



**The right of access to information in the European Union institutions and the  
role of the European Ombudsman in this process**

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## **Introduction**

The purpose of the paper is to discuss the regulation of the right of access to information in the European Union institutions and the role of the European Ombudsman in the process of effective implementation of this right.

**The right of access to information is an essential element for providing transparency of the European Union institutions, promoting good governance of the decision-making bodies and ensuring communication between the European citizens and the institutions of the European Union.** Transparency is the fundamental principle of the European Union on the same level as proportionality, supremacy and direct effect of the law and is guaranteed by the Article 1 of the EU Treaty, which defines that the decisions are taken „as openly as possible” in the European Union. The principle of transparency requires access to official documents held by the European Union institutions, knowledge of the decision-making process and giving reasons for their decisions to the European citizens. **Transparency is a crucial problem of the European Union institutions and citizens are not satisfied with the level of transparency of the decision-making bodies of the European Union, which results „democratic deficit” on the European Union level.**<sup>1</sup>

**The EC Treaty, EU Charter of Fundamental Rights and several regulations adopted by the EU institutions guarantee the legislative regulation of the right to access information.** The independent mechanism of the European Ombudsman provides effective implementation of the right of access to information. The European Ombudsman was established for the purpose of the protection of the citizens’ rights and encouragement of good administration of the EU institutions.

The article will discuss the scope of the legislation, the restrictions of the right to receive information and its procedural guarantees as well as the role of the European Ombudsman in the

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<sup>1</sup> Annual Report of the European Ombudsman, 2011, p.8.

effective implementation of the right of access to information and the latest cases decided by the European Ombudsman in this area.

## **Chapter 1. Legislative framework of the right of access to information**

The right of access to information is a fundamental human right guaranteed by Article 255 EC Treaty and Article 42 of EU Charter of Fundamental Rights, which provides to enforce the transparency principle in the European Union. **The European Union does not have competence to harmonize national laws on access to information and only relates to access to documents held by the European institutions.** Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents provides the detailed regulation of the right of access to information on the European Union level. The purpose of this regulation is to define the conditions, grounds and limitations on the right of access to documents, to establish procedural guarantees for exercise of the right and encourages good administration practice in the EU institutions concerning access to documents.<sup>2</sup>

**The right of access to information covers documents held by the three main decision-making institutions of the European Union, such as European Parliament, Council and Commission.**

However, most of other institutions and bodies of the European Union use this regulation and comply with its requirements to grant access to documents held by them in practice. Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State are granted the right of access to information.<sup>3</sup> Furthermore, the Regulation 1049/2001 provides a possibility for the EU institutions to extend the group of beneficiaries to any natural or legal person

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<sup>2</sup> *Regulation 1049/2001* of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, art.1

<sup>3</sup> *European Union Treaty*, art.255 (1); *European Union Charter of Fundamental Rights*, art. 42(1).

not residing or not having registered office in a Member State.<sup>4</sup> All three institutions used this possibility in practice.<sup>5</sup>

**The scope of the right of access to information is very broad, contains all documents held by an institution, which is drawn up or received by, and is in its possession concerning all areas of activity of the European Union.**<sup>6</sup> The document is defined by the Regulation 1049/2001 as any content 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.<sup>7</sup> However, the European Union institution is restricted to disclose a document originated from the Member State without the prior consent of the originator and is required to have consultation with Member States in the process of assessing the nature of the document.<sup>8</sup>

**The right of access to official documents is not an absolute human right and may be restricted in some circumstances prescribed by the Regulation 1049/2001.**<sup>9</sup> The purpose of the exceptions is to ensure a proper balance between the public and private interest. **Exceptions of the right to access official documents are evaluated in the light of three tests: harm test, balancing test and the requirement of approval.** Harm test means that access to information may be limited when openness will cause harm to some interests. Balancing test outweighs the public interest of transparency and interest defined by the restriction, and the requirement of approval implies personal information, which may be disclosed after receiving an approval from the subject of this information. There are three types of exceptions, which applied to the right of access to official documents in accordance to the Regulation 1049/2001. Firstly, there are exceptions, which are subject to a harm test, and the interests, which may undermine by the disclosure of the information,

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<sup>4</sup> *Regulation 1049/200*, (Footnote 12), art .2 (2).

<sup>5</sup> *Decision 2001/84* of the Council (OJ 2001, L313/40); *Decision 2001/937* of the Commission (OJ 2001, L345/94); *Decision of the European Parliament* (OJ 2001, L 374/1).

<sup>6</sup> *Regulation 1049/2001* (Footnote 12), art 2 (2).

<sup>7</sup> *Regulation 1049/2001* (Footnote 12), art 3(a).

<sup>8</sup> *Regulation 1049/2001* (Footnote 12), art. 4(4).

<sup>9</sup> *Regulation 1049/2001* (Footnote 12), art. 4.

are public security, defense and military matters, international relations, financial, monetary and economic policy of the Community or a Member State as well as privacy and integrity of the individual.<sup>10</sup> Secondly, the access to documents may be refused if its disclosure would undermine commercial interests of a natural or legal person, court proceedings and legal advice and the purpose of inspections, investigation and audits, but the institutions should use the balancing test in the decision-making process to evaluate the exceptions in the light of the public interest in disclosure.<sup>11</sup> The third type of exception concerns to internal documents and stricter harm test applies to these documents, which requires that the documents should be closed if its disclosure seriously undermines the decision-making process.

Besides the exceptions, **the Regulation 1049/2001 defines a different regime for access to information about sensitive documents.** The category of sensitive documents is created for the purpose of protection of the interests of the European Union or its Member States in the areas of public security, defense and military matters and is regulated by separate rules adopted by the EU institutions.<sup>12</sup> The sensitive documents classified as “TOP SECRET”, “SECRET” or “CONFIDENTIAL” in accordance with the rules of the EU institutions taking into account its content. Access to sensitive documents based on the need-to-know principle, which means that only persons who need to know certain information in order to exercise their duties authorized to have this information.

**The effective enjoyment of right of access to information also depends on the procedural rules defined for implementation of the right in practice.** Accordingly, to Regulation 1049/2001, application for access to a document should be submitted in any written form, including electronic, and should be sufficiently precise for institutions to identify the document.<sup>13</sup> The EU institutions should send a response to the applicant within 15 working days whether they provide access to

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<sup>10</sup> *Regulation 1049/2001*, art.4 (1).

<sup>11</sup> *Regulation 1049/2001*, art.4 (1).

<sup>12</sup> Council Decision 2001/264 of 19 March 2001 (OJ 2001, L101/1); Commission Decision 2001/844 of 29 November 2001 (OJ 2001, L 317/1).

<sup>13</sup> *Regulation 1049/2001*, art.6 (1), art.6 (2).

requested documents or refuse to its access with sufficient reasons.<sup>14</sup> In the case of total or partial refusal, applicant can submit a confirmatory application for reconsidering the application within 15 days and the institutions have a possibility to change its decision.<sup>15</sup> If an applicant receives a negative answer to the confirmatory application, there are two remedies available. Firstly, the applicant can submit a complaint to the court against the institutions under Article 230 EC Treaty or make a complaint to the European ombudsman under Article 195 EC Treaty.

Deriving from the principle of transparency **the EU institutions are obliged to provide some documents directly accessible to the public in electronic form or through a register,**<sup>16</sup>**especially legislative documents, which are legally binding for the Member States.**<sup>17</sup> Furthermore, EU institutions are obliged to publish an annual report concerning the implementation of the right of access to documents for the members of the society.<sup>18</sup>

As a conclusion, **the legislative regulation of the right of access to information provides sufficient guarantees for transparency of the EU institutions.** The effective implementation of the legislative regulations depends on the administrative practice of the European Union Institutions.

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<sup>14</sup> *Regulation 1049/2001*, art.7 (1).

<sup>15</sup> *Regulation 1049/2001*, art. 7 (2).

<sup>16</sup> *Regulation 1049/2001*, art. 12 (1).

<sup>17</sup> *Regulation 1049/2001*, art.12(2)

<sup>18</sup>*Regulation 1049/2001* art. 17.

## **Chapter 2. The role of the European Ombudsman in the implementation of the right of access to information**

The European Ombudsman is an independent mechanism for the protection of the citizens' right, including the right of access to information, and implementation of good administration practice in the European Union institutions. **The activity of the European Ombudsman is regulated by Articles 21 and 195 of the EC Treaty, the Statute of the Ombudsman<sup>19</sup> and the Implementing Provisions adopted by the European Ombudsman.**

The mandate of the European Ombudsman covers the activities of the European Union institutions and bodies and does not consider complaints concerning maladministration of the national authorities. **Every citizen of the European Union is entitled to apply to the European Ombudsman when the European Union institutions or bodies violate their rights.**<sup>20</sup> Besides discussing complaints of the EU citizens, the European Ombudsman has a power to start own inquiries about the activities of European Union institutions. The European Ombudsman informs the complainant about the results of his/her investigation. **Because of investigation, the European Ombudsman may achieve several findings: no maladministration, a settlement to the institutions, a critical remark, a draft recommendation and a special report to the European Parliament.** In case of finding no maladministration, the complainant receives, a full explanation from the decision-making institutions or bodies and the European Ombudsman may prepare a further remark for improving the quality of administrative practice of the institution. The settlement is achieved when the European institutions or bodies cooperate with the European Ombudsman and provides the full satisfaction of the complainant. In the case of finding maladministration, the European Ombudsman can use a critical remark, a draft recommendation and a special report. A critical remark is used when the maladministration cannot be eliminated and the case does not have general implications. The draft recommendation may be used when the institution can still change

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<sup>19</sup> *Decision of the European Parliament #94/262 of 9 March 1994 on the regulation and general conditions governing the performance of the Ombudsman's duties.*

<sup>20</sup> *Treaty Establishing European Community*, art. 228 (1). *EU Charter for Fundamental Rights*, art. 43.

the maladministration and it has general consequences. In the case of draft recommendation, the European institutions or bodies should submit a report about the implementation of the recommendation within three months. If the European institution does not consider the draft recommendation, the European Ombudsman can submit a special report to the European Parliament. The decisions of the European Ombudsman are not legally binding for the EU institutions, however they are highly recommended to improve administrative practice.

**The main areas of the complaints submitted to the European Ombudsman relates to the transparency of the European Union institutions and the right of access to official documents.**

The high number of complaints shows the implementation problem of the right of access to information in practice in the EU institutions. Accordingly, to the annual reports of the European Ombudsman, the number of complaints concerning the right of access to information was 36% of the total number of complaints in 2010,<sup>21</sup> 23% of the total number of complaints - in 2011<sup>22</sup> and 22% of the total number of complaints in 2012.<sup>23</sup>

**The European Ombudsman discusses the cases of the right of access to documents in two different dimensions: procedural issues and substantive issues. The cases concerning procedural issues mainly related to the late registration of the requests,<sup>24</sup> complying with the applicable time limits<sup>25</sup> and failure to provide reasons of the decision<sup>26</sup>.** Another procedural issue concerns defining fees for the requested documents, which should be regulated by the EU institutions and they should find a sufficient solution for defining **reasonable fee** in case of very large and numerous documents.<sup>27</sup> The European Ombudsman also pays attention to the language policy of the European Union institutions and defined that the EU institutions should ensure **access**

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<sup>21</sup> Annual Report of the European Ombudsman, 2010, p. 10

<sup>22</sup> Annual Report of the European Ombudsman, 2011, p. 11.

<sup>23</sup> Annual Report of the European Ombudsman, 2012, p. 1.

<sup>24</sup> Case 1972/2009/ANA, Case 2938/2009/EIS, Annual Report of the EO, 2012, p.19.

<sup>25</sup> Case 2466/2011/ER, Annual Report of the European Ombudsman, 2012, p. 19.

<sup>26</sup> Case 1683/2010/MMN, Annual Report of the European Ombudsman, 2012, p.20.

<sup>27</sup> Case 429/2008/PB, Annual Report of the European Ombudsman, 2010, p. 51.



**to information to the citizens in their own language.**<sup>28</sup> In case of procedural maladministration, the European ombudsman prepares a critical remark to the EU institutions and request to change the practice.

**The cases concerning substantive issues mainly related to the exceptions of the right of access to information defined by Regulation 1049/2001.** The analysis of the EU Ombudsman's case-law shows that the European Ombudsman discuss the exceptions concerning international relations; court proceedings and legal advice; inspections, investigations and audits; the institutions' decision-making process. In case of refusal of access to information based on exception of international relations, the European Ombudsman took into account the sensitive nature of the issue and grants a wide discretion to EU institutions to determine whether disclosure determine the public interest.<sup>29</sup> However, the European Ombudsman required the detailed inspection of the document and valid arguments why the disclosure should damage the negotiation process or interests of the parties. The exception concerning access to the legal advice may be accepted if the European institutions will show that the refusal will protect the interest to receive useful legal advice from its Legal Service.<sup>30</sup> The access to information concerning investigation held by the EU institutions is very sensitive and highly requested area by the citizens. The European Ombudsman interpreted in several cases that the European institutions should provide to distinguish the secret and public part of the document and provides the partial access to documents where it is possible.<sup>31</sup> It may works in case of information of the investigation or existence of high public interest in this area.<sup>32</sup> In cases of substantive issues, the European Ombudsman may make a critical remark or draft recommendation to the European Institutions depending on the nature of the maladministration.

As a conclusion, **the European Ombudsman makes a huge work in the area of improving transparency and effective implementation of the right of access to information in the EU**

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<sup>28</sup> Case 2413/2010/MHZ, Annual Report of the European Ombudsman, 2011, p.36.

<sup>29</sup> Case 1051/2010/BEN, Annual Report of the European Ombudsman, 2011, p. 39.

<sup>30</sup> Case 1170/2009/KM, Annual Report of the European Ombudsman, 2011, p.39.

<sup>31</sup> Case 1735/2010/MHZ; Case 2073/2010/AN; Annual Report of the European Ombudsman, 2011, p. 41.

<sup>32</sup> Case 1581/2010/GG; Annual Report of the European Ombudsman, 2011, p. 41.

**institutions. However, effectiveness of the activities of the European Ombudsman depends on the level of cooperation between the EU institutions and the European Ombudsman in the area of achieving more transparency of the European Union.**

## **Conclusion**

Analyzing the legislative framework and the enforcement mechanism of the right of access to information by the European Ombudsman shows that **the European Institutions have sufficient legislative guarantees for access to information, but its implementation in practice needs improvements.**

The legislative regulation of the right of access to information establishes sufficient tests for estimation of the restrictions and exceptions imposed on the right of access to information, such as harm test, balancing test and requirement of approval, which provides to balance private and public interests by the European institutions in a particular case. Therefore, the reasonable application of the harm test, balancing test and the requirement of approval to the defined exceptions are very important for the exercise of the right to information and transparency of the European Union. The monitoring of the activities of the European institutions by the European Ombudsman provides to establish the good administration practice in the European Union institutions and ensures transparency in a way of improving access to information. The analysis of the case law of the European Ombudsman shows that his activities make great contribution in the establishment of the effective enjoyment of the citizens' rights, including the right of access to information.

In our opinion, **Georgia should take into consideration the main achievements of the legislative regulation of the right of access to information and the good administration practice of the European institutions to establish the best international experience on the national level and improve the effective enjoyment of the right of access to information in practice.**