents is then left to the discretion of the government. Therefore, the documents excluded from access vary according to the executive regulation of the authority concerned. The **Slovene** FOIA does not provide for absolute exceptions in the field of defense or international relations. In **Croatia**, the defense and national security issues are not prescribed explicitly as an expectation but must be designed as classified information according to Law on Data Secrecy.

5.2 The Economy and Monetary and Financial Issues of the State

The economy and monetary and financial issues of the state are internationally recognized as protected interests and exempted from disclosure in most of the countries. This exemption aims at protecting the currency and public

[55] Section 5 and 8 of Law No. 153/1994 Coll., on intelligence services, in wording of Law No. 118/1995 Coll.

[56] Sicherheitsüberprüfungsgesetz in the version promulgated on April 20, 1994 (BGBl. I p. 867), as most recently amended by Article 2 of the Act of 29. März 2017 (BGBl. I p. 626).

credit ratings (France and Belgium), and financial or foreign exchange policy of the state (Hungary and Croatia), while in other countries it regards the information relating to generally the state's economic and political interests, if this type of information belongs to the categories of classified information, according to the law (Romania and the Czech Republic). The latter general wording is provided also by Article 4 of the 2001 Regulation on access to documents in the EU—"the financial, monetary or economic policy of the Community or a Member State". Some legislations, like the **Hungarian** FOIA (Infotv.), provide that EU legislation can also restring the access to information in order to protect the economic and financial interests of the EU, including monetary, fiscal, and tax policies.[57]

The economy of the state in **France** is classified as exception based on grounds of public interest that need to be protected in the absolute (Article 6 FOIA). This exception was aimed at preventing action that could lead to weakening of French monetary policy, yet this ground is rarely accepted by the CADA, especially after the shift of monetary competencies to the European Central Bank (ECB) and the EU level. Similar trend applies to other European countries in the Eurozone. Likewise, in **Serbia**, a public authority shall not allow an applicant to exercise the right to access information if it would thereby substantially undermine the government's ability to manage the national economic processes or significantly impede the achievement of justified economic interests (Article 9 FOIA).

For **Croatia and the Czech Republic,** the economy and monetary and financial issues of the state are designed as classified information: in Croatia according to Law on Data Secrecy, and in the **Czech Republic** under the Czech Act on the Protection of Classified Information (Act No. 89/2012 Coll). In the **Belgian** case, the federal economic and financial interests form part of the relative exceptions and therefore the administrative authority has some margin of discretion determining which interest prevails.[58] In the **Netherlands**, the economic and financial issues of the state are not qualified as absolute exception and are thus subjected to a public interest test to determine whether to grant an application for information (Article 10(2) WOB).

Generally, what is not considered as excepted information is public spending or budgets of public bodies as these should be all public. For example, in **Croatia,** public spending information is regularly disclosed even if it entails protected information in line with the principle of proportionality

[57] Article 27 paragraph 4 Infotv.

[58] See Keunen S. and Van Garsse S., Access to Information in Belgium (2018) in this volume.

and necessity. Information related to taxation and tax proceedings is a separate chapter. In **Germany**, laws protect information that serves to check taxable persons because if the taxable person has access to certain information that would reduce tax revenue.[59] Also, it excludes data that would distort the competition between companies included in the Act against Restraints of Competition, the Telecommunications Act, or the Energy Industry Act. These impediments to disclosure surrounding the German public budgets and budgeting procedure were criticized.[60] Lastly, **Italy** excludes the right of access to documents related to tax proceedings (Article 24.1 of Law No. 241/1990). Nonetheless, the administrative courts favor a strict interpretation (limited to ongoing proceedings) on this point as they recognize that the activities of public administration carried to ascertain tax obligations should not be secret.[61]

5.3 Jurisdictional and Judicial Proceedings and Investigations

This exception is based on the presumption that withholding the information would prejudice the criminal proceedings or the effectiveness of tests and audits conducted by a public entity and keeping secrecy over this type of information would serve better public interest than the disclosure. The exemption applies only when information is obtained from confidential sources, so that public should be encouraged to participate with information in public proceedings and investigations without the fear of being put out in the open (whistle blowers). This is included in Belgian and German regulations, where the exemption aims at protecting the identity of the person who has informed the administration about a criminal fact or something similar. When the exemption is not absolute, it has to involve consultation of the person interested before deciding for disclosure. Sometimes, though, the exemption is absolute, meaning that it permits an agency to respond to a request under FOIA as if the records in fact did not exist.

On a practical approach, this exemption relates to, for example, *preliminary investigations in criminal cases*. On the other hand, some aspects in connection with preliminary investigations in criminal cases are not subject to secrecy—the decision to open legal proceedings, not to launch a preliminary investigation, or to discontinue a preliminary investigation

[59] Ziekow, Debus, and Musch (2012), in Mueller Ch. E., Engewald B., and Herr M., "Freedom of Information in Germany" (2018), in this volume.

[60] See Berger et al. (2006), section 3 No. 57 f.

[61] Cons. St., IV, 10.02.2014, No. 617; IV, 6.08.2014, No. 4209.

should not be subject to secrecy. In most cases, final judgments upon a case do not include any confidential elements, but this rule also has exceptions, when, for instance, the judgment includes information of a sensitive personal nature as in the case of sex crimes.

In Central and Eastern European countries analyzed here, both freedom of information laws and procedural codes allow for secrecy on information related to ongoing court, disciplinary, or criminal proceedings. The competence to withhold such information is given to the officials who possess the information in the scope of their official duties in the proceedings. The protected information usually concerns ongoing judicial proceedings before the judicial body has made a decision or pretrial materials that have been submitted to the court.

For instance, the **Hungarian** 1992 Act exempts data related to criminal investigation and crime prevention, and separately data regarding judicial and administrative authoritative proceedings. However, final judgment or complaints and fines constitute public information and should be accessible upon request (Information Commissioner Report 2004). Pursuant to the **Czech** FOIA (s.11 par. 3), the following are exempted from disclosure: (a) unconcluded criminal procedures, (b) decisive activity of the court, and (c) preparation, performance, and review of control results of the bodies of the Highest Control Office.

The 2001 **Romanian** Act first exempts from public access information regarding procedures in a penal or disciplinary investigations, if (a) the result of the investigation is jeopardized, (b) confidential sources are disclosed, or (c) the life, the physical integrity, or health of a person are jeopardized in the course of or as a result of the investigation. Second, it exempts information with respect to the judiciary procedures if their publicity jeopardizes the principle of a fair trial or the legitimate interest of any of the parts involved in the trial.

Similarly, in **France** documents related to the proper conduct of proceedings begun before jurisdictions or of operations preliminary to such proceedings are exempted from disclosure, unless authorization is given by the authority concerned; actions taken by the proper services to detect tax and customs offenses can also be included here. In 2001, jurisdictional proceedings counted for 3.8% of the rejected requests, in 2004 for 1.6%, while tax and custom proceedings counted for 0.6% in 2004.[62] The exclusion of administrative documents for the reason that they would interfere with pending judicial proceedings is rare. The Conseil d'État, for instance,

[62] CADA Report 2004, p.16.

decided that an internal opinion of the Home Office directed to police forces could not be disclosed as it had been drafted within the context of a litigation relating to a public procurement. The disclosure of that document would have indicated to the judge who had to decide on the dispute how one of the parties itself assessed the legality of the procurement.[63]

In **Germany**, the exception seeks to protect independent judicial proceedings and person's entitlement to a fair trial before they are concluded. Similarly, the protection of ongoing criminal and administrative investigations is included (not involved parties or proceeding in foreseeable future). In the **Netherlands**, the investigation of criminal offenses and the prosecution of offenders and inspection, control, and oversight by administrative authorities are among the grounds for an exception to which, however, public interest test is applied. An interesting case is Italy, where although the ongoing investigation is the reason for exemption, the law also states that "applicants must be guaranteed access to those administrative documents the knowledge of which is necessary for defending legal claims" (Article 24). This is known as *defensive access* and was until recently highly debated. The opinion prevailing in courts' rulings is that *defensive access* would override the right to privacy but not public interests protected by the exclusions set forth in Article 24.

In the **Croatian** case, the criminal investigation procedure is regulated in Article 15 of the RTI Law, as a case of the mandatory absolute exemption does not allow for public interest test, while the information linked to court proceedings and oversight procedures are regulated as a relative exemption. This is also confirmed by the data—a criminal investigation is the second most used exception (8–14%) after the personal data protection (15–24%). Requests denied on the basis of the fact that a criminal investigation is pending constituted between 7.95 and 14.06% of all cases in the years 2013 and 2016. Once concluded, the information can be subjected to public interest test as any other piece of information. In **Serbia**, in line with Article 9 FOIA, a public authority shall not allow an applicant to exercise the right to access information of public importance if it would thereby jeopardize, obstruct, or impede the prevention or detection of a criminal offense, indictment of a criminal offense, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial. In **Slovenia,** restrictions are provided regarding classified information and pending proceedings (paragraphs one and six of section 82) by the General Administrative Procedure Act (GAPA).

[63] Lallet (2014), p. 179.

5.4 Protection of Investigations Into Offenses

In general, the exemption is given by the fact that the information could jeopardize the right of third parties, police investigation and ability to discover criminal activities, law enforcement activities, and safety of citizens. With respect to information on ongoing criminal proceedings, a major role is played by the need to protect information that might violate a person's right to the presumption of innocence.

In **Romania**, according to Article 12 No. 544/2001, the information is not disclosed if it would expose the outcome of an investigation and reveal confidential sources or endanger life, physical integrity, or health of a person in the course of the investigation. This provision is also part of the **Czech** and **German** regulations. In Germany, the law (lit g) protects the ongoing and preliminary proceedings (not proceeding in foreseeable future), as well as all data gathered during the investigation. In **Croatia**, pending cases are exempted due to a reasonable doubt that the disclosure might (1) prevent the efficient, independent, and unbiased unfolding of court, administrative, or other legally regulated proceedings, or the execution of court orders or sentences, or (2) prevent the work of the bodies conducting administrative supervision, inspections, or other legality supervision. According to public authorities' reports, the exemption was used in 5–10% of cases in the period 2014–2016. The information gathered for the purpose of criminal prosecution, administrative control, and court procedures whose disclosure would prejudice the course of the procedure is also included as one of the ten exceptions in **Slovenian** FOIA.

In **Belgium**, the prosecution of criminal acts is considered as relative exception and has to be therefore weighted against whether the protected interest prevails over the interest of disclosure, in this case, the possibility of a fair trial; the confidentiality of the actions of an instance in so far as the confidentiality is necessary for the pursuit of the administrative enforcement; or the execution of an internal audit. This is also true in the Flemish case. In the **French** case, the documents that explain proceedings and methods used by tax and customs authorities to fight fraud are not disclosed. The documents relating to cooperation with foreign authorities can be disclosed as long as sensitive data are hidden. Also, this exemption is very rare—it was recorded in less than 1% of the cases between 2005 and 2008, and in none between 2009 and 2013.

Following the same pattern, **European institutions** are allowed to refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice, and the purpose of

inspections, investigations, and audits, unless there is an overriding public interest in disclosure (Article 4 of the 2001 Regulation). Regarding the court proceedings after the entry into force of the Treaty of Lisbon, the European Court of Justice (ECJ) has adopted a decision establishing rules concerning public access to documents held by the court in exercise of its administrative functions.[64] This means that claimants cannot apply for court pleadings directly through the court.

With regard to ongoing investigations, the European Ombudsman has stressed the fact that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Furthermore, institutions need to prove, for each individual document, that disclosure would undermine the investigation[65] and provide clear reasoning on the motives for non-disclosure[66] and be proactive in disclosing the documents when the investigation is closed. The application for court pleadings through the other EU institutions is subjected to the rules set forth in the leading case in this area, namely, API.[67] However, the general presumption of confidentiality is counterbalanced by a time limitation. In other words, after the conclusion of proceedings, there are no grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the court. Similar reasoning is suggested by the Ombudsman for the case of inspections and audits, in the sense of information.[68]

6 Summarizing Considerations

As it can be seen from the sections in the chapter, although modern FOIAs are comparable in terms of structure, parties, procedure, and exceptions covered, they are still not uniform in their interpretation and application.

The specifics of the legal system in which these rules apply still play a significant role in their interpretation, and the administrative practice is also different. However, the comparative law finds here a fertile ground for assessment, as the legal institutions enabling freedom of information are in

[64] Decision of the Court of Justice of the European Union of December 11, 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).

[65] European Ombudsman Case: 3699/2006/ELB, April 06, 2010; Case: 725/2014/FOR, October 01, 2015; Case: 248/2016/PB, October 31, 2016.

[66] European Ombudsman Case: 2004/2013/PMC, November 05, 2015.

[67] CJEU, September 21, 2010, Kingdom of Sweden and ASBL (API) v Commission, C-514/07 P, C-528/07 P and C532/07 P.

[68] European Ombudsman Case: 1506/2014/JAS, September 17, 2015.

large part similar, and thus they can be compared, so that good practices from one country can be easily shared and referred to by other countries.

The parties and procedure for accessing public information are similarly regulated in the jurisdictions analyzed in this book. Differences are to be spotted in the approaches for the regulation of specific grounds for exceptions. However, even in these cases, the similarities abound, as the differences are not essential.

The major point of interest regarding exceptions is the interplay between the FOIA and the special laws regulating exceptions. The principle that access to information is trumping exceptions and the latter are of limited and restricted interpretation should be a given, but is not always that easy to implement in practice, so the secrecy sometimes prevails.

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CHAPTER 17

Legal Remedies in Exercising the Right to Information: A Comparative Overview

Polonca Kovač

1 Introduction: Understanding the Importance of Legal Protection in the Field

No right is fully guaranteed unless legal protection is provided.[1] There must be a right of appeal to a court or an independent body that can issue binding final decisions, and a regulated appeal procedure. This is firmly acknowledged by many international organisations, such as the United Nations and the Council of Europe, or under regional charters.[2] In this respect, legal remedies should be effective within the scope of the right in question, which in the case of the right(s) to information (RTI) presents some specifics.

[1] In this text, we use several expressions, such as "legal protection", "legal remedies", and "appeals", which, if not explicitly stated otherwise, are taken as synonyms. Specific forms of legal protection, such as (internal) objection, complaint, administrative appeal, judicial review or suit/action brought before the court, application to ombudsman, and similar, should therefore be understood restrictively, especially due to various national systems.

[2] Banisar (2006), pp. 11–13.

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D. C. Dragos et al. (eds.), *The Laws of Transparency in Action*,
Governance and Public Management,
https://doi.org/10.1007/978-3-319-76460-3_17

Firstly, we address a right that is a tangible realisation of the general principle of transparency, which further enables a whole set of good administration and sound governance standards, such as the rule of law and inclusion. Transparency constitutes a concept of good administration, stipulated, inter alia, by the European Union (EU) Charter of Fundamental Rights, pursuing the systemic function of political-administrative systems acting efficiently and democratically at the same time. Several experts[3] see the RTI as a basic tool of good administration since it enables and enhances the fundamental principles of transparency, participation, and accountability. In this sense, RTI laws and legal protection serve as a part of general public administration reforms (PARs), especially in Eastern and Southern Europe. Namely, this field is quite strongly supervised within the Europeanisation process, even though some countries have recently expressed their resistance to supranational powers.[4]

Legal protection, however, is rather a formal way of exercising explicit right(s), the ground to build general public awareness of the importance of the mentioned principles and rights. Drawing from several international studies, the comparative analysis proves that selected procedural institutions—an appeal to an independent body and judicial review being among the most crucial—contribute to a significantly higher level of implementation of the RTI in practice. Nevertheless, in some countries, for instance in the Nordic region, formalised legal remedies are less relevant, especially due to the understanding of transparency deeply rooted in their culture. Here, the infringements of rights are so rare that an elaborated formal system might even hinder the development of transparency.

[3] For more details, particularly with regard to legal aspects, see the analysis by Galetta et al. (2015) and the Venice Commission (2011). As stated by Galetta et al. (2015), p. 21, the search for balance between transparency and privacy is the most often addressed issue in the EU, in relation to lawfulness, accountability, and so on. Compare also Bevir et al. (2011), emphasising legitimacy and simultaneously efficiency of public administration based on transparency. Access to or the right to information is a fundamental principle, as stipulated also in § 41 and § 42 of the EU Charter of Fundamental Rights. See also Banisar (2006); Savino (2010), pp. 21–30. Compare OECD (2014), stating that transparency is one of the key parts of overall accountability in democratic governance. Or, as given by the European Commission in the White Paper on European Governance (2001): "*Governance means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence*."

[4] For example, Hungary. More on PARs in EE in Kovač and Bileišis (2017), Koprić et al. (2016), OECD (2014). For more, see the corresponding chapters in this book (Romania, Serbia, etc.).

Secondly, not every legal protection within the administrative sphere suffices to enhance democratic authority. Hence, internal administrative but also judicial review and other forms of oversight (e.g. the ombudsman) need to be developed in order to enable an overall system of pursuing transparency and the related rights. This is significant since administrative appeal or objection procedures contribute to coherence in public administration. Administrative remedies are usually faster and less costly, prevent an increase in the workload of the courts, provide specialised supervision, and promote the harmonisation of administrative practices. On the other hand, checks and balances mechanisms (still) seem to be necessary in most countries to limit administrative power, mostly by judicial review over the legality of conduct of the executive. Moreover, taking into account the content of access to information, a special function of non-governmental organisations (e.g. Transparency International) and the mass media is also to be put forward, particularly when speaking of the development of a holistically transparent society. In this context, we need to emphasise the role of (more or less) formalised procedures.[5] It is interesting to establish, inter alia, that the RTI field presents specifics not only regarding the special forms of remedies in terms of fast and costless protection, but also regarding the alternative dispute resolution (ADR) tools, typically mediation in different appeal procedures.[6]

The importance of procedural regulation or procedural law in general has changed over time in both theory and practice. Formal legality is necessary to achieve predictability and thus legal certainty and transparency, as well as the administration's awareness of the respect for legitimate expectations and personal dignity.[7] The most crucial procedural entitlements in this respect, comparatively, are (1) the set deadlines to respond to the request and (2) legal protection, especially by an independent information commission/commissioner (IC) or agency. In order to act effectively, the level of

[5] Only an a priori defined procedure gives a right substantive content; otherwise, it can be hollowed out or remains just a dead letter. Many authors in this respect even speak of "procedural transparency". Procedural issues are in fact of paramount importance with a view to turning a theoretical entitlement to a measure into an actual right that may be effectively enforced. See Banisar (2006), p. 141; Kovač (2014), p. 34; and so on.

[6] Cf. de Graaf et al. in Dragos and Neamtu (2014), p. 606. This is especially the case when the ombudsman or similar bodies (as the French CADA) are handling appeals by non-binding decisions.

[7] Cf. Kovač (2014), p. 32; Rose-Ackerman and Lindseth (2010), pp. 350ff; Statskontoret (2005), p. 73.

formalisation increases proportionally to higher instances and severity of a dispute. However, even the first instance procedure should be seen as a formal administrative relation despite any formalities regarding the stand or the (non)formality of the application and response to the information requested, if further legal protection is guaranteed in the sense of enforcement of a decision and its contestable modes. Formalised prior proceedings might bureaucratise the initial disclosure but, especially in the developing phases and environments, they decrease the number of disputes and hence the need for an appeal or a judicial review. In other words, legal remedies can support an effective RTI only if and when there is some minimal (administrative) procedure formalised and pursued as such in practice.[8] Some formalisation is required not only when the information is denied or no response given, but in any partially unfavourable decision for the applicant or others, such as partial disclosure or full disclosure with financial burden, or full and costless disclosure with the opposing parties. Therefore, some national regulations consider the disclosure of information as a "non-procedure" (e.g. based on an oral application and information fully and freely disclosed) to enable simple and fast proceeding, although this same relation becomes an administrative one if (written) appeal is lodged. In almost all countries, the RTI regulatory framework is elaborated by the (General) Administrative Procedure Act or Code ((G)APA).[9]

[8] For instance, regarding law in action versus law by the book, see the corresponding chapter in this book from Croatia, stating: "*In practice, public authorities often fail to issue a decision or a notice that contains the prescribed elements, most often an explanation and instructions on the legal remedy, especially when the request is submitted via e-mail. Similarly to the failure to respond within prescribed time limits, this omission strongly affects the protection of citizens' rights, since beneficiaries are not often aware that they are entitled to lodge an appeal against silence of administration to the IC.*"

[9] The APA was adopted by 21 out of 28 EU Member States (not so merely in the Anglo-Saxon oriented systems), as well as globally (in the United States, Japan, etc.). For more in general, see Auby et al. (2014); with regard to RTI in particular, see Statskontoret (2005), pp. 35–43; Mendel (2008); Savino (2010), pp. 7ff; Rose-Ackerman and Lindseth (2010), p. 342; OECD (2014), pp. 29, 60; and the European Parliament Resolution of 9 June 2016 for an Open, Efficient and Independent EU Administration. The latter stipulates inter alia: "*The Union's administration shall be open. It shall document the administrative procedures and keep adequate records of incoming and outgoing mail, documents received and the decisions and measures taken. All contributions from advisory bodies and interested parties should be made available in the public domain.*" RTI implementation is defined as an administrative affair (in most countries except for those without division into public and private law) with the subsidiary use of the APA since the beneficiaries address (public) authorities and the latter unilaterally decide upon request in single cases (cf. Auby et al. (2014)).

Thirdly, information disclosure rarely affects merely one person or is limited to the legal position of the beneficiary (if so, information is provided more easily based on the right to access one's own file under the APA). Most often, two problems arise in such regard. As elaborated in the national profiles, competent bodies must in approximately one-tenth to one-third of the cases balance different opposing rights in relation to the Freedom of Information Act (FOIA) and other legally grounded exemptions. Hereby, at least some reasoning is required, hence a formal individual (administrative) act with indication of the legal remedies. Furthermore, when there are other affected persons whose information and data are disclosed against their will, they might challenge the decision on information disclosure regardless of its form.

Fourthly, one cannot ignore the fact that any "right delayed is a right denied",[10] this being very true and acute regarding the RTI. As put forward by the ruling of the German Constitutional Court of 1969, effective legal protection constitutes a significant element of the fundamental right as such. Unless information is disclosed to legitimate beneficiaries in due or at least reasonable time, most often there is no use of the information provided, say, after two years when the court adopts such verdict. Therefore, the respective legal remedies are of additional importance in three aspects: (1) to allow an appeal in the case of administrative silence and when the authorities refuse to disclose the information actually required[11]; (2) to promptly decide on applications and, even more importantly, on appeals; and (3) to take into consideration whether to regulate the legal remedies with suspensive effect since this element guarantees the protection of the affected parties, yet it might delay the enforcement of an initially acknowledged right to a beneficiary or the general public.

This chapter presents the overall trends regarding legal protection in RTI implementation in the European context, mainly based on the national profiles gathered in the core book. We have tried to identify the most salient convergences and some divergent characteristics and trends in individual countries, in order to better understand how to improve RTI laws on paper and in practice in the future.

[10] Following Martin Luther King's famous saying. Similarly, justice delayed is justice denied.

[11] As shown within national profiles and further on in this chapter, such phenomena are characteristic of some countries, for example Croatia or the Czech Republic, yet not limited to the respective region (of Eastern Europe).

2 Key Convergences and Divergences in Legal Remedies Regarding the RTI

2.1 Legal Sources of Access to Information

There are different types or levels of legal grounds that provide for access to information and, consequently, for legal protection regarding the RTI. In most countries, access to information is embedded into the constitutionally grounded concept of freedom of information. Such constitutional categorisation requires further elaboration by a statute, namely the Freedom of Information Act (originally adopted in the United States in 1966), which is most often known as the FOIA or the "RTI law". In fact, the RTI is regulated by the national constitution and the FOIA (with the APA) in more than half of all countries worldwide.[12] In addition, other statutes need to be taken into account that contradict the FOIA or complement its provisions (for instance, on exemptions to information disclosure), such as those relating to personal or classified data protection, taxes, and the media. These, too, are often adopted on constitutional grounds, which is important since in individual cases an authority or a court must resolve a dispute between two or at least one constitutional safeguard and a safeguard guaranteed by general or sector-specific laws.

As regards the type of legal protection, one also needs to pay attention to the legal branch under which the RTI is understood. This is important considering the trend of transmission among different fields of law while any type of relations (e.g. criminal, civil, or administrative) incorporates own set of safeguards and (judicial) review. For instance, in order to effectively implement the RTI, particularly in transitional environments and periods, international sources (e.g. GRIR or Open Government Partnership (OGP)) recommend sanctions for any infringement of the right (e.g. administrative fees that are considered criminal sanctions by the European Court of Human Rights, ECtHR). Moreover, one can observe a disappearing difference between public and private law in this respect since public

[12] Although the exact titles of the respective regulations might differ slightly. For instance, in Slovenia the FOIA is titled "Public Information Access Act" (*Zakon o dostopu do informacij javnega značaja,* from 2003) or in Liechtenstein *Informationsgesetz* (from 1996). The constitutional grounds are important for legal protection, especially in formally oriented environments such as Central Europe, even though some countries exercise a high level of transparency without such a basis (more in Statskontoret (2005), p. 41; Mendel (2008), p. 103; Savino (2010), p. 7; Salha (2014)).

tasks have been delegated and authority (and accountability!) dispersed. On the other hand, the RTI is one of the tools acting anti-fragmentally to the overall authority system since the entities bound to disclose public information are not limited to classical administrative bodies.

2.2 Comparative Ratings on Access to Information

A comparative insight into the (effective) system of legal remedies can also be provided by the respective international analyses. One of them is the GRIR review for 111 countries,[13] even though this comparison is conducted mainly based on a regulatory framework, while law in action is assessed only partially within national overviews. Nevertheless, since good law is often a necessary if not sufficient ground to exercise the right, such analysis gives us an interesting overview, especially as only the countries with the FOIA in force are categorised. The GRIR evaluates several subgroups of 61 indicators, with a maximum of 150 points to be awarded. There are seven subgroups: right of access (6 maximum points), scope of the right (30), application procedures (30), exceptions (30), appeals (30), sanctions (8), and promotional measures (16). We will take a closer look at selected indicators that relate to the RTI directly or to legal protection in exercising the RTI.[14] There are 14 out of 61 indicators with a maximum of 30 points out of 150 dedicated to the subgroup (administrative, judicial, etc.) "Appeals". The 14 indicators for "Appeals" relate to

1. types of appeals, including internal administrative review, independent body such as the IC (7 out of 14 indicators herein), and judicial review,
2. costs and legal assistance requirement for the use of legal remedies,
3. broadness of the grounds of the appeal,
4. clear and time-efficient procedures and the burden of proof, and
5. imposition of structural improvements on the public authority by an external oversight body.

[13] GRIR stands for "Global Right to Information Rating", a programme founded by two NGOs, Access Info Europe and the Centre for Law and Democracy (see http://www.rti-rating.org/). The vast majority of (altogether 111) countries (90%) have a score over 60 out of 150 points. Europe overall accounts for 11 of the bottom 20, primarily the older European laws that are more limited in scope and have weaker appeals mechanisms. All of the top 20 laws in the world, except for the Finnish one, were passed after 2000.

[14] However, there are several more indicators that indirectly address also legal remedies, such as locus standi (with no legal interest required) or clear and simple procedures. If the latter are sufficiently regulated and implemented, less legal protection is required.

Similarly, the OGP (2017) explicitly sets the independent review of decisions as one of the standards of an advanced level of open government development (as opposed to lower initiative and the intermediate or the highest mature phase).

We pay special attention to the top five ratings, but also illustrate the ratings of some selected countries that are usually—historically and comparatively speaking—considered to be the role models of transparency, or the opposite. Among the countries addressed in this book, we have chosen Denmark for the first group (with the FOIA since 1970) and Austria (law since 1987) for the second, adding for the sake of comparison the Netherlands as a Western European country (the FOIA since 1978) and Slovenia as an Eastern European one, together with the "new" EU members (since 2004, the FOIA adopted in 2003). We have anticipated a decreasing rating in most indicators in this order of development stages: Denmark, the Netherlands, Slovenia, and Austria.

As revealed by Table 17.1, there is—contrary to our expectations—no general rule. This is particularly evident when evaluating not just the general overview but specifically the effectiveness of the RTI through appeals of any kind. Namely, among the best-ranked countries, there are Eastern European ones but also the United Kingdom, Ireland, and the Nordic countries. Among the lowest ranking countries, we find the central, German oriented countries and several Eastern European ones, despite the overall or appeals-related indicators, which can be attributed to specific historical reasons. Moreover, the year of adoption of the FOIA does not seem to have a dominant impact since the recent (after 2000) laws can obviously be either a model or rather criticised (e.g. Germany). In addition, the old laws can prove to be very effective (e.g. in Denmark with the FOIA since 1970), even though there is a trend towards a modernised regulation being more proactively and holistically oriented and hence better. Regarding the selected countries in the last column, Slovenia illustrates a modern and effective approach, over time even preceding the traditionally open Denmark, while the Netherlands seems to be merely a follower and not a trendsetter. Only Austria is classified as anticipated, due to the specifics of its historical development as a state governed by law (*Rechtstaat*), the historical burden of breaches of individuals' freedoms in the nineteenth and, especially, mid-twentieth century, and the constitutional protection of personal data over the RTI with no such status.

Table 17.1 Selected countries' ratings on legal protection indicators

Criteria	*Top five ratings in Europe[a] (with year of adoption of the FOIA; No. of points)*	*Lowest five ratings in Europe*	*Ratings of selected countries (p=points; rank out of 111 worldwide countries in 2017)*	
All 61 indicators (max 150 points)	1. Serbia (2003; 135) 2. Slovenia (2003; 129) 3. Albania (1999; 127) 4. Croatia (2003; 126) 5. Macedonia (2006; 113)	1. Austria (1987; 33) 2. Liechtenstein (1970; 39) 3. Germany (2005; 54) 4. Belgium (1994; 59) 5. Lithuania (1996; 64)	Denmark The Netherlands Slovenia Austria	64p = 93rd 82p = 63rd 129p = 4th 33p = 111th
"Appeals" indicators (max 30 points)	1. Serbia (29) 2. Croatia (29) 3. Slovenia (28) 4. Russia (2009; 26) 5. –8. Albania, Ireland, UK, Denmark (23)	1. Liechtenstein (1) 2. Bulgaria (2000; 3) 3. –5. Montenegro, Romania, Latvia (4)	Denmark The Netherlands Slovenia Austria	23 p 14 p 28 p 6 p

Source: GRIR (2017)

[a]The highest rankings of all are given to Mexico with 136 points, Sri Lanka with 131 points, and India with 129 points. However, most of the non-European countries are classified among the lowest, for instance, Philippines, Tajikistan, and Iran

2.3 Key European Convergences on Legal Remedies Concerning the RTI

Despite varying regulatory frameworks and traditions of the RTI in individual countries, there are several trends that can be defined as convergences, at least on the European level. Firstly, there is the importance and hence increased role of a sui generis independent body in relation to the supervised (mainly administrative) authorities bound to disclose information, that is, the IC. In terms of organisation, the latter can be part of administrative structures but is not under the influence of the government. Individual applicants cannot really be said to have a right, but merely a right to have their requests considered, unless there is an independent

body to ensure their realisation.[15] In this sense, more and more national systems combine RTI and (personal and other) data protection body(ies) before the IC but also in (the same) judicial proceedings (as in Germany, Slovenia, Hungary, etc.). This is crucial for an effective and balanced evaluation of opposing rights.

Secondly, the FOIA quite often offers the regular administrative procedure as a formal framework to deal with objections and disputes, but adds some specifics to these classic tools. Specific provisions on the field can relate to more simplified proceedings not only at the first instance but also generally (e.g. less strict formalities regarding the elaboration or form of different appeals). Obviously, special attention is paid to the (more) effective consideration of appeals (e.g. timeliness or devolutive and suspensive effects).

Thirdly, it is important to offer an overall system of appeals that is complementary rather than confusing or even excluding each other.[16] Therefore, particularly in Scandinavia and at the EU level, a single unified "right to know" is emerging.[17] In this respect, a threefold approach seems to give the best results. This means that the system initially enables a rather informal internal dispute resolution, as in the case of (devolutive or not) objections. At the same time, although consequent to an objection, the applicants lodge a (semi) formal appeal before an independent yet specialised IC or other body. These forms are inevitably followed by judicial review provided by special administrative and/or general courts. Such modes enable both the beneficiaries and the administrative system alike to resolve disputes as fast and as effectively as possible while still preserving the international democratic standards.

Besides the positive characteristics of several complementary forms of RTI legal protection, side effects are reported. On a national and also the EU scale, one can notice, for example, the dual nature of access to information, based on the FOIA and the APA or similar codes.[18] The beneficia-

[15] See Mendel (2008), p. 38. The same, that is improvement of RTI implementation if guaranteed by the IC outside governmental (daily political) influence and given a certain level of autonomy, is evident from national reports, for instance for Croatia.

[16] The same is emphasised by Savino (2010), p. 40. And so explicitly ruled by the Constitutional Court in Slovenia regarding the FOIA and APA RTIs (Decision U-I-16/10, Up-103/10, 20 October 2011). The Slovene court explicitly ruled that both rights could be exercised simultaneously since their aim and scope differ even though they are sometimes overlapping.

[17] Cf. Banisar (2006), p. 6; Savino (2010), p. 5.

[18] See Kovač (2014), pp. 34ff, putting forward the important differentiation between access to information under the APA as (only) a procedural one, while the FOIA-related

ries (and sometimes authorities as well) in some countries are often confused as to which appeal to lodge to get the desired information. The dilemma deepens when the beneficiaries are parties in their own proceedings or when special legal ground is given to disclose the information under specific laws parallel to the FOIA (e.g. to a journalist under the media act or in the environmental sector). Further confusion occurs when, according to the national general or RTI-related systems, some appeals are optional, which means that the applicant may lodge two or three at the same time (e.g. administrative appeal and judicial action, which can be horizontal to an appeal to the ombudsman). Moreover, in systems that change the pure mandatory application of an administrative appeal before access to courts (e.g. Austria, Italy, or Romania), the dilemma is whether a direct RTI court action is admissible. Alternatively, as in Belgium under federal law, when a request for access to information is refused, an applicant must simultaneously address a request for reconsideration to the same authority that refused its initial request as well as a request for advice to the national IC (the Commission for Access to Administrative Documents).[19] However, parallel appeals are quite often found inadmissible. There is also the problem of differing protection concerning the bodies bound to disclose information, for example in Serbia. In the case of a failed response to a request by the National Assembly, the President of the Republic, the Government, the Supreme Court of Cassation, the Constitutional Court, and the State Public Prosecutor, the applicant may not appeal to the IC due to the hierarchical relation thereof but may only appeal directly to the administrative court.[20] Hence, sometimes having more legal options means having less effective RTI implementation. Therefore, it is important to regulate the system coherently, with forms of legal protection that are complementary and not exclusive.

Finally (see Table 17.2 for an overview), as a common denominator, many national rapporteurs point out that the FOIA and its interpretation have changed over time due to strong international (comparative) incentives

RTI(s) are of substantive nature and therefore usually more strongly protected before the courts.

[19] See Veny in Dragos and Neamtu (2014), p. 188, more in the corresponding chapter of this book.

[20] A slightly similar relativisation of the access to information is emerging in Denmark. See the corresponding chapter of this book regarding some exclusions to the RTI, "ministerial advice", and information shared between the parliament and administrative bodies as stipulated by Articles 24 and 27 of the new FOIA.

Table 17.2 Main trends on RTI legal remedies Europe-wide

Key European trends regarding RTI legal protection	*Examples of countries following individual trends*[a]
Regulated (administrative) procedure, increasingly formalised at higher instances, as a safeguard for effective RTI implementation, usually by subsidiary use of the APA (or GALA, CAP, etc.)	More German oriented countries (Germany, Austria, the Netherlands, Slovenia, Croatia, etc.), while some rather abstract and pragmatic (e.g. Denmark)
Independent IC, competent for administrative appeal, that is centralised yet specialised for the RTI (and data protection)	Germany, Slovenia, Serbia, Hungary, etc., where the respective bodies act as merged RTI and data protection agencies; or only RTI (e.g. in Croatia); or advisory appellate body only (e.g. in France or Belgium), while some have not established the IC (yet) (e.g. Romania, the Czech Republic)
Judicial review as an upgrade of legal protection besides internal administrative or other forms, as a devolutive and suspensive remedy	All countries, although forms of judicial review vary (as in general public law or administrative affairs)
Ombudsman and informal forms of protection	Denmark, Italy, Belgium, France, also the EU; while in other countries rather auxiliary or (almost) excluding (e.g. in Romania)
Broadly defined stand (no legal interest required) to access the information and lodge appeals, especially before the court by applicants but also authorities	Denmark, Slovenia (approximately 50% appellants before the court being authorities), the Netherlands (approximately 20% appellants before the court being authorities), etc.
Broadening grounds to lodge an appeal, administrative silence, costs of disclosure, and even RTI misuse included	The Netherlands, Slovenia, France, etc., less in Austria, for instance, with a significant implementation gap observed in some countries
A prevailing inclination to grant applications and, vice versa, mainly refusing appeals	All countries at first instance (approximately 50–90%), while differences regarding appeal proceedings with rather various level of success (approximately 30–50%)
A problem of and strive for overcoming administrative silence and more reasonable timing in further appellate proceedings	Serbia or Croatia (with over 60% of appeals to the IC based on administrative silence), the Czech Republic, Romania (especially on judicial instances)

[a]The list is not exclusive, mostly indicating some typical examples. For more, see the corresponding national chapters

(or pressures) to broaden the RTI scope.[21] A pattern of three steps is noted regarding the regulatory approach: (1) adoption of a basic FOIA, (2) its implementation through administrative practices and case law, and (3) improved regulation based on national and European courts' verdicts.

On the other hand, there are some major divergences. The prevailing one is the cultural context of RTI understanding. Some societies, for example Denmark, do not need formal modes of RTI protection owing to a historical development of openness. These communities might experience a detailed legal protection as an obstacle to the otherwise rather pragmatic resolution of dilemmas regarding RTI implementation. However, more formal oriented (e.g. the Central European ones) and transitional countries (Croatia, Hungary, Serbia, etc.) do strive for significantly stricter and predictable rules. Both approaches can be effective but depend on the national legal framework and tradition, which need to be taken into account when setting common standards and publishing comparisons (as in German: *kapieren, nicht kopieren*).[22] Put differently, the national regimes of the RTI that are not constitutionally and statutorily strictly differentiated (as in Sweden or the United States) imply less detailed procedural provisions, legal protection included. Consequently, a relatively low-quality rating is attributed to these countries in comparative analyses, albeit the level of RTI implementation might even be significantly higher than in formally exemplary countries.

2.4 Forms of RTI Legal Protection and Their Characteristics

There is a variety of appeal mechanisms and enforcing acts globally. The effectiveness of these different methods and systems as a whole varies greatly.[23] In practice, most countries pursue a complementary approach, although differing in terms of several issues. The differences refer, for instance, to the introduction of an administrative objection or appeal before access to court, or to whether special administrative or courts of general competence oversee the appeals. Nevertheless, these characteristics are not considered as the most influential for an effective RTI implementation, except for whether an administrative appeal is assessed by the administration itself or—much more recommendable—by an independent body (commission/commissioner).

[21] This is similarly emphasised by GRIR (2017) or comparatists, for example Savino (2010).

[22] On the cultural impact of RTI implementation, see Mendel (2008), p. 10, Savino (2010), pp. 12–13, Kovač (2014), pp. 39ff, etc.

[23] As established also by Banisar (2006), pp. 23–24, who analyses countries worldwide, but the same is true even in Europe.

Generally speaking (see also Table 17.2), one can distinguish the following forms of RTI-related appeals which are horizontally grounded (a) by the FOIA and/or (b) by the (subsidiary use of) APA or general laws on judicial review of administrative acts:

A. *Administrative remedies:*

1. Often (although unknown in some countries, for example in Slovenia or Croatia), a specific RTI (as in the Czech Republic) or a general (as in the Netherlands) remedy is the non-devolutive objection, which is an internal administrative tool. It sometimes serves to mitigate the difference between an informal proceeding (e.g. the one initiated upon an oral request only) and a formalised procedure/protection. Objection can be parallel to the regular legal protection or a prerequisite to lodge a further devolutive administrative or, directly, court appeal (as in the Netherlands). This first level generates mixed results; it can be an inexpensive and quick way to review the decisions but tends to uphold the denials and results in more delays rather than enhanced access (even in the United Kingdom, over 70% of the requests for internal review to national bodies were denied in full).[24]
2. The most common solution based on the APA in almost all countries is a devolutive yet internal administrative appeal. It is usually addressed to a specific IC (as in Germany, Slovenia, Serbia, etc.), but can also be addressed to regular appellate authorities (as in the Czech Republic or Romania without the IC). This appeal regularly provides suspensive effects and serves as a procedural prerequisite to access the court (especially in Central and Eastern European oriented countries, as in Germany, Hungary, Slovenia, Romania, etc.; regarding the RTI also in France and Belgium while not in Italy, or specifically regulated as in Austria).

B. *Judicial remedies:*

3. In all countries, there are judicial appeals, albeit the forms of courts and court proceedings differ according to national specifics. The most frequent is the administrative dispute before spe-

[24] Regarding the pros and cons of internal versus external and administrative versus judicial oversight, see Banisar (2006), p. 23; Savino (2010), p. 40.

cialised administrative courts (as requested by the ECtHR by two-tiered administrative judiciary) or the administrative sections of general courts (e.g. in the Netherlands), with further potential constitutional and international remedies (as before the ECtHR).[25]

C. *Informal remedies:*

4. In many countries,[26] yet frequently only when regular legal remedies have been exhausted, there is an appeal to the ombudsman as well, based on the RTI or contradicting data protection as a fundamental right (as in Romania, Slovenia, etc.).

Some countries, on the other hand, pursue mixed approaches, such as France with its commission (the Commission d'acces aux documents administratifs, CADA) acting less as the other ICs and more as a special ombudsman since its decisions are not binding as it rather issues advisory opinions. Similarly, such approaches can be established for the Belgian Federal Commission for Access to Administrative Documents.[27] An informal effect also pertains to otherwise formal appellate bodies (i.e. ICs) through their publicly disseminated annual reports, opinions, and so on.

In sum, regarding RTI legal protection, the countries may be grouped as (compare Tables 17.1 and 17.2):

1. traditionally open countries with loose legislation, for example Scandinavia;
2. legal(istical)y driven countries with consistent RTI system in Central Europe; and
3. countries with frequently best regulatory practices, yet larger or smaller implementation gaps, for example the transitional Eastern Europe.[28]

[25] For more on the general system of appeals in European administrative law, see Dragos and Neamtu (2014), pp. 542ff; explicitly differing administrative and judicial remedies and the first as an option or obligatory step before access to the court. Cf. Auby et al. (2014); Koprić et al. (2016), pp. 11ff.

[26] Compare the roles and scope of oversight of national ombudsmen in Remac in Dragos and Neamtu (2014), pp. 572 and related.

[27] For more details, see the corresponding chapters of this book (France and Belgium).

[28] In this respect, implementation gaps are characteristic of many administrative fields (see Kovač and Bileišis (2017), Koprić et al. (2016)), albeit some countries, such as Slovenia or Croatia, report a less pronounced gap in the RTI than in comparable fields, which seems to be a result of consistent central authorities' measures and case law over time.

The experiences of several countries are generally more inclined towards administrative than direct judicial protection, provided that the objection procedure is conducted by the body that is to disclose the information or—as a rule—a body that is independent (of the government). The respective forms are far more accessible, faster,[29] and cheaper for the people than the courts and have a proven track record with regard to being an effective way of ensuring the RTI.[30] But overall, it is not so much about individual forms and legal characteristics of legal protection than about the fact that the review should be holistic and coherent, independent, centralised, and specialised.[31]

Let us examine some elements more thoroughly. Regarding the stand to lodge an appeal, the countries have either a narrower or a broader scope in force. The main differences relate to third affected persons and the legitimacy of the authorities bound by law to disclose information to contest an appellate decision of the IC before the courts. The affected persons usually have, based on the APA, the same set of rights—the right to appeal and access to court included—as the main party (beneficiary or applicant). However, there are cases when a possible misuse or abuse of a right (to appeal in relation to the RTI) is taken into consideration or proven. In some countries (e.g., the Netherlands, Slovenia), law or, more frequently, case law has developed the criteria under which misuse can be stated, although this is more an exception than a rule. In most legal regimes, judicial review is intended to protect a subjective (individual) right, hence it is dominant not to recognise the legitimacy to lodge a court suit to administrative and other authorities. On the other hand, countries with the opposite system (e.g. Slovenia) experience this as a positive solution, as long as these bodies are not the dominant ones to lodge actions. That is explained by the suspensive effect of a suit and the huge and irrecoverable consequences for the affected persons in case of disclosure if the contested administrative decision is found unlawful by a higher instance court.

An appeal may be lodged for different grounds, however these should be as broad as possible to effectively guarantee the RTI, for example not

[29] In some countries, judicial proceedings suffer from excessive delays measured in years, despite the fact that some legal systems provide for the constitutional protection of reasonable timeliness and, specifically, for the RTI to be proceeded urgently and as a priority. See Case Magyar Helsinki Bizottsag *v.* Hungary, No. 18030, 3 November 2016, which states, inter alia, that the RTI procedures should be simple, rapid, and free or low cost.

[30] For more, see Kovač (2014), pp. 37–42. Cf. Statskontoret (2005).

[31] Cf. Savino (2010), p. 40.

only due to the refusal of a request, but also owing to administrative silence, incorrect or partial information, failure to follow the form for requesting information, excessive costs, and so on. The countries have similar if not the same reservations regarding disclosure both in terms of the regulation and in terms of administrative and court practice, which is also demonstrated by a large share of appeals on grounds of administrative silence (e.g. in Croatia but also in Ireland, etc.). The appeal procedure is rather more formalised than the one at the first instance, usually initiated and concluded by a written (individual administrative or judicial) act. When a dispute is established, the decision has to follow the basic procedural (APA) safeguards, particularly reasoning and indication of further legal remedies. A major provision of various RTI laws is that the burden of proof in a dispute is on the public body rather than on the applicant.[32] The deadlines to resolve the appeals vary, but are rather similarly provided within 30–60 days, albeit in practice they may extend to several months (as, for example, in Romania or the Czech Republic). The decisions of the IC are mostly binding, yet their enforcement might be hindered in practice (e.g. in Serbia or the Czech Republic, especially compared to other administrative sectors). However, the decisions are more regularly respected if there is a clear connection and coherence between appellate and judiciary authorities—as in France despite non-binding CADA acts.

Considering the workload of the IC and the courts, the quantity of disputes after the adoption of the FOIA might increase initially, while after the establishment of some case law the number of disputes falls significantly. The majority of the countries' rapporteurs emphasise that there is weak statistical data available on RTI implementation in general and legal remedies in particular. Based thereon and on the impressions obtained from the interviews with higher officials and judges, we can generally say that there are several thousands of appeals annually in all the respective countries, while 70–90% of these are at least partially granted. Approximately 5–10% of all proceedings are run based on a lodged appeal (measured in most countries in hundreds),[33] in the majority in second instance administrative procedures before a national IC. Further judicial

[32] Mendel (2008), p. 38. Explicitly also stated in several national reports in this book, for example as in Hungary.

[33] If compared to data in other administrative fields, more requests are granted at the first instance and consequently there is a lower share of appeals, including court actions (for more on comparison among countries and sectors alike, see Dragos and Neamtu (2014)).

actions are rather rare (several tens) but lodged in an estimated 10–30% of the cases. Over time, the number of appeals is mostly stable or slowly decreasing (with some individual specific cases). At both appeal levels, administrative and judicial, individual countries report approximately 30–50% of all appeals as granted (having in mind that when the appellant is an authority, that means refusal of information disclosure).

Content-wise, appeal cases are very diverse, yet in most cases there is a common indicator that decisions are disputed since the body bound to disclose information claims the required information to be one of the lawful exceptions. However, only courts really have the authority to set standards and ensure a well-reasoned approach, especially regarding controversial areas and difficult issues, such as balancing opposite fundamental rights. The role of case law is therefore most significant to implement not just the letter but also the spirit of the FOIA. That is why it is crucial for the courts to pay particular attention to adequate procedural rights (e.g. reasoning in the Netherlands, while in Belgium, for instance, judicial review is rather limited to direct illegality). Judicial coherence often leads to a broader scope of rights in the regulatory sense as well.[34]

3 Conclusion

To sum up, several systems of legal protection of the applicants are known throughout Europe. Legal protection is provided either in a formal sense with direct appeal to the court or with an administrative appeal to an independent state body (the IC or some other non-governmental agency), or through a (more) non-formal devolutive objection to the head of the body at issue or via the ombudsman. Regulated appeal procedures and the IC are of utmost importance with a view to turning a theoretical entitlement to a measure into an actual right. Only the procedural elaboration of a substantive RTI law enables the actual enforcement thereof, both nationally and in the relation of individual Member States towards the EU. Hence, most countries have a formalised legal and judicial protection enshrined in RTI law, or the level of the RTI is considered very low. "Non-formal" protection can be afforded only in the countries with a long and solid tradition of openness (e.g. Scandinavia). Nevertheless, the comparative analysis shows the RTI as (still) being a right in progress. The power

[34] For instance, the German legislator and the courts have developed good administration principles(s) specifically in relation to the FOIA (Dragos and Neamtu (2014), p. 49).

of the respective RTI laws in action proves that, particularly by evaluating the legal protection thereof. Comparative analyses and practice in various countries reveal that the legal remedies are the very essence of RTI law as well as a tool for enforcing such right. Procedural principles and rules are thus among the foundations that contribute to enforcing the importance of the RTI in terms of a democratic modern society.

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[1] Note: Page numbers followed by 'n' refer to notes.

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