Private enforcement of EU environmental law at EU institutional level (1A)

Access to environmental information

Just as is the case with information held by public authorities at national level (as explored in Chapter 9), the issue of access to environmental information held at EU level by Union institutions and other bodies bears a close and important relationship with the subject of access to environmental justice. If civil society is unable to scrutinise effectively the decisions taken by EU institutions concerning or affecting the development or implementation of EU environmental policy, then any rights of action that private persons may have in seeking judicial review of EU institutional conduct will be of limited use in holding institutions to account for conduct that breaches Union law. Access to information is particularly important in relation to private law enforcement of EU environmental law vis-à-vis EU-level decision-making in two respects, namely for assisting in the assessment as to whether (1) EU institutions and other bodies have complied with procedural or substantive obligations under Union law when taking decisions on environmental policy (e.g. using the correct legal basis for promulgating legislation affecting the environment; acting in compliance with legislative requirements when authorising the marketing of chemicals that have actual or potential environmental impacts); and (2) the European Commission has managed its infringement caseload properly under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU) against member states suspected of breaching EU environmental law. Whilst it is true to say that a wide range of information relating to
EU-level decision-making is readily published, such as that relating to the EU legislative process, there is nevertheless a considerable amount of documentation relating to key EU-level non-legislative decisions that is not automatically disclosed to the public and which nevertheless is in practice frequently crucially important in enabling civil society to be able to scrutinise the legality of EU institutional conduct in relation to EU environmental law. This is borne out by the considerable number of requests filed by members of the public for environmental information held by EU organs each year. The Commission’s report on documentation disclosure requests concerning the EP, Council of the EU and European Commission for 2012 revealed that 9.4 per cent (some 565) of the total number of requests to access EU documentation (6,014) were for environmental documentation.\(^1\) The environmental sector was the policy sector with the largest amount of information requests that year. Between 2002 and 2012 environmental documentation requests have represented on average 7.4 per cent of the total number of requests.\(^2\) The total number of requests for information from EU institutions has steadily increased in recent years, rising from 991 in 2002 to over 6,000 requests annually since 2010.

As one might expect, the impact of the Union’s membership of the 1998 United Nations Economic Commission for Europe’s (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Århus Convention)\(^3\) has been very important for the development of Union rules on access to environmental information held by EU institutions. As already briefly outlined in Chapter 8, the Convention sets out a range of requirements concerning public disclosure of environmental information held by contracting parties’ authorities (so-called first-pillar obligations). In particular, Article 4 of the Convention requires parties to ensure that members of the public have a right of access to environmental information, subject to certain
exceptions (reactive type obligation). Article 5 stipulates a number of obligations for contracting parties with a view to ensuring that environmental information is collected on an up-to-date basis as well as disseminated efficiently (active-type obligations). As discussed in the previous chapter, the Union has sought to implement the requirements contained in the Convention as they apply to EU institutions through Regulation 1367/2006 (Århus Regulation). The issue of enhancing access to environmental information was specifically endorsed as a commitment in the Union’s Sixth Environmental Action Programme 2001–10.

However, as far as compliance with the first pillar is concerned, the EU did not have to work from a blank piece of legislative paper when adopting the Århus Regulation – far from it. Prior to the adoption of the latter regulation, the Union had already promulgated a set of legislative rules establishing an access to information regime that fulfilled a good deal of the first-pillar requirements under the Convention. Specifically these rules, contained within EU Regulation 1049/2001 regarding access to European Parliament (EP), Council and Commission documents (hereafter referred to as the ‘Access to Documents Regulation’) and which became applicable on 3 December 2001, remain in force. The Århus Regulation’s access-to-information provisions have served to supplement those of the Access to Documents Regulation, the latter remaining the principal legislative instrument in the field. By virtue of the Århus Regulation, the current EU legislative framework has now essentially aligned itself with the access-to-information requirements under the Århus Convention, which of course is a key objective of the Århus Regulation.

This chapter considers the extent to which members of the public under EU law are vested with rights to access environmental information held at EU institutional level. For this purpose, the chapter is divided into a number of sections addressing particular aspects of this
emerging legal area. The first section considers briefly the historical origins and development of EU rules promoting greater transparency in EU-level decision-making. The second section considers the EU legislative framework specifically relevant for dealing with requests from members of the public for access to environmental information held by EU institutions and other bodies, including the relevant appeal mechanisms. The legislation is complex, vesting EU institutions with responsibility to assess a range of (often conflicting) factors before deciding on whether they are obliged to disclose certain information they hold. The third section focuses on the right of access to information as it relates to the decision-making of the European Commission on the processing of infringement cases. As discussed in Part I of this book, the infringement procedures constitute a significant component of the law enforcement machinery relating to EU environmental law. The right of access to information under EU law raises the issue as to what extent EU law should afford civil society, particularly non-governmental environmental organisations (NGEOs), the ability to monitor and influence the Commission’s management of infringement casework. The third section considers the contribution made by the EU courts (Court of Justice of the European Union (CJEU) and General Court (GC)) in interpreting the extent of legislative rights of access set down in Union law as well as the relevant administrative practice of the Commission on disclosure of infringement dossier information. Finally, the chapter concludes with some reflections on the state of Union law on access to environmental information.

9A.1 Origins of the EU’s legal framework on access to environmental information

Before considering the specific EU legislative framework regarding access to environmental information in detail, it is first appropriate to take a step back and acknowledge the main
relevant constitutional-level developments that have impacted on the EU over the last quarter of a century in this area. The origins of the Union’s commitments in earnest towards opening up EU-level decision-making on policy matters to greater levels of public scrutiny may be traced to the time when the Treaty on European Union (TEU) was first established in 1992 in the form of the Maastricht Treaty. Prior to Maastricht, the EU’s rules on transparency of decision-making were weak, particularly with respect to decision-making within the Council of the EU and Commission. The development of an access-to-information legal regime at EU level stems largely as a result of the clear political will expressed on the part of the member states within the text of the TEU to engender a process to develop a legal culture of transparency of decision-making at EU level, specifically in relation to the administrative and legislative processes employed by the three supranational institutions of the Union primarily engaged in policy decisions: namely the European Commission, European Parliament (EP) and Council of the EU. In the wake of follow-up declarations made by the European Council during the UK’s Presidency in 1992, the EU promulgated a number of measures in the early 1990s intended to bind its political institutions to a code of conduct on disclosure of documents. Specifically, measures on access to information were taken in relation to the European Commission, Council of the EU and EP. These particular rules were ultimately replaced in 2001 by the Access to Documents Regulation. Whilst technically obsolescent, the practical experience and judicial interpretation gleaned in relation to the earlier transparency initiatives remain of considerable practical value; a good deal of the basic principles contained within their respective frameworks has been carried over into the provisions and operation of the Access to Documents Regulation.

It was not until the 1997 Treaty of Amsterdam (ToA) that the former European Community (EC) Treaty was amended specifically so as to include a specific set of provisions concerning
access to information. The ToA introduced a provision into the former EC treaty framework (ex Article 255 EC)\(^\text{18}\) to provide for a right of access to information and legal basis for the enactment of detailed ancillary legislation. It provided the legal basis for the enactment of the Access to Documents Regulation in 2001, which fleshes out in detail the specific information access rights of individuals and the three political EU institutions’ responsibilities relating to public disclosure of information held by them.

The EU treaty framework on transparency of EU level decision-making has subsequently been subject to further entrenchment and consolidation by virtue of the changes introduced by the 2007 Lisbon Treaty. First, both the TEU and TFEU contain some general provisions cementing the Union’s clear constitutional commitment towards opening up its decision-making to the public as far as possible. The key provisions here are Articles 1 and 11 TEU and Article 15(1) TFEU. That these provisions are located amongst the most important initial general commitments in the two founding treaties underpins their constitutional significance.\(^\text{19}\) Article 1 TEU stipulates that ‘decisions are taken as openly as possible and as closely as possible to the citizen’. Article 11 TEU requires the European Commission to carry out ‘broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’;\(^\text{20}\) it also requires all EU institutions\(^\text{21}\) to offer the public the opportunity to make known and publicly exchange their views on EU activities as well as maintain an ‘open, transparent and regular dialogue with representative associations and civil society’.\(^\text{22}\) By way of complement, Article 15(1) TFEU lays down the general obligation on all the Union’s organs\(^\text{23}\) to ‘conduct their work as openly as possible’ as a means to ‘promote good governance and ensure the participation of civil society’.
Secondly, the Lisbon Treaty upgraded the general right of access to information contained in the former EC Treaty with a new wider-reaching provision in the form of Article 15(3) TFEU. Article 15(3) TFEU, unlike its predecessor provision, applies to all EU organs and not simply the three principal political supranational institutions, and states:

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the EP and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.
The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Whilst the EU courts have as at the time of writing not confirmed the point, it is most probable to draw from the treaty text that Article 15(3) TFEU may not be invoked and relied upon by individuals as a directly effective norm in court proceedings. Given that the right of access to which it refers is made conditional upon the promulgation of specific legislation, it is difficult to see how the treaty provision fulfils the standard requirements of direct effect (namely clarity, sufficient precision and unconditionality) as discussed in Chapter 6. Moreover, the TFEU provision is essentially modelled on its predecessor, Article 255 EC, which the GC confirmed as lacking direct effect on account of its requirements being conditional upon the adoption of further measures. Although the Access to Documents Regulation itself has not yet been reformed to be in line with the scoping requirements of Article 15(3) TFEU, steps have been taken by the three EU political institutions to ensure that the founding instruments of EU agencies are made subject to the regulation’s requirements. Both Article 15(3) TFEU and the Access to Documents Regulation require the three institutions to amend their respective internal Rules of Procedure so as to be in accordance with the requirements over access to information. The European Commission has amended its Rules of Procedure in order to accommodate these legislative changes and ensure that detailed practical arrangements are in place for its administrative staff to adhere to the regulation’s provisions. The other two political institutions have also made relevant amendments to their Rules of Procedure.
One other key development to the EU’s constitutional framework concerning the issue of transparency has resulted from the transformation of the EU’s 2000 Charter on Fundamental Rights (EUCFR) into an integral legally binding component of the primary law of the Union by virtue of the 2007 Lisbon Treaty. Specifically, Article 42 EUCFR establishes as a fundamental right the right of access to documents of EU organs, albeit with the qualification that the personal scope of beneficiaries is limited to EU citizens and natural or legal persons resident or having their registered office within a member state. The legally binding status of Article 42 EUCFR serves to underpin as well as illustrate the general importance that the recognition of the need to ensure respect for an effective right of access to EU documentation has assumed within the constitutional fabric of the Union.

The above-mentioned sources of primary EU law underline also that the EU’s commitment to a right of access to information has broader, deeper and older legal roots than those flowing from commitments entered into under the 1998 Århus Covention. To be sure, the Union’s 2005 ratification of the international agreement as well as the adoption of the Århus regulation have both served to ensure that the Union implements the agreement’s first-pillar obligations fully within its legal order as far as EU institutional conduct is concerned. However, it is important to note also that much of the legal groundwork had already completed beforehand through the EU treaty framework on transparency and related legislative instrumentation.

9A.2 EU legislative framework on access to environmental information

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The EU’s legislative framework relevant to the area of access to environmental information is addressed by two principal legislative instruments, namely the 2001 Access to Documents Regulation as amended by the 2006 Århus Regulation. As confirmed by the CJEU, the EU regulatory framework is intended to give the fullest possible effect to the right of public access to documents of the EU institutions, as recognised in the EU treaty framework. Given that the rules have been housed within the form of EU regulations, it is evident that a number of significant legal effects flow as a result. Regulations are defined in the EU treaty framework (Article 288(2) TFEU) as having general application and being binding in their entirety and directly applicable within all the member states. Accordingly, both legislative instruments are legally binding on the relevant EU institutions. Moreover, as self-executing legislative instruments, they have legal application directly within the national legal systems of the member states as well as at EU level and may be relied upon directly by private individuals so long as the requirements of direct effect are fulfilled. Under the terms of the doctrine of direct effect, as discussed in Chapter 6, the (several) norms contained within the Access to Documents Regulation that are sufficiently precise and unconditional may be enforced by individuals against the EU institutions concerned.

Before considering the Union’s legislative framework in detail, it is appropriate first to consider the nature of the relationship between the two instruments. The Access to Documents Regulation is the principal legal instrument governing public access to documentation held at EU level, including in respect of environmental documentation. In implementing a right of access to EU documentation, the regulation defines the general personal as well material scope of the individual right of access as well as the core obligations (procedural and substantive) that EU institutions must follow when dealing with an access request. Moreover, the regulation stipulates other requirements for EU institutions
concerning the active disclosure of documents, notably in electronic format in publicly accessible registers. In complementary fashion, the Århus Regulation’s role has been to amend the Access to Documents Regulation with a view to ensuring the latter’s full alignment with the Århus Convention. To achieve this goal the Århus Regulation’s access-to-information provisions have amended the Access to Documents Regulation where necessary. The primary role of the Access to Documents Regulation is confirmed by Article 3 of the Århus Regulation, which stipulates that the former shall apply to an applicant’s request for access-to-environmental information, albeit subject to certain amendments or refinements (discussed in the next section). The GC has confirmed that the Århus Regulation may be viewed as a *lex specialis*, so that the Århus Regulation’s provisions in relation to disclosure of environmental information apply over and above the general disclosure stipulations contained in the Access to Document Regulation.

To a considerable extent the legal framework contained in the Access to Documents Regulation relevant to law enforcement material shares textual similarities and resonances with the regime applicable under the preceding legislation of the early 1990s, with the result that a good deal of the judicial interpretation from the EU courts applicable under the former rules remains pertinent today. Notably the early codes of conduct on access to documents applicable to the Commission and Council of the EU in the 1990s contained specific and general exceptions to disclosure in the public interest that were similar in structure to the current EU legislative framework. In a series of cases, the EU courts developed a number of basic legal principles pertaining to questions over rights of access to documents covered under the codes, which continue to serve as guidance on the parameters of the current public interest exceptions contained in the Access to Documents Regulation.
In 2008, the Commission proposed a draft regulation intended to consolidate and reform the existing legislation into a single instrument.\textsuperscript{35} However, due to political differences between the EU political institutions, notably between the EP and Council on the degree to which a general right of access to EU information should be extended, legislative progress has so far effectively stalled. As a result, the current legislative framework on access to environmental information at EU level remains in a bicephalous and accordingly rather fragmented state.

To assist understanding of their legal impact, the following analysis of the EU legislative framework in this chapter section will consider the key legal requirements of the two instruments cumulatively rather than assessing each one in turn. The European Commission has published useful guidance documentation in relation to the operation of the Århus Regulation concerning access to environmental information\textsuperscript{36} as well as in relation to the general functioning of the Access to Documents Regulation.\textsuperscript{37} Whilst not binding and subject to the EU judiciary’s definitive interpretation of the legislative provisions,\textsuperscript{38} these guidance notes (as periodically updated) offer a useful introductory overview of EU institutional understanding of the scope of disclosure obligations as well as practice in processing information requests. In addition to the submission of annual reports on its operation, the Access to Documents Regulation also requires the Commission to submit by the end of January 2004 a report on the implementation of the principles of the instrument, with a view to making recommendations including, if necessary, proposals for legislative revision.\textsuperscript{39} The Commission’s implementation report\textsuperscript{40} provides a useful overview to date of the operational aspects of the regulation. It does not make any specific recommendations for revising the regulation.
9A.2.1 Scope of EU legislation on access to environmental information

A key objective of the Århus Regulation has been to ensure that the Access to Documents Regulation is sufficiently broad in scope and depth to ensure that the access to environmental information obligations contained in the Århus Convention are respected. As a result a number of amendments were made to the provisions of the Access to Documents Regulation, notably in relation to the instrument’s personal as well as material scope.

9A.2.1.1 Personal scope: beneficiaries and duty-holders

In accordance with the Århus Convention’s requirements,41 Article 3(1) of the Århus Regulation ensures that the range of beneficiaries entitled to take advantage of the right of access to information under the Access to Documents Regulation as far as environmental documentation is concerned is not confined to those natural or legal persons who are nationals of, resident within or registered in a member state. For non-environmental information requests, this limitation on the range of beneficiaries applies,42 a legacy from when the 2001 regulation was promulgated under Article 255 of the former EC Treaty which focused its attention on providing access for EU citizens and those with residence in a member state. Under Article 3(1) of the Århus Regulation the right to request information is to apply without discrimination as to citizenship, nationality or domicile and, in the case of legal persons, without discrimination as to where it has its registered seat or an effective centre of its activities.

In similar vein Article 3(2) of the Århus Regulation also ensures that the scope of EU organs subject to duties of disclosure under the Access to Documents Regulation, as far as
environmental information is concerned, is suitably broadly termed in line with the Århus Convention. Article 3(2) ensures that the latter instrument applies to any ‘Community institution or body’ which in turn is defined, for the purposes of access to environmental information, as ‘any public institution, body, office or agency established by, or on the basis of the Treaty’ except when acting in a judicial capacity. This may be contrasted with the position that otherwise applies to non-environmental information matters under the Access to Documents Regulation, which applies formally only to the three supranational institutions primarily engaged in policy decision-making (EP, Council and Commission).

Material scope: environmental information

The material scope of Access to Documents Regulation as amended by the Århus Regulation is also very broadly defined so as to encompass a very large range of documentation held by EU organs containing environmental information. Article 3(1) of the Århus Regulation stipulates that the Access to Documents Regulation applies to any request by an applicant for access to ‘environmental information’ held by EU organs. A very broad definition of ‘environmental information’ is contained in Article 2(1)(d) of the Århus Regulation. In summary, it encompasses the following information whether in written, visual, aural or electronic or any other material form on:

- the state of the elements of the environment;
- factors affecting or likely to affect the elements of the environment;
- measures (whether administrative or legislative) such as policies, legislation, plans or programmes, environmental agreements and activities affecting or likely to affect the
state of elements of the environment or factors affecting or likely to affect the elements of the environment;

- measures or activities designed to protect the state of the elements of the environment;
- reports on the implementation of (EU) environmental legislation;
- economic analyses and assumptions used within the framework of measures (referred to in third and fourth bullet points above); and
- the state of human health and safety, including contamination of the human food chain, and where relevant, conditions of human life, cultural sites and built structures insofar as they are or may be affected by the state of the elements of the environment or, through those elements, by factors or measures (as referred to in the second, third and fourth bullet points above).

It is important to note that the material scope of EU legislative framework on access to information is, as a matter of principle, based on possession by as opposed to authorship of the EU organ concerned. This is confirmed in Århus Regulation, which grounds access-to-information duties on the basis of information ‘held’ by EU organs.46 Under the Access to Documents Regulation the general right of access to information applies ‘to all documents held by an institution’, namely ‘documents drawn up by it or received by it and in its possession’.47 This means that the right of access, in principle at least, applies to documents drawn up by third parties falling within the possession of an institution, such as those emanating from member states.48 As discussed later, though, certain qualified exceptions apply here in respect of member state and other third-party environmental information held by EU organs.49 Whilst in practice it is usually the case that an EU organ is only capable of disclosing environmental information insofar as the information falls within its sphere of responsibility, it is clear that mere possession on the part of the EU organ is sufficient to
trigger access-to-information obligations under the EU legislative framework. The position is
different for non-environmental information matters, though, in that the Access to Documents
Regulation defines ‘document’ to include content ‘concerning a matter relating to the
policies, activities and decisions falling within institution’s sphere of responsibility’.50

9A.2.2 Right of access to environmental information

By virtue of Article 3 of the Århus Regulation members of the public (natural as well as legal
persons) are vested with a right to request access to environmental information held by EU
organs. Such information is to be made accessible to the public either following a written
application filed by the applicant or directly in electronic form or through a register
established by EU organs under the aegis of the combined legal framework of the Access to
Documents and Århus Regulations.51 The European Commission, as lead institution
overseeing the operation of the legislation, has established a central website through which a
person may submit a request for information electronically as well as search through the
various registers of information kept by EU organs.52 The right of access is subject to certain
exceptions53 which will be considered in section 9A.2.3 below. Under the Access to
Documents Regulation, each EU institution is obliged to take the necessary steps to inform
the public of their access rights.54

The combined EU legislative framework on access to information contains two key sets of
provisions that require EU organs to ensure that the public has sufficient access to
environmental information held by them. The sets of provisions may be categorised
respectively as reactive as well as proactive disclosure obligations. The proactive set consists
of those provisions requiring EU organs to ensure that certain sources of environmental information originating or held at EU level are publicised and kept up to date. The reactive set comprises those provisions which establish an individual right to request access to information, in respect of which EU organs are obliged to respond. Both sets are complementary in the sense that in practice individuals will usually utilise the application procedure when unable to locate information they seek on EU organs’ websites and electronic registers. Each set of provisions is examined in turn below.

9A.2.2.1 Proactive duty of disclosure

Under the EU legislative framework EU organs are subject to a number of duties on ensuring active disclosure to the public of a wide range of environmental information held at their disposal. The legislation lays down general obligations for EU organs to make such documentation as far as possible directly accessible to the public in electronic form or through a register which is to be accessible electronically.\(^5\) Under Article 4(1) of the Århus Regulation EU organs are required to organise the environmental information relevant to their functions and held by them so that it becomes progressively available in electronic databases easily accessible to the public via the internet.\(^6\) Whilst this obligation does not apply to information collected prior to entry into force of the Århus Regulation (28 June 2007), EU organs are required as far as possible to indicate where such information unavailable in electronic form may be located.\(^7\) In addition, whilst being obliged to make ‘all reasonable efforts’ to maintain environmental information they hold in readily reproducible and accessible electronic form, EU organs are duty-bound ‘insofar as within their power’ to ensure that information they compile is up to date, accurate and comparable.\(^8\)
Articles 12–13 of the Access to Documents Regulation in conjunction with Article 4(2) of the Århus Regulation as well as Article 297 TFEU stipulate that a number of documents must or should either be publicised or relevant links to internet sites containing them be provided (subject to none of the exceptions applying). In summary, these sources of environmental information include the following environmental documents which must be published in an EU organ’s database system or register where the content is relevant to their functions and held by them:

- **EU legislative documentation**: EU acts on the environment adopted by way of legislative procedure, as well as official documents adopted during the legislative procedure (Commission proposals, Council common positions, EP opinions). Such documentation must also be published in the Official Journal of the EU (OJEU).

- **International environmental agreements concluded by the EU**: these must also be published in the OJEU.

- **EU non-legislative measures**: non-legislative regulations and directives addressed to all member states as well as decisions not specifying any addressee. Such documents must also be published in the OJEU.

- **EU policies, plans and programmes** relating to the environment.

- **Implementation reports**: progress reports on the implementation of the items listed above in the first three bullet points where prepared or held in electronic form.

- **Infringement proceedings**: disclosure of steps taken in proceedings for infringements of EU environmental law under Art.258 TFEU as from the reasoned opinion stage onwards.

- **State of the environment reports**: the Commission is required to publish and disseminate at regular intervals not exceeding four years a report on the state of the
environment, including information on the quality of, and pressures on, the environment.\textsuperscript{67}

- \textit{Environmental monitoring data:} data or data summaries from the monitoring of activities affecting or likely to affect the environment.\textsuperscript{68}

- \textit{Authorisations with significant environmental impact:} a reference to be provided regarding their location if not made directly available on the relevant EU organ’s database system/register.\textsuperscript{69}

- \textit{Environmental agreements:} contractual as well as voluntary arrangements on environmental matters made between EU organs and third parties. A reference is to be provided regarding their location if not made directly available on the relevant EU organ’s database system/register.\textsuperscript{70}

- \textit{Environmental impact studies and risk assessments:} a reference is to be provided regarding their location if not made directly available on the relevant EU organ’s database system/register.\textsuperscript{71}

From the above, it is evident that the Union’s policy on proactive disclosure policy with respect to environmental information is far-reaching, covering a very broad range of documents and anchored within a legally binding and enforceable structure. The European Commission’s Environmental Directorate-General (DG ENV) as well as other EU bodies actively involved in environmental policy matters have been active in progressively developing webpages and database systems containing advice and information for the public on securing electronic access to information held at EU-level relating to environmental policy decision-making\textsuperscript{72} as well as on the state of the environment held at EU level.\textsuperscript{73} With regard to the latter aspect, DG ENV has co-ordinated the pooling of online links to the various information registers of the EU organs, the European Environment Agency (EEA) website,\textsuperscript{74}
the EIONET (European Environment Information and Observation Network) website\(^7\) (a collaborative network between the EEA and member country authorities and research bodies providing data on the state of the environment) as well as the E-PRTR (European Pollutant Release and Transfer Register) website,\(^6\) which contains annually reported data for the public on the amounts of releases from a list of 91 pollutants (such as heavy metals, pesticides, greenhouse gas emissions and dioxins) from over 30,000 industrial facilities located in Europe.

Notwithstanding the wealth of environmental information published by the Union, it is also the case that several EU-level documents which have a material bearing or influence on EU environmental policy decisions are not readily placed into the public domain, such as those relating to influential informal working groups advising official committees or institutions as well as internal assessments on infringement casework. The EU legislative framework accordingly provides a mechanism whereby members of the public may request access to environmental information held by EU organs which is not published as a matter of course, and to this we now turn.

9A.2.2.2 Reactive duty of disclosure

As mentioned earlier, Article 3 of the Århus Regulation vests members of the public with the right to request access to environmental information held by EU organs. The Access to Documents Regulation sets out a detailed framework of the procedures (principally contained in Articles 6–8 thereof) applicable for handling requests for access to such information. As an integral part of the motivation underpinning the instrument to present a more user-friendly service to the general public, the regulation stipulates relatively short deadlines for the turn-
around of assessment of information requests, a step that constitutes a notable change from
the requirements set down in the initial EU instruments on access to information in the 1990s.
It remains to be seen in the long term whether the civil servants within the respective
institutions, in particular those working within the European Commission which is the
recipient of most requests, are going to able to meet with its requirements, bearing in mind
other responsibilities that the personnel usually have to fulfil. The Access to Documents
Regulation envisages a two-stage administrative procedure for handling information requests.
Specifically, this entails initial processing of applications and, where necessary, a follow-up
processing of confirmatory applications in the event that the institution initially refuses to
grant access and the applicant wishes the institution to reconsider its position.

In order to be admissible, applications for accessing documentation must comply with a
number of basic conditions. Specifically, applications must be filed with the relevant
institution in written form, including electronically by email, be in one of the official
languages of the EU and be made in a sufficiently precise manner in order for the institution
to be able to identify the relevant document. An acknowledgement of receipt is dispatched
to the applicant. Applications to the European Commission may be sent either to its
Secretariat-General or the relevant Directorate-General (DG) or department responsible for
the area covered by the request. In order to ensure that the request reaches the appropriate
recipient within the Commission, it is best policy to send applications to the Secretariat-
General, which will then forward the request to the appropriate department or unit concerned.
Where an application is imprecise, the institution is to request clarification from the applicant
and provide assistance, as far as is appropriate. A special procedure applies in relation to
requests for very long documents or large quantities of documentation, whereby the
institution is to confer informally with the applicant in order to come to a ‘fair’ solution.
This particular procedure, essentially of a pragmatic nature, may well involve applicants having to assist in the inspection and copying process, in order to alleviate what would be unreasonable administrative burdens placed on the particular EU organ’s resources. In most instances, such a mechanism will not be triggered, unless the particular subject matter is very broad or involves a particularly lengthy and detailed project.83

Once considered admissible, applications for environmental information are subsequently subject to initial processing within the relevant EU organ.84 Within the European Commission, this usually means that this is undertaken by the staff within the relevant DGs responsible for the area covered by the request, namely under the supervision of the relevant Directors-General and/or heads of individual units.85 The legal unit of the Commission’s DG ENV will normally handle any queries for information concerning environmental infringement files initially. The relevant technical units within Commission’s DGs will usually address requests for other types of environmental information held by the Commission, depending on the relevant DG holding the information. Given that environmental-related policy decisions are spread across a range of EU policy fields, a number of DGs could potentially be involved in handling requests for environmental information other than DG ENV depending on which DG is responsible for the particular document in question (e.g. the DGs responsible for climate change, transport, agriculture, fisheries, internal market or external trade). Within 15 working days86 from the request’s initial registration with the relevant EU organ, the institution shall either grant access or, in a written reply, state reasons for the total or partial refusal of the applicant’s request and inform the applicant of his right to reply to confirm the request.87 Such a confirmation is known as a ‘confirmatory application’. Failure on the part by the institution to reply within the time-limit automatically entitles the applicant to send a confirmatory application.88 The time-limit may,
though, be extended by 15 working days in respect of applications for accessing very long documents or very large quantities of documentation, so long as the applicant is notified in advance and the notification is fully reasoned.\textsuperscript{89} In the event of a partial or total refusal on the part of the EU organ to provide access with the time period allowed, within 15 working days thereafter the applicant must submit a confirmatory application requesting the institution to reconsider its initial position if the applicant wishes to maintain their claim for information access.\textsuperscript{90} It is important that the applicant complies with this deadline, because failure to submit a confirmatory application within this period has the effect of closing the possibility of appealing against the EU organ’s response. The applicant is deemed to have accepted the position or response adopted by the EU organ concerned within the initial reply period. Confirmatory applications sent belatedly are technically inadmissible. It is, of course, open to the institution to waive this deadline but, other things being equal, it is not obliged so to do.

Once in receipt of a valid confirmatory application, the EU organ concerned has 15 working days either to grant access to the relevant environmental information or, again through written reply, to provide reasons for a total or partial refusal to grant such access.\textsuperscript{91} As is the case with initial processing, the period may be extended by a further 15 working days with respect to requests for very lengthy documentation.\textsuperscript{92} In the latter event, the reply shall inform the applicant of his rights to take annulment proceedings under Article 263 TFEU and/or file a complaint of maladministration with the European Ombudsman (EO) under the auspices of Article 228 TFEU. Failure by the institution to send a timely response is to be considered a ‘negative reply’, which automatically entitles the applicant to have recourse to the above-mentioned review procedures.\textsuperscript{93} Where an applicant wishes to seek judicial review in respect of a failure to respond, it is important that they adhere to the strict time limits for filing court proceedings, otherwise the action will be rendered inadmissible. Under Article
263(6) TFEU, a person is required to bring proceedings within a two-month time limit. In respect of a failure by an EU organ to respond to confirmatory application, this time limit runs from the elapse of the 15 working day (or extended) period granted to the EU organ to issue a timely response. The GC has confirmed that a belated court action will be rendered inadmissible, even in circumstances where the EU organ has repeatedly promised to provide disclosure but has pleaded for more time than that foreseen in the EU legislative framework to do so. Forbearance, in this instance, evidently does not pay.

Where an application for information is successful, either through voluntary institutional disclosure or by virtue of a positive outcome upon appeal, the applicant has a number of options on how to access the documentation containing the relevant information. Specifically, they may either inspect them at the EU organ’s premises (known as ‘on-the-spot consultations’) or require copies (hard photocopy or electronic) to be dispatched to them. Whereas no charge may be made in respect of on-the-spot consultations of documents, copies under 20 A4 pages and direct access in electronic form or via a register, the EU organ concerned may otherwise charge applicants for the costs of producing and sending copies.

9A.2.3 Exceptions to the right of access to information

It is important to note that the right of access to environmental information is subject to exceptions designed to protect certain public interests under the combined EU legislative framework of the Access to Documents and Århus Regulations. Applicants do not have an absolute right to access all environmental information held by EU organs. The principal legislative provision concerned is Article 4 of the Access to Document Regulation, as
amended by Article 6 of the Århus Regulation. Prior to examining the exceptions in detail, it is perhaps first useful to take stock of some general principles relevant to their interpretation and application which have been established by the EU courts.

As a matter of general principle confirmed by case law of the EU judiciary, the legislative exceptions are to be interpreted narrowly by the institutions concerned. The principle reflects the underlying approach of the EU legislation to ensure as full disclosure of information as possible. This is complemented by the requirement contained in the Access to Documents Regulation that if only parts of the requested documentation are covered by an exception, the remainder are to be released to the applicant. In addition, the legislation specifies that exceptions are to apply for only as long as protection from disclosure is justified. The case law also makes it clear that an EU institution holding requested documentation may not simply justify the application of one or more of the exceptions set out in Article 4 of the Access to Documents Regulation simply on the ground that it concerns a protected interest. Instead, an exception may only be invoked if the institution concerned has actually assessed whether access would specifically and actually undermine a protected interest and, where applicable to exceptions covered by Article 4(2)–(3), that there is no overriding public interest in disclosure. Secondly, the risk that a protected interest may be undermined must be shown to be reasonably foreseeable and not purely hypothetical. Thirdly, subject to a few limited exceptions, the EU institution must carry out a concrete examination and assessment of whether a particular protected interest applies to each document subject to a disclosure request. The need for concrete individual examination of documents is waived where the request involves a very large quantity of documentation and material liable to impose an unreasonable burden on available EU administrative resources, where the document concerned falls within certain categories of document to which general
presumptions relating to the application of a protected interest may apply. As is discussed in section 9A.3 below, the latter qualification is particularly relevant with regard to requests for access to the infringement case files of the European Commission.

The main exceptions to the right of access to information contained in the EU legislative framework may be broadly divided into exceptions of a relatively strict or more nuanced nature, the latter type requiring the EU organ concerned to balance a protected exceptional interest against the interest of ensuring transparency in EU level decision-making. Each is considered in turn below, with reference to how they relate to requests for environmental information (unless otherwise indicated).

9A.2.3.1 Strict exceptions

The relatively strict types of exception concern those derogations which provide for a significant weight to be attached to the protected interest, which make it difficult to envisage it being trumped by the public interest objective of disclosure. Specifically, Article 4(1) of the Access to Documents Regulation foresees that EU organs must, subject to the requirements of Article 6(2) of the Århus Regulation, refuse access to environmental information where disclosure would undermine protection of:

- public security
- defence and military matters
- international relations
- financial or monetary or economic policy of the EU or a member state
- privacy and integrity of the individual, in particular in accordance with EU legislation on personal data protection.
Article 6(2) of the Århus Regulation stipulates that these grounds must, though, be interpreted in a narrow manner, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment. Article 6(2), introduced by way of response to the terms of the Århus Convention, constitutes a rather vague and Delphic limitation. However, it is clear that ultimately it leaves a considerable margin of discretion to EU organs in weighing up the relative interests involved and it is difficult to envisage any EU organ likely to hold that public interest in disclosure should override the consequences of one of these high-profile exception interests being undermined. The CJEU has held that the exception ground relating to privacy and integrity of the individual must be interpreted in full conformity with the relevant EU legislation on personal data protection. The issue of privacy arose in connection with an environmental dispute in *Borax*, which involved a request for access to conclusions of a Commission working group on the toxicity status of certain chemicals relevant for evaluation by the Technical Committee established under the aegis of the EU legislation on classification and labelling of dangerous substances. In refusing access to the document containing a record of the group’s recommendations, the Commission argued that disclosure of experts’ identities and opinions might undermine their integrity by exposing them to external pressure. The GC dismissed such concerns in the absence of any convincing evidence, as it saw it, to substantiate such a risk. The Court’s finding was controversial, given that oral testimony had been given by experts participating in the working group that outside pressure from chemical industrial interests could be expected if such information were to be disclosed.

In addition, in tandem with these derogations special rules apply in Article 9 of the Access to Documents Regulation in relation to the handling of requests and disclosure of sensitive
documents. Sensitive documents are defined as meaning those originating from EU organs or third parties which are classified as top secret/secret/confidential and which protect essential interests of the Union or one or more member states in the areas covered by the first four bullet points above (i.e. public interests protected under Article 4(1)(a)), notably within the context of the public security, defence and military matters. Finally, Article 6(2) of the Århus Regulation specifies that EU organs may refuse access to environmental information where disclosure of the information would adversely affect protection of the environment to which the information relates, such as breeding sites of rare species. This particular provision reflects an exception incorporated within the terms of the Århus Convention. 116

In practice, most of the exceptions contained in Article 4(1) of the Access to Documents Regulation are relatively rarely invoked, including in relation to environmental information requests. Apart from protection of privacy and the integrity of the individual, which accounted for 14.65 per cent of all refusals to disclose documentation held by the EP, Council and Commission in 2012, the other exception grounds in that provision represent but a very minor fraction of rejected applications. 117

9A.2.3.2 Nuanced exceptions

The set of more nuanced exceptions to the right of access to environmental information contained in the EU legislative instrumentation is far more significant in practice. These are contained in Article 4(2)–(3) of the Access to Documents Regulation, as amended by the Århus Regulation. The legislative provisions establish an intricate as well as challenging task for EU organs to balance these particular exception interests against the public interest of
disclosure. These nuanced exceptions may be divided into three broad categories, each with a distinct framework to be used for analysing information requests.

The first category of nuanced exceptions is contained within Article 4(2) of the Access to Documents Regulation, subject to additional qualifications laid down in Article 6(1) of the Århus Regulation. Article 4(2) as amended requires EU organs to refuse access to environmental information where disclosure would undermine the protection of one of the following protection interests, unless there is an overriding public interest in disclosure:

- a person’s commercial interests, including intellectual property\(^{118}\)
- court proceedings and legal advice\(^{119}\)
- the purpose of inspections, investigations and audits\(^{120}\)

Article 6(1) first sentence of the Århus Regulation specifies that, where an information request concerns the protection of commercial interests as well as the purpose of inspections and audits, an overriding public interest (OPI) in disclosure shall be deemed to arise where the information requested relates to environmental emissions, subject to an important qualification. Specifically, the presumption of an OPI in disclosure does not apply with respect to requests for information concerning investigations, such as decisions by the Commission on the processing of suspected infringements of EU environmental law under Article 258 TFEU. Article 6(1) second sentence of the Århus Regulation stipulates that legislative exceptions not caught by the first sentence of Article 6(1) must be interpreted in a restrictive way, taking into account the interest in public disclosure and whether information requested relates to environmental emissions.
The impact of the first sentence of Article 6(1) of the Århus Regulation on the protected interest of commercial confidentiality was taken up recently in the *Glysophate* litigation before the GC. In *Glysophate* two NGEOs had requested access to several documents held by the Commission concerning the first authorisation in 2001 of the marketing of a particular herbicide (glysophate) under the aegis of EU plant protection legislation. The information requested included a draft assessment report compiled by the rapporteur member state (Germany) as well as a list of documents relating to toxicity tests. The German government refused to authorise disclosure by the Commission of documents its authorities had authored on grounds of commercial confidentiality. The GC held that the impact of Article 6(1) is that environmental information held by the Commission relating to environmental emissions is required to be disclosed, even if there is a risk of undermining the interests protected under Article 4(2) of the Access to Documents Regulation. In this instance, the Commission was required to disclose the data it held on the chemical composition of impurities present in glysophate (products) subjected to toxicity tests by the manufacturer. Section 9A.3 below considers the operation of the other exceptions contained in this nuanced category, insofar as they relate to disclose of Commission infringement case files (notably the exceptions covering ‘investigations’ and ‘court proceedings’).

In practice, the first category of nuanced exceptions under Article 4(2) of the Access to Documents Regulation account for a significant proportion of the decisions made to refuse access, collectively approximately 50 per cent. The Commission’s report on access to documentation held by the EP, Council and Commission for 2012 relates that the amount of disclosure refusals based on these protected interests was as follows: commercial interests (16.94 per cent), court proceedings and legal advice (9.84 per cent) and inspections, investigations and audits (25.32 per cent). The Commission has noted that the most
frequent ground for refusing and confirming a refusal of access has been the protection of the purpose of investigations, which essentially concerns its decisions over the processing of infringement casework under Article 258/260 TFEU. Between 2008 and 2012 the invocation of this exception was used as the basis for justifying 25.6 per cent of all initial refusals of document disclosure. In 2012, 45.1 per cent of all confirmatory refusals were justified on this particular exception.

The second category of nuanced exceptions is set down in Article 4(3) first subparagraph of the Access to Documents Regulation, as amended by the Århus Regulation. Specifically, this legislative provision stipulates that, unless there is an OPI in disclosure, access to environmental documentation drawn up by EU organs for internal use or documents received by an EU organ relating to a matter in relation to which it has not taken the decision, must be refused if disclosure would ‘seriously undermine’ the organ’s decision-making process. The Commission has noted that the reference to the protected interests in the first subparagraph of Article 4(3) having to be shown to be ‘seriously’ undermined, and not just undermined as in the case of interests contained in Article 4(1)–(2), signals that the conditions for applying the exception contained in Article 4(3) first subparagraph are relatively more onerous, although in practice it may well be difficult to crystallise a specific difference. The Commission has interpreted the purpose of this exception as ensuring that decision-making may be shielded from any ‘undue external pressure’, in other words so that the EU organ may be able to weigh its decision-making options freely and frankly. The EU organ’s assessment on whether to disclose is, in addition, made subject to the requirements set out in the second sentence of Article 6(1) of the Århus Regulation, namely that the exception ground(s) must be interpreted in a narrow manner, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the
environment. In practice, refusal to disclose information on this ground also constitutes a
significant proportion of refusals to grant access to EU documentation. Between 2008 and
2012, this exception accounted for 17.1 per cent of all initial refusals to disclose
documentation held by the EP, Council and Commission.

In practice, an EU organ is most likely to invoke this legislative exception when the
information or documentation sought concerns a matter yet to have been decided upon. In
light of EU case law, assessment of the element of ‘seriousness’ depends on all the
circumstances including the negative effects on the EU-level decision-making process. The
GC has acknowledged that, in particular, this may be shown where disclosure ‘has a
substantial impact’ on the decision-making process. The GC has held that the legislative
exception does not cover preliminary analyses carried out by an informal working group
commissioned by the EU institution charged with making the final decision.

The third category of nuanced exception is enshrined within Article 4(3) second
subparagraph of the Access to Documents Regulation, as amended. According to this
provision, subject to there being an OPI in disclosure, access to environmental information
which comprises opinions for internal use as part of deliberations and preliminary
consultations within the EU organ concerned is to be denied if disclosure would ‘seriously
undermine’ the organ’s decision-making process. As with the second exception category, the
EU organ’s assessment on whether to disclosure must also be undertaken in accordance with
the requirements of Article 6(2) of the Århus Regulation. In practice, this exception is now
applied on relatively few occasions – in 2012 amounting to just 4.92 per cent of all initial
refusals to disclose documentation held by the EP, Council of Commission.
The application of the legal framework on exceptions is often a challenging one to undertake in practice. For instance, it has been noted that the Commission has expressed uncertainty in comprehending the distinction to be made between a situation which undermines and one that seriously undermines a protected interest.\textsuperscript{133} The Commission has acknowledged that balancing the public interest and exceptional protected interests is ‘one of the most difficult exercises in the processing of applications’\textsuperscript{134} The public interest, being in its view quite a ‘vague legal concept’, makes it difficult for EU organs like the Commission to set criteria for its application.\textsuperscript{135} The Commission has taken the view to rule out the applicant’s interest in disclosure, the scientific nature of a request as well as the general principle of transparency as amounting to instances of the ‘public interest’ in the context of the legislative framework. On the other hand, the Commission has also conceded that it is possible to maintain that there is always a public interest in disclosing information held by public authorities. Each case must be assessed on its relative merits, with the key issue for the Commission being whether the harm caused to a protected interest in a particular case outweighs the interest in making the information public.\textsuperscript{136} In practice, the legislative framework would not appear to have led to a notable opening up of environmental information covered by one of the protected interests in Article 4(2)–(3) of the Access to Documents Regulation, as amended. To date, the author is unaware of any case in which the Commission was persuaded that an OPI in disclosure should override the existence of a protected exceptional interest. A number of factors seem to have ensured that the balance of interests favours the protected exceptions. These include the fact that in practice applicants have the onus of demonstrating an OPI, the wide margin of appreciation effectively afforded to EU organs in weighing up the relative interests as well as the fact that the legislation does not vest power in an independent body to assess the request. EU organs holding information (often) have clear vested interests in holding onto information.
9A.2.3.3 Third-party documents held by EU organs

Apart from the above-mentioned exceptions, additional specific requirements apply under the EU legislative framework in respect of environmental information held by EU organs and which have been generated by third parties. As a general requirement, unless it is clear that the relevant document must be disclosed or not, EU organs must consult with the third party concerned with a view to assessing whether one or more of the exceptions in Article 4(1)–(2) of the Access to Documents Regulation applies. In this context, the EU organ must also pay special regard to the requirements of EU requirements regarding personal data protection.137 With respect to documents originating from EU member states, Article 4(5) of the Access to Documents Regulation stipulates that a member state may request the EU organ concerned not to disclose such documentation without its prior agreement. Contrary to the position taken initially by the Commission, the CJEU has clarified that this provision does not give a member state a veto over whether a document originating from it should be disclosed to the public.138 Instead, the CJEU has confirmed that in order to block disclosure the member state concerned must demonstrate that one or more of the exceptional grounds contained in Article 4(1)–(3) of the Access to Documents Regulation applies and those reasons must be apparent in the EU organ’s decision in relation to the request.139 Furthermore, the statement of reasons underpinning the EU organ’s decision on disclosure must explain how access could specifically and effectively undermine a protected interest, unless such explanation would inevitably disclose the content of protected information and thereby render the exception meaningless.140 At the same time, the GC has acknowledged that member states enjoy a ‘broad discretion’ for the purpose of determining whether one of
the Article 4 exceptions apply to the information requested. The task of the Commission (or other EU organ) holding member state documents is not to substitute its own decision for the state concerned with a comprehensive assessment but to test whether the grounds proffered by the member state for non-disclosure are capable of justifying refusal of access. Judicial review of the operation of Article 4(5) is limited to verifying compliance with the relevant procedural rules of the EU legislative framework, the duty to state reasons, whether facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. In practice, therefore, Article 4(5) of the Access to Documents Regulation makes it additionally difficult for applicants to gain access to those documents held by EU organs but originating from member states.

9A.2.4 Appeal mechanisms: European Ombudsman and judicial review

If an applicant is dissatisfied with the response of an EU institution or other organ to a request for information, they have two possible routes to appeal. Specifically, they may decide to file a complaint of maladministration to the EO under Article 228 TFEU or seek judicial review before the GC through commencing annulment proceedings under Article 263 TFEU. If an EU organ refuses to disclose environmental information held by them to an applicant who has submitted to them a confirmatory application, the organ is obliged under the Access to Documents Regulation to inform the applicant of his/her rights to refer to the EO and the GC.

Where an applicant denied access to information decides to elect for the judicial route of appeal (i.e. bring annulment proceedings before the GC under Article 263 TFEU), this has
the effect of automatically terminating the EO’s jurisdiction with respect to the case. As stipulated in the second subparagraph of Article 228(1) TFEU, the EO is not entitled to take up any complaint which is or has been the subject of current legal proceedings. If it were otherwise, the EO’s mandate would encroach upon the independence and powers of judicial bodies. Hence, an applicant may not elect to appeal to both the EO and the GC. These two appeal options will be considered briefly later in general terms. The broader role and impact of the EO are examined in detail in the next chapter.

9A.2.4.1 The European Ombudsman and access to information

Applicants located within the EU who consider that they have been unfairly denied access to environmental information held by an EU organ have, by virtue of Article 228 TFEU and Article 43 of the EU Charter of Fundamental Rights, the opportunity to appeal to the European Ombudsman (EO). Under this treaty provision, the EO is charged with the responsibility of investigating complaints made to him/her concerning instances of maladministration on the part of the EU institutions, bodies, offices or agencies, with the exception of the CJEU acting in its judicial role.

The EO is charged with the mandate under the TFEU to investigate cases of alleged ‘maladministration’ on the part of non-judicial EU organs, which include notably the European Commission, EP and Council of the EU. The term ‘maladministration’ is not defined in the EU treaty framework or in secondary legislation. In broad terms, the EO has interpreted it to mean a situation where a public body fails to act in accordance with a rule or principle that is binding upon it. Essentially, this means that the EO’s task, when investigating complaints of maladministration, is to verify the absence or presence
institutional compliance with EU law as well as with principles of good administrative practice to which the particular EU organ has bound itself. In practice, the latter have been derived from general principles of EU administrative law developed over the years by the EU’s judicial institutions.

There are certain advantages in taking an appeal to the EO rather than the GC in relation to an access-to-information dispute. From a practical costs perspective, the appeal mechanism to the EO is free of charge and representation by a qualified legal practitioner is not required. In addition, it appears that the EO is on average able to deliver a final decision quicker than is the case with respect to cases before the GC. Specifically, a decision from the EO is made usually within a year or less of the complaint being filed, whereas a judgment from the GC on an annulment action may take on average some 25 months.

However, appeals to the EO have also definite shortcomings. First, it should be noted that natural persons resident outside the territory of the EU and legal persons without a registered office within the EU do not have a right of recourse to the EO; no such obstacle applies in relation to annulment proceedings brought before the GC. In addition, the EO’s decisions are not legally binding and any interpretation of EU law by the Ombudsman is subject to the qualification that definitive legal interpretations of Union law and legislation are made by the EU’s judicial institution, namely the Court of Justice as composed of the CJEU and GC. Accordingly, the EO has, as a matter of basic principle, upheld refusals on the part of the European Commission to disclose infringement dossiers in line with GC jurisprudence.

Having said that, the EO has indicated willingness to explore the parameters of the phrase ‘overriding public interest’ in relation to the qualified exceptions contained in Article 4(2)–
of Access to Documents Regulation, subject to compliance with any principles or limits laid down in available CJEU/GC jurisprudence. This was illustrated in an allegation of maladministration made to the EO in 2002 about the handling of a complaint made to the European Commission relating to a suspected breach of EU legislation within the UK concerning the non-life insurance sector. The complainant, a private investor in the Lloyd’s insurance market who had made considerable financial losses (a ‘Name’), had contacted the Commission alleging that the UK had failed to implement EU Directive 73/239 on non-life insurance correctly. He requested access to the Commission’s letter of formal notice subsequently sent to the UK, but was denied access on the grounds of the public interest exception cited in the third indent of Article 4(2) of Access to Documents Regulation. The EO’s decision, whilst formally upholding the Commission’s decision to refuse to disclose the legal document, is noteworthy for its close scrutiny of the reasons for non-disclosure and whether or not on balance there was an overriding public interest to grant access. The EO accepted that in principle the complainant had established a ‘significant public interest in disclosure’, given that disclosure in this case would make it possible for the public to check the accuracy of information supplied to the Commission from the UK authorities for the purposes analysing compliance with EU law and ‘thereby enhance the effectiveness of the Article [258] procedure’. The EO accepted, in this context, that a considerable amount of information supplied to the Commission would have emanated directly from the Lloyd’s insurance market itself and a question would accordingly arise as to the objectiveness of that information supply. However, the EO considered that this particular concern was met by the fact that the Commission services were able to set about verifying the accuracy of the information from a number of internal and external sources (e.g. UK court judgments, petitions to the EP, official UK parliamentary and government reports as well as in-house expertise on auditing arrangements and legal issues). As a result, the EO was not
persuaded that the complainant had adduced a case for there to be an overriding public
test that the complainant had adduced a case for there to be an overriding public
interest in disclosure, given that the issue of verification of information was satisfactorily
addressed in his opinion by the Commission’s range of working methods and resources
involved in assessing the case.

In another case, a scientific researcher had sought to gain access to a legal opinion drawn up
by the Commission’s Legal Service on the relationship between the Euratom Treaty and the
former EC Treaty in relation to the latter’s rules on state aids.156 His request was rejected on
the basis of the second indent of Article 4(2) of Access to Documents Regulation, namely
that the opinion constituted ‘legal advice’ for the purposes of the regulation. It was not
apparent that the legal opinion had been drafted with the view to contemplating the
commencement of any specific legal proceedings on the part of the Commission. The EO
agreed with the Commission’s view in holding that non-disclosure was covered by the public
interest exception in the second indent. In assessing whether there was nevertheless any
overriding interest in requiring that access to the information be granted, the EO accepted that
scientific interest on the part of the applicant in gaining access to the material constituted a
public interest but this was not sufficient to be ‘overriding’ in the sense required by the
Access to Documents Regulation. The EO, in disagreement with the applicant, considered
that under the EU legislative framework it was incumbent on the applicant and not on the
Commission to come forward with submissions intended to persuade the case for an
overriding public interest in disclosure. In addition, the EO did not accept that the fact that
the opinion in question was drawn up two years before the applicant’s request was material;
the age of the document in this instance did not raise any presumption that access should be
granted.
In one notable respect, the EO has sought to develop a particularly innovative interpretation in favour of disclosure in relation to certain types of legally related documentation held by an EU institution. Specifically, the EO has confirmed that legal opinions emanating from the Legal Service within the Council of the EU relating to draft legislative instruments are not covered by the exception of ‘legal advice’ contained in the second indent of Article 4(2) of Access to Documents Regulation, but instead by the public interest protection clauses in Article 4(3). In his view, when the legislative process has finished, access to a legal opinion of the Council could only be refused where the institution was able to demonstrate that disclosure would seriously undermine its decision-making process, and even if this could be done this would then be subject to the possibility of this being rebutted by a complainant establishing an overriding public interest in disclosure. The EO’s position appears to run counter to an earlier interim ruling by the Court of First Instance (CFI), where the President of the GC in the Norup Carlsen case had found that the Council’s refusal to disclose access to the opinions of legal services concerning draft legislation did not appear to breach the former code of conduct binding on the Council on access to documentation applicable prior to the Access to Documents Regulation. The EO considered that the GC’s interim ruling in that case did not have any bearing on the interpretation of Access to Documents Regulation, whose provisions in Article 4(3) were not reflected in the previous legislation. In addition, the EO considered that there were additional special legal reasons which required non-disclosure in that case, given that the public release of the documents concerned would have had a prejudicial impact on the outcome of the main legal proceedings in question.

A notable feature of an EO decision is the fact that it is not legally binding upon other EU organs. Accordingly, where the EO takes a decision based upon his own interpretation of the rules underpinning Access to Documents Regulation, where there is no available case law
from the EU courts on the material points of law in issue, and/or where the EO considers that
the EU organ concerned has made an erroneous refusal to disclose material, it is uncertain to
what extent, if at all, the political EU institutions, notably the Commission and Council, will
be prepared to adopt his recommendations. It is arguably regrettable that the TFEU does not
provide the EO with more ‘teeth’, such as conferring legal force to his decisions, or possibly
creating a special procedure to obtain a confirmatory declaration from the GC on legal
interpretations of the regulation where appropriate.\(^{161}\) In practice, the EO’s decisions appear
overall to command widespread respect. The EO reported in 2011/12 that some 80 per cent of
EO recommendations are adhered to by other EU organs.\(^ {162}\) As encouraging it might appear,
this figure cannot, however, detract from the reality that EU organs remain legally entitled to
maintain their original positions for any given case, and in 20 per cent of cases this appears to
remain the case.

9A.2.4.2 Judicial review: annulment proceedings under Article 263 TFEU

Recourse to judicial review is another form of appeal that applicants may wish to utilise in
order to challenge a refusal to disclose environmental information held by an EU organ.
Under Article 263 TFEU, a person has the right to initiate annulment proceedings before the
GC within two months of the EU organ’s response\(^ {163}\) or failure to respond (deemed to be a
‘negative reply’).\(^ {164}\) In order to succeed with the legal action, a plaintiff must show that the
EU organ in question has breached one of the substantive grounds listed in Article 263(1)
TFEU namely: lack of competence; infringement of an essential procedural requirement;
infringement of the TEU/TFEU or of any rule of law relating to their application; or misuse
of powers. In practice, annulment actions concerning information request refusals are most
likely to be based essentially on the second and third grounds of review (namely a breach of
an essential procedural requirement or misapplication of legislative provisions by the EU organ concerned). Article 7 of the Access to Documents Regulation, as amended, stipulates that the EU organ must provide the applicant with written reasons for any refusal to disclose information requested.\textsuperscript{165} Failure by an EU organ to state adequately the reasons for a refusal on its part to disclose in full information requested by a member of the public constitutes a breach of an essential procedural requirement.\textsuperscript{166}

Whilst the EU courts have confirmed that the EU legislative exceptions to the right of access to information should as a matter of general principle be construed restrictively,\textsuperscript{167} in practice recourse to judicial review has not led to any notable successes in enabling private persons to be able to prise them open. To date, over a decade on from entry into force of the Access to Documents Regulation, neither the CJEU nor the GC has upheld an applicant’s annulment action based upon the criterion of ‘overriding public interest’ for disclosure. It may be argued that this is down to a number of reasons, some of which may be highlighted here. In particular, it is important to note that the role of the GC is not to substitute its own assessment of the relative balancing of interests under the EU legislative framework on access to information but to review whether the EU organ concerned has entered into a serious and credible assessment of the various legal considerations involved. It is also evident that the exceptions to disclosure of information under the Access to Documents Regulation are relatively wide-ranging, addressing a number of protected interests. In addition, the effect of the case law of the EU courts has been to place the onus on the applicant to prove the existence of an OPI in disclosure, which in itself requires proof of the existence of a specific interest relevant to the particular circumstances of the information request which may be classed as being of a higher order than the list of exceptions contained in Article 4 of the Access to Documents Regulation.
9A.3 Access to information and European Commission infringement case files: EU case law and administrative practice

This section focuses on the extent to which the legal framework for access to environmental information may reach into the law enforcement operations of the European Commission conducted under the aegis of the infringement procedures in Articles 258 and 260 TFEU. As discussed in Part I of this book, the infringement procedures constitute a significant component of the law enforcement machinery relating to EU environmental law. Under the EU treaty framework, the Commission has the responsibility to ensure the correct application of Union law and for this purpose is vested with powers to use the infringement procedures to oversee that EU law is duly applied. In discharging this responsibility, the Commission enters into dialogue and negotiation with member states to ensure that non-compliance issues are resolved as far as possible amicably without recourse to litigation before the CJEU. Traditionally, that negotiation with member states has remained confidential and free from outside influence. At one level, there are strong reasons supporting this approach. Confidentiality means that the parties may engage in free and frank discussions with a view to achieving a resolution, and the Commission will be able to operate free from third-party influence that might compromise its ability to discharge its functions fully independently. At another level, though, the matter is less straightforward. One notable problem is that the Commission carries out executive (and legislative) as well as law enforcement functions. These functions may at times be conflicting or raise potential issues of conflict of interest for the Commission, which gives rise to possibilities for the EU institution to lean towards the adoption of politically strategic decisions on law enforcement decisions. It should be remembered that all Commission decisions taken in respect of infringement actions are,
formally at least, taken by the Commission College and not by an independent law enforcement agency. Whether conflicts of interest materialise or not is a matter particularly difficult to monitor if Commission decisions on infringement casework are rendered immune from public scrutiny. The balance between these legitimate interests, namely protecting the effectiveness of infringement procedures as well as ensuring that decisions are shown to be made impartially on the basis of rule of law considerations, is a difficult but an important one to make.

As already noted earlier, one of the most frequent types of information request submitted concerns applications to the European Commission’s files on its infringement casework. Given the fact that the infringement procedures under Articles 258 and 260 TFEU are particularly significant for the purposes of upholding the enforcement of EU environmental law at national level, it is not surprising that there is considerable public interest, particularly from NGEOs, in monitoring how the Commission fulfils its treaty mandate under the Article 17 TEU to ensure due application of Union environmental law. Frequent applications have been filed to the Commission for access to its infringement file records to ascertain the reasons underpinning Commission decisions to either not open or to cease prosecuting a particular infringement action. As apparent from the previous section, the EU legislative framework on environmental information requests only offers a very limited right of access to such files. Specifically, the third indent of Article 4(2) of the Access to Documents Regulation requires EU institutions to refuse access to a document where disclosure would undermine the protection of the purpose of investigations, subject to there being an OPI in disclosure. This legal framework is essentially unaffected in substance by the amendments introduced by the Århus Regulation, which stipulates in general terms that this exception
must be interpreted in a restrictive way, taking into account the public interest served by
disclosure and whether the requested information relates to environmental emissions.\textsuperscript{170}

9A.3.1 EU case law on access to environmental infringement files

The EU courts have adopted a relatively restrictive approach as regards attempts to open up
Commission infringement case files, particularly those that have not been definitively
concluded. This may be highlighted with reference to the environmental case of \textit{LPN}.\textsuperscript{171} The
GC judgment provides an up-to-date analysis of the EU legislative framework in light of the
impact of the amending Århus Regulation, and highlights the stiff legal challenges faced by
applicants when seeking to access information regarding Commission decisions concerning
environmental infringement cases. In \textit{LPN} a Portuguese NGEO filed a complaint in 2003
with the Commission alleging that a dam project in Portugal was in breach of the
requirements of the Habitats Directive 92/43 as a result of its encroachment on certain nature
protection sites. In March 2007 the NGEO applied to the Commission for information
concerning the processing of its complaint, including disclosure of exchange of
correspondence between the Commission and Portuguese authorities as well as a consultation
document drawn up by a Commission working group. The Commission refused disclosure of
documents contained within its infringement file, relying upon Article 4(2) of the Access to
Documents Regulation, arguing that disclosure of the requested documentation would impair
its ability to deal with the alleged infringement and undermine prospects of achieving an
amicable settlement with the Portuguese authorities. When the legal action was brought
against the Commission, the Commission decided to close its infringement file against
Portugal with the result that it authorised LPN to have partial access to the documentation contained within its infringement file.

In a detailed ruling the GC dismissed LPN’s annulment action in favour of the Commission. In confirming that where an infringement procedure was still being processed at the time of the annulment action being brought, as in this case, the Commission was entitled to invoke the investigation exception in Article 4(2), the GC underlined that the institution was obliged first, though, to satisfy its obligation to assess whether the documents requested were covered by the legislative exception as well as consider any possible overriding public interests in disclosure.\footnote{172} It acknowledged that the Århus Regulation did not modify the relevant EU legislative framework on access to information in this instance, given that Article 6(1) of the Århus Regulation only establishes a presumption of an OPI in disclosure in relation to requests for information concerning environmental emissions insofar as that information does not concern an investigation into a possible EU environmental law infringement.\footnote{173} The Court also held that the Commission was not entitled to rely on the exception in Article 4(2) simply because a particular document concerned an investigation, as the latter institution had to satisfy itself that the document is actually likely to undermine the investigation’s purpose, namely to induce a member state to comply with Union law.\footnote{174} However, the GC also established an important exception to the general rule that the EU organ concerned must examine each individual document to assess whether it is caught by one of the derogations to disclosure in Article 4(1)–(3) of the Access to Documents Regulation. Specifically, the Court acknowledged in light of existing case law that it is open to an EU organ to dispense with the general requirement of the need for an assessment of individual documents requested in the following scenarios:\footnote{175}
- where it is obvious that access must be either refused or granted: such could be the case where documents were manifestly covered in their entirety by an exception to the right of access or conversely manifestly accessible in their entirety or had been the subject of a concrete individualised assessment by the EU organ concerned\textsuperscript{176}
- where considerations of a generally similar kind are likely to apply to disclosure requests relating to documents of the same nature: here the EU organ concerned is entitled to apply general presumptions to such documents, so long as it establishes that in each case whether 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.\textsuperscript{177}

According to the GC, nothing in the Århus Regulation detracted from these considerations.\textsuperscript{178} As far as documents contained within infringement files were concerned, the GC considered that the Commission was entitled to consider such documents obviously falling within a single category capable of being covered by an Article 4 exception.\textsuperscript{179} This was important, as the Commission had not provided a detailed explanation to justify non-disclosure of each document contained within the file. Moreover, the GC considered its legal analysis and conclusions were fortified by the fact that infringement complainants are not endowed with any specifically enforceable procedural rights in relation to the handling of their complaint under Union legislation. In contrast with the position applicable to complainants in competition cases, who are specifically vested with procedural rights vis-à-vis the Commission in relation to alleged breaches of EU competition law,\textsuperscript{180} complainants of suspected member state infringements of EU law have no rights to seek review of Commission decisions refraining from taking legal action against member states (as was discussed in Chapter 10). A case in point proved to be the LPN litigation itself, where the
NGEO brought an unsuccessful annulment action in respect of the Commission’s decision to close the particular infringement file against Portugal.\(^\text{181}\) In view of these considerations the GC held that there a general presumption may be made that disclosure of infringement file documentation would in principle undermine protection of the investigation’s purpose.\(^\text{182}\)

At the same time, the GC made it clear that such a presumption left the door ajar for a rebuttal. Specifically, it was open for a plaintiff to challenge the presumption, either by showing that a document was not covered by a legislative exception or that there was a higher OPI to justify disclosure.\(^\text{183}\) Crucially, though, the onus here is placed on the plaintiff and one which is difficult to fulfil in practice; as the GC confirmed, an OPI may not be demonstrated to exist on the basis of a reference to the general objective of enhancing access to environmental information underpinning the EU legislative framework.\(^\text{184}\)

The GC’s ruling in *LPN* is illustrative of the generally restrictive approach of the EU judiciary towards claims regarding access to investigation files. A similar result was arrived at, for instance, in *ClientEarth*\(^\text{185}\) which concerned a request by a UK-based NGEO to access certain studies which had been specifically carried out at the behest of the Commission to provide it with advice on the degree to which member states had secured transposition of certain EU environmental directives into national law. Relying on Article 4(2) third indent of the Access to Documents Regulation, the Commission denied access to those parts of the studies which contained analysis on the state of compliance with the EU legislation. Then GC confirmed that the studies constituted part of an ‘investigation’ for the purpose of Article 4(2), notwithstanding they represented a preliminary phase of an investigation and that no decision had yet been taken to open infringement proceedings.\(^\text{186}\) These recent judgments also follow on from a well-established seam of EU case law affirming the European
Commission’s entitlement to refuse access to information contained in its infringement
dossiers on the grounds of the public interest exceptions provided in its former code of
conduct on access to Commission documentation (former Decision 94/90).  

The EU courts have also adopted a similar approach with respect to the issue of access to
information in court proceedings. Under the second indent of Article 4(2) of the Access to
Documents Regulation EU organs must refuse access to documents where disclosure would
undermine the protection ‘court proceedings’, unless there is an OPI in disclosure. Such
information includes, for example, pleadings filed by parties to the CJEU in the context of the
litigation phase of an infringement action under Articles 258 and 260 TFEU. It also
includes national court proceedings related to the documentation in question. In the context
of infringement proceedings, the GC confirmed in Interporc II that documents covered
would include notably contents of documents drawn up by the Commission solely for the
purposes of specific court proceedings, pleadings or other documentation lodged with the
CJEU, internal documents concerning the investigation of the case filed with the CJEU as
well as correspondence concerning the case between the DG concerned leading the file and
the Commission’s Legal Service or a lawyer’s office. The GC based its interpretation on the
need to protect work done within the Commission as well as confidentiality and safeguarding
the doctrine of professional legal privilege for lawyers. The issue of access to court
proceeding documentation was taken up notably in the API litigation. In API a number of
journalists had requested access to Commission pleadings in a range of cases, some of which
were still pending judgment before the CJEU. On appeal from the GC, the CJEU held that the
Commission was entitled to assume a general presumption that disclosure of such
documentation would undermine the protection of court proceedings when proceedings were
still pending final judgment. Specifically, disclosure would undermine the principles of
equality of arms of the litigants as well as sound administration of justice.\textsuperscript{194} The CJEU overturned the findings of the earlier first-instance ruling of the GC\textsuperscript{195} that the EU institution concerned needs to carry out a concrete assessment of individual documentation filed in court proceedings to determine whether proceedings could be undermined.\textsuperscript{196} Moreover, a claim that the public had a right to be informed of important issues in EU law was, for the CJEU, too vague a consideration to constitute an OPI to prevail over the exception in Article 4(2) of the Access to Documents Regulation.\textsuperscript{197}

Where an infringement case has been definitively closed, either by virtue of a unilateral decision on the part of the Commission not to commence or further pursue a particular investigation or by virtue of the CJEU delivering a judgment, the right of access to information becomes strengthened under the EU legislative framework. Specifically, the exception relating to ‘investigations’ will no longer be deemed to apply if there are no immediate or foreseeable prospects of case file that has been closed being reopened by the Commission, on account of the fact that the legislative exception covers only the protection of the ‘purpose’ of the investigation. This position is broadly accepted by the Commission, whose administrative practice is considered below in section 9A.3.2. The EU courts have also been receptive to the importance of limiting the application of the legislative exceptions when an infringement case has been concluded. In \textit{API}\textsuperscript{198} the CJEU held that the Commission is not entitled to presume that disclosure of Commission pleadings that have culminated in a first-round infringement ruling under Article 258 TFEU will undermine investigations which may lead to second-round infringement proceedings under Article 260 TFEU. Whilst the CJEU conceded that the first- and second-round infringement procedures share the same general purpose, namely to ensure the effective application of Union law, they also constitute two distinct procedures each with its own subject matter.\textsuperscript{199} The CJEU considered that once a
first-round judgment has been issued, the continuation of negotiations between defendant member state and Commission is no longer designed to establish the existence of an infringement and an amicable settlement is no longer possible relating to the infringement, given that judicial finding. For the Court, second-round investigations have a distinctive design, namely to establish whether the necessary conditions for bringing an action under Article 260 TFEU are met (namely, whether the member state fails to honour the first-round judgment within a reasonable period of time).200

However, the CJEU also acknowledged in API that disclosure of court pleadings which are formally closed but connected to other live proceedings may create a risk that the latter may be undermined.201 In such a situation, the Commission would be entitled to refuse disclosure of its pleadings in the closed case on grounds that disclosure might risk the undermining of other court proceedings. Following on from the logic of the CJEU, the position would presumably be similar if there were live investigations pending against other member states that had not yet reached the stage of court proceedings. In the absence of other related live proceedings, the Commission would not be entitled to presume that disclosure of its pleadings submitted in litigation subsequently closed would undermine the protection of court proceedings for the purpose of Article 4(2) of the Access to Documents Regulation.202

Prior to the Access to Documents Regulation, the powers of the Commission to refuse disclosure of an infringement file even after its termination were much stronger, given that the former Code of Conduct regime applicable to requests for disclosure of Commission documents contained a much broader public interest exception on investigations.203 This was highlighted in the WWF UK case,204 in which the GC held that the Commission was entitled
to refuse access to its file on a closed investigation into a suspected breach of EU legislation on environmental impact assessment in Ireland. The GC considered that:

[T]he confidentiality which the member states are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal to access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.\(^{205}\)

The GC did not specifically justify why non-disclosure should continue for a period even after closure of an investigation. One possible explanation might have been that a closure of a file may be considered to be provisional, in the sense that the Commission has the opportunity to reopen its file at any stage.\(^{206}\) Whatever the explanation, it is evident that the legal position has now changed since *WWK UK* with the entry into force of the Access to Documents Regulation, in that the Commission is obliged to demonstrate that non-disclosure of a closed file is justified on account of actual (as opposed to theoretically possible) related live infringement investigations or court proceedings.

9A.3.2 Administrative practice of the Commission on access to its infringement case files

Currently, the Commission discloses only limited information relating to the pre-litigation phase of an Article 258 TFEU case. In essence, it has to balance important but potentially conflicting interests. On the one hand, the need to safeguard autonomy and impartiality of
decision-making supports the argument that the amount of information and opportunities for comment by the public concerning live infringement proceedings should be restricted. On the other hand, as mentioned above, it is also important, and now a well-established principle in EU law, that decisions taken by Union institutions should be made as openly and as transparently as possible.  

Since the early 2000s the Commission has undertaken a review of its practice and procedure relating to the disclosure of the reasoning underpinning its decision-making in relation to management of infringement cases. Some limited reforms have been introduced as a result, notably in the wake of the 2007–8 Commission review of the application and implementation of EU law. As a result, the Commission has now instituted a range of internal initiatives designed to render infringement decisions more transparent. The following constitute the key means by which the Commission provides information and opportunity for stakeholders to discuss its environmental case management decision-making, as confirmed by the 2008 Communication: 

- publication of general annual reports by the Commission on the application of EU law by member states, including a statistical overview of infringement casework decisions across EU policy sectors
- annual reports by DG ENV on the state of infringement proceedings on its webpages
- regular dialogue with the EP on infringement related casework, e.g. with the EP Petitions Committee
- regular dialogue with NGEOs in Brussels and/or via the Commission’s representative offices in national capitals of member states
• publication of summary reports on case management decisions with contact points via the Commission’s RAPID press release communications database (information on reasoned opinions (ROs), CJEU referrals)\textsuperscript{211}

• open access to the Commission’s electronic database on national transposition information and correlation tables\textsuperscript{212}

• opening up of dialogue with stakeholders regarding general discussions on implementation of the EU acquis.\textsuperscript{213}

However, notwithstanding these measures, the Commission stops well short of providing full, detailed and immediate information to the public concerning its decisions on managing individual infringements. It does not provide detailed reports on decisions taken not to launch infringement proceedings. Neither does it publish letters of formal notice (LFNs), ROs or the pleadings before the CJEU at any stage; these documents are treated under current Commission policy as being in principle confidential and accordingly barred to persons other than the parties to the immediate disputes, insofar as they concern proceedings that have not been terminated or have no bearing on other pending legal actions. Complainants are not considered to be parties for this purpose. On the other hand, press releases from the Commission are issued disclosing in brief summary decisions concerning ROs and referrals to the CJEU. No press releases are usually made providing information about Commission decisions to issue LFNs, except those involving non-communication cases and the launch of second-round proceedings.\textsuperscript{214}

Subsequent to the promulgation of Access to Documents Regulation, in 2003 the European Commission published some guidance in the form of a Working Paper\textsuperscript{215} setting out its
approach on applying the legislative rules relating to applications for access to documents contained within its infringement files. In taking on board existing case law of the CJEU/GC as well as relevant decisions of the EO, the document fleshes out to what extent the Commission is prepared to allow requests for access to its infringement files. The 2003 Working Paper was complemented by a 2004 Commission report reviewing the implementation of the principles underpinning the Access to Documents Regulation, which provides a qualitative analysis of the application of the public interest exceptions contained in the legislative instrument, including those applicable to court proceedings, legal advice and investigations.

In line with CJEU/GC jurisprudence, the 2003 Working Paper specifies that the public interest exception in Article 4(2) third indent of the Access to Documents Regulation concerning investigations applies when an infringement file is ‘live’, namely is either actively being pursued by the Commission or has not been definitively closed during the pre-litigation phase or discontinued during the litigation phase of proceedings under Articles 258 and 260 TFEU. Where an infringement case has been either closed or discontinued definitively, the Commission indicates in the Working Paper that it is prepared to apply a ‘presumption of accessibility’ in relation to infringement dossiers. In taking on board the GC’s judgment in the WWF UK case, the Commission indicates in the Working Paper that a decision as to when disclosure of a file should be granted in such circumstances ‘should be decided on a case-by-case basis, the basic principle being the broadest possible access and a restrictive interpretation of the exceptions’. It notes, however, that the investigation exception contained in the third indent of Article 4(2) of Access to Documents Regulation could continue to apply if disclosure could jeopardise another investigation under way.
A presumption of accessibility is also declared in the Working Paper to apply after a judgment has been handed down by the CJEU under Article 258 TFEU. However, it indicates that this presumption may be reversed on a case-by-case basis, such as in the context of joined cases or when negotiations with member states are being pursued with a view to achieving compliance, bearing in mind that these may ultimately lead to second-round Article 260 TFEU proceedings against the member state concerned. As noted earlier, though, the CJEU has ruled that there is no reason to presume that disclosure of court pleadings from the first-round action would undermine a second-round investigation.

A table of categories of documents relating to infringement files that may be the subject of access-to-information requests and analysis of how access in relation to these is governed under the terms of Access to Documents Regulation is also provided in the Working Paper. According to the table, the following documents are considered covered by the ‘investigation’ public interest exception contained in the third indent of Article 4(2) of the regulation: complainant’s correspondence and replies from the Commission services; correspondence between the Commission and member state concerned; internal Commission documentation including notes provided by the Commission’s services and infringement forms; the LFN; and the RO. Legal advice, such as that from the Commission’s Legal Service (or elsewhere) is deemed to be covered by the ‘legal advice’ public interest exception contained in the second indent of Article 4(2) of the regulation. Documents drawn up for the purpose of any specific court proceedings, such as written submissions to the CJEU, are treated as falling under the ‘court proceedings’ exception contained in the second indent to Article 4(2). Finally, the Commission indicates in the table that other more administrative and/or policy-oriented documents, such as special minutes of the chefs de cabinet of the Commissioners as well as those of the College of Commissioners as well as minutes of
‘package’ meetings with member states over compliance issues in general, are to be assessed under the auspices of Article 4(3) of the regulation dealing with internal preparatory Commission deliberations.

The Working Paper provides a useful insight into the approach of the Commission in handling requests for documentation contained in its infringement files, including those relating to environmental cases. Given that the declared aim of the paper is to facilitate and standardise the processing of requests for such material, it represents an appropriate benchmark against which administrative practice of the Commission may be scrutinised. In this sense, it is a particularly useful document to which the EO may refer in assessing whether or not Commission services’ handling of information requests relating to law enforcement dossiers pass muster or are tantamount to maladministration in any given case.

9A.4 Some reflections on the EU legal framework concerning access to environmental information

With the promulgation in 2001 and 2006 of the Access to Documents Regulation and Århus Regulation respectively, the Union has now established a legal framework that ensures to all intents and purposes that its internal rules on access to environmental information from EU-level organs are in alignment with the requirements of the Århus Convention. In the main, civil society is offered a far-reaching set of rights so as to be able to gain access to environmental information held by EU institutions.
The rules contained in the Access to Documents Regulation, as amended, contain a number of public interest exceptions, offering potentially considerable opportunity for EU institutions to restrict the disclosure of information they possess in relation to environmental matters insofar as these do not relate to environmental emissions. In the past, the legislative exceptions contained in the Access to Documents Regulation have been subject to the criticism that their coverage of material is unduly broadly worded. However, case law of the EU courts together with the introduction of the Århus Regulation have served to ensure generally that the list of protected exceptional interests contained in the legislative framework has remained for the most part narrowly construed, with the onus firmly on the EU organ concerned to provide reasoned justification for their invocation in any given case. The public interest exceptions contained in the regulation appear essentially in keeping with those housed in the relevant counterpart provisions of the Århus Convention (Article 4(3)).

From the perspective of EU environmental law enforcement, the issue of public access to the European Commission’s infringement casework files is particularly significant. Given the key importance of infringement proceedings under Articles 258 and 260 TFEU in ensuring that member states honour their EU environmental obligations, whether or not the Commission decides to take legal action in a particular case of a suspected breach of EU law may well make the difference between enforcement action being taken or not. It should be borne in mind in this context in particular that the hurdles, legal and financial, for private persons such as NGEOs to be able to supervise adherence to EU environmental obligations at national level remain challenging (as is evident from the analysis in previous chapters in Part II of this book). Moreover, national authorities may often face resource issues and/or even conflict of interest difficulties when engaging in law enforcement roles at national level.
Without doubt, Commission decisions over infringement action have major implications in terms of implementation of EU environmental policy and should accordingly be made subject to effective public scrutiny in accordance with the general principle of transparency of EU decision-making that underpins the Union’s legal framework. A number of commentators have not been satisfied that the current policy of maintaining a closed process is justifiable. For instance, there have been calls for the Commission to change its policy and publish in full pre-litigation documents, disclose complainant files as well as publicise reasons for non-pursuit of cases. There are a number of arguments in favour of the Commission adopting a more open approach to the prosecution of infringement cases, including in the environmental sector. First, decisions taken by the Commission on behalf of and paid for by the public to take or not to take action deserve public scrutiny, so that the decisions may be subject to a proper degree of accountability. In particular, it is important to be clear about the reasoning behind law enforcement decisions, not least in order to ensure that there is an opportunity to see that political reasons do not interfere with the decision-making process and that competent legal assessments are made internally within the Commission. In this context, one needs to bear in mind the multiplicity of roles performed by the Commission that may at times raise potential conflicts of interest. In particular, unless properly checked, possibilities exist for the Commission to use its power in relation to infringement proceedings to garner political support amongst member states for particular legislative initiatives. Secondly, disclosure affords an appropriate degree of respect for the participatory rights of complainants, who also quite clearly have a legitimate interest in seeing that decisions are made on a sound footing. Finally, fuller disclosure would have the effect of applying more pressure on member states to ensure that their records on implementation were improved (e.g. disclosure of information on LFNs). At the very least, if LFNs were disclosed member states
would be subject to a greater amount of public scrutiny as to whether their positions in particular cases could be justified.

However, at the same time there is also a strong counter public interest in ensuring that the principle of transparency should be tempered by the need to ensure that the Commission is able to undertake its law enforcement role effectively, impartially and independently. This public interest legitimises the need to keep Commission decisions in the area of infringement proceedings confidential, so long as the Commission has not completed its involvement with respect to the particular suspected infringement case at hand. Allowing the public to access internal legal deliberations and exchange of correspondence between Commission and member state in relation to a case that is pending or ‘live’ might well hobble the ability of the Commission to perform its law enforcement role effectively. In particular, its ability to determine its decisions without outside interference would be compromised and its position vis-à-vis the defendant member state would be weakened were its legal analysis and argumentation to be prematurely exposed. One should also reflect here on the possibilities for deep-pocket interests in utilising an ‘open access’ policy in order to disrupt the prospects of law enforcement litigation. It is, of course, not only NGEOs that are interested in monitoring Commission decision-making in this area but also industrial concerns that may constitute the source(s) of the particular breach of EU environmental law in issue. A flood of information requests may well have the (designed) effect of depleting Commission resources to prosecute a case effectively.

The Commission has stuck resolutely to the position of refusing to subject its conduct relating to the pursuit of ‘live’ infringement proceedings to more openness or accountability. Two reasons in particular appear to have been key to the policy of non-disclosure. First, the
Commission has always considered that the infringement procedures, as legal proceedings, should be subject to a strict policy of confidentiality that would apply normally to any litigious proceedings. The Commission appears to consider that the exchange of correspondence between respective parties as well as preparatory activities on infringement cases should be treated as privileged material and not for public disclosure, as otherwise this could undermine the legal position and basic procedural rights of the respective parties in the case. It has, however, been disputed that disclosure of the Commission’s case (e.g. LFN, RO) would undermine any legal or environmental interest.\textsuperscript{228} The second main argument for upholding the confidentiality of infringement proceedings is of a more pragmatic nature. The Commission maintains that if the principle of confidentiality were to be lifted in the context of Article 258 and 260 proceedings, the process of negotiation itself would become undermined. It would not be possible, so the argument runs, to create an environment in which the member states and the Commission would feel confident in reaching a suitable solution.\textsuperscript{229} This accords with concerns previously expressed by member states about Commission disclosure of material they supply to it in course of the prosecution of infringement proceedings.\textsuperscript{230} However, this position also opens up possibilities for the Commission to use the procedure as a mechanism for negotiating unaccountable political trade-offs behind the scenes and for steering policy, as opposed to being simply focused on the question of law enforcement in the instant case. It is also questionable to what extent the Commission needs to retain confidentiality of its position in order to arrive at a satisfactory resolution of a case; there are strong arguments to suggest that a policy of full public disclosure on the part of the Commission of its own case would strengthen and not weaken its hand in putting pressure on member states to rectify or least seek to account for suspected implementation deficiencies. It is quite clear that the infringement procedures are no longer seen to be significant diplomatic embarrassments by member states and routes of last resort.
(ultima ratio) for the Commission; on the contrary, it has been the member states which have expressed their clear wish to see enhancements to the procedures as a means of deterring non-compliant behaviour.

The EU legislative framework on access to information, in conjunction with EU case law and Commission administrative practice, has made considerable progress with respect to accommodating these competing public interests. Debate will no doubt continue as to whether the current policy on access to the infringement files goes far enough. However, it is submitted that the position which the Commission has arrived at goes a long way to accommodate the main competing public interests in issue, effectiveness and transparency, in preserving confidentiality with respect to live infringement cases and in favouring where possible disclosure of documentation concerning historic (i.e. terminated) cases. The policy of the Commission, as set out in its 2003 Working Paper, to allow disclosure of historic case files offers arguably a realistic compromise and means that ultimately EU decision-making on infringement actions is subject to public scrutiny, whilst the block on live files meets the need to ensure that the purpose of the infringement procedures is respected. One might argue that this stance on access does not address the more fundamental problem of the Commission being charged under the EU treaty with a multiplicity of tasks that may lead potentially or actually to conflicts of interest for the purposes of law enforcement. However, that particular problem would be more appropriately dealt with through structural changes at EU treaty level concerning the scope of institutional functions and responsibilities accorded the Commission.

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to be processed by the Commission’s Directorate Generals on environmental and climate policy (DG ENV and DG CLIMA)).


4 Regulation 1367/2006 on the application of the provisions of the Århus Convention to access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies (OJ 2006 L264/13).

5 See recital 15 and Art. 3(9) of Decision 1600/2002 laying down the Sixth EAP (OJ 2002 L242/1).


7 OJ 2001 L145/43.


9 For an overview of the general background of the EU’s relationship with the Århus Convention concerning access to environmental information, see Hallo (2011).

10 See 4th recital in the preamble as well as Art. 1 (a)–(b) Århus Regulation 1367/06 (OJ 2006 L264/13).

11 E.g. only certain measures were required to be published in the Official Journal of the EU.

12 See Declaration No. 17 on the right of access to information incorporated in the TEU 1992.

13 The European Council was omitted from this list of actors given its intergovernmental status, lack of legislative power and omission from the official list of EU institutions at the time.


18 Specifically, Art. 255 EC (ex Art. 191a EEC) located within Chapter 2 (Provisions common to several institutions) of Title I (Provisions Governing the Institutions) of the former EC Treaty.
Arts. 1 and 11 TEU are located within Title I (Common Provisions) and Art. 15 TFEU is located within Part I (Principles) of the respective treaties.

Art. 11(3) TEU.

It should be noted that the list of EU institutions was expanded under the 2007 Lisbon Treaty to include the European Council and European Central Bank (ECB). Art. 13 TEU states that the list of EU institutions includes the EP, European Council, Council, Commission, CJEU, ECB and Court of Auditors.

Art. 11(1)–(2) TEU.

Art. 15(1) TFEU refers to the Union’s institutions, bodies, offices and agencies.

See Case T-191/99 Petrie (para. 34 of judgment).


See Art. 18(1) Regulation 1049, requiring this to be done by 3 December 2001.


OJ 2010 C83/02.

See Art. 6(1) TEU.

See e.g. Case T-545/11 Stichting Greenpeace Nederland and Pesticide Action Network (PAN) Europe v Commission (paras. 27–8 of judgment). See also Case C-266/05P Sison v Council (para. 61 of judgment), Case C-64/05P Sweden and Turco v Commission (para. 33 of judgment), Case C-139/07P Commission v Technische Glaswerke Ilmenau (para. 51 of judgment) and Joined Cases C-514, 528 and 532/07P Sweden, API and European Commission (para. 69 of judgment).

See Title II (Arts. 3–8) of Regulation 1367/06 (OJ 2006 L264/13).

See e.g. Case T-29/08 Liga pra Protecção da Natureza (LPN) v Commission (para. 105 of judgment).

For an overview of these cases affecting the environmental sector, see e.g. Williams (2002), pp. 279 et seq.


38 See also Case T-545/11 *Stichting Greenpeace Nederland and Pesticide Action Network (PAN) Europe v Commission* (paras. 54–5 of judgment) confirming that the UNECE Implementation Guide to the Århus Convention is similarly not legally binding (on the EU).

39 Art. 17(2) of the Access to Documents Regulation 1049/01 (OJ 2001 L145/43).


41 See Art. 1(4) in conjunction with Art. 4(1) of the Århus Convention.

42 See Art. 2(1) of the Access to Documents Regulation. Art. 2(2) provides the possibility for the EU institutions’ rules of procedure to broaden the personal scope of beneficiaries, to include natural or legal persons not residing or having a registered office in a member state. Since 2001 the European Commission’s Rules of Procedure have specifically provided such persons with a right of access in relation to documents held by the Commission (see Art. 1 second subpara. of Commission Decision 2001/937 (OJ 2001 L345/94)).

43 The EU legislature accepted the view that the broad definition of ‘public authority’ in Art. 2(2) of the Århus Convention in covering, next to government at all levels, also ‘natural or legal persons performing administrative functions . . . , including specific duties, activities or services in relation to the environment’, has meant that it would not be appropriate to construe the reference to ‘institutions of regional economic organisations’ as simply meaning only the Union’s institutions as defined in EU law. See the Commission’s explanatory memorandum to its draft proposal for a regulation to apply the Århus Convention to EC institutions and bodies (COM (2003)622, p. 8).

44 See Art. 2(1)(c) of the Århus Regulation 1367/06.

45 See Art. 1(a) in conjunction with Art. 2(3) of the Access to Documents Regulation 1049/01. However, as was noted earlier, the EU institutions have taken steps to ensure that Union agencies’ constitutions incorporate commitments to be bound by the regulation.

46 See notably Arts. 3, 4 and 7 of the Århus Regulation 1367/06.

47 Art 2(3) of the Access to Documents Regulation 1049/01.

48 See ibid., Art. 3(b).

49 See ibid., Art. 4(4)–(5).

50 Ibid., Art. 3(a).
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51 See ibid., Art. 2(4).

52 The website, managed by the Commission’s Secretariat General, is located at: http://ec.europa.eu/transparency/access_documents/index_en.htm.

53 Notably set out in Arts. 4 and 9 of the Access to Documents Regulation 1049/01.


55 See ibid., Arts. 11 and 12(1) and Art. 4(1) of the Århus Regulation 1367/06.

56 Art. 4(1) of the Århus Regulation

57 Ibid., Art. 4(1) second indent.

58 Ibid., Art. 4(1) third indent and Art. 5(1).

59 See ibid., Art. 4(3).

60 See Art. 297(1) TFEU and Art. 13(1)(a)–(b) of the Access to Documents Regulation in conjunction with Art. 4(2)(a) of the Århus Regulation.

61 Art. 13(1)(f) of the Access to Documents Regulation in conjunction with Art. 4(2)(a) of the Århus Regulation.

62 Art. 297(2) TFEU (which supersedes the weaker obligation contained in Art. 13(2) of the Access to Documents Regulation which calls for publication of such measures only ‘as far as possible’).

63 ‘Plans and programmes’ are defined in Art. 2(1)(e) of the Århus Regulation as including (1) EU general environmental action programmes as well as (2) plans and programmes subject to preparation and/or adoption by an EU organ which are required under legislative, regulatory or administrative provisions and which contribute to or likely to have significant effects on the achievement of objectives of EU environmental policy, as for instance set out in EU general environmental action programmes.

64 Ibid., Art. 4(2)(a).

65 Ibid., Art. 4(2)(b)). The website of the DG ENV (http://ec.europa.eu/environment/index_en.htm) publishes implementation reports on EU environmental legislation (within the webpages of the relevant environmental policy sector).


67 Ibid., Art. 4(2)(d) in conjunction with Art. 4(4).

68 Ibid., Art. 4(2)(e).

69 Ibid., Art. 4(2)(f).
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70 Ibid.

71 Ibid., Art.4(2)(g).

72 See DG ENV website: http://ec.europa.eu/environment/index_en.htm. On climate policy see the
websites concerning environmental matters affecting other policy areas have also been established:
see e.g. DG ENER sites on renewable and energy efficiency
(http://ec.europa.eu/energy/index_en.htm), DG MOVE sites on clean and sustainable transport
initiatives (http://ec.europa.eu/transport/index_en.htm), DG MARE pages on fish stock management
(http://ec.europa.eu/fisheries/cfp/index_en.htm) and DG AGRI sites on agri-environmental initiatives
(http://ec.europa.eu/agriculture/envir/index_en.htm) and DG ENTR sites regarding registration,
evaluation, authorisation and restriction of chemicals
(http://ec.europa.eu/enterprise/sectors/chemicals/index_en.htm)).

73 See DG ENV information page on online access to environmental information at:


77 The relevant email addresses for requests for information are: register@europarl.eu.int (European
Parliament); access@concilium.eu.int (Council) and sg-acc-doc@cec.eu.int (European Commission).

78 As at the time of writing, there are 24 official languages covering the linguistic diversity of the
current membership of 28 countries of the EU: see Regulation 1/1958 (OJ P017, 6 October 1958, p. 385) as last amended by Regulation 517/13 (OJ 2013 L158/1).

79 Art. 6(1) of the Access to Documents Regulation 1049/01.

80 Ibid., Art. 7(1). Requests for information lodged with the Commission are issued in practice as soon
as the application is registered: Art. 3(1) Commission Decision 2001/937.

81 Art. 6(2) of the Access to Documents Regulation 1049/01.

82 Ibid., Art. 6(3).

83 The Access to Documents Regulation does not provide guidance on what constitutes a very long
document or large quantities of documentation. For an example of an extreme case, see the Case T-2/03 Verein für Konsumenteninformation (VKI), where the applicants sought to have access to a
competition file which reportedly ran to at least 47,000 pages.

84 Art. 7 of the Access to Documents Regulation 1049/01.

85 See Arts. 3(3) and 10 Commission Decision 2001/937.
This works out in practice to mean three calendar weeks. The deadline is shorter than the one month time limit set by the previous generation of EU access-to-information instruments (see e.g. Art. 2 of former Commission Decision 94/90 (OJ 1994 L46/58).

87 Art. 7(1) of the Access to Documents Regulation 1049/01.
88 Ibid., Art. 7(4).
89 Ibid., Art. 7(3).
90 Ibid., Art. 7(2).
91 Ibid., Art. 8(1).
92 Ibid., Art. 8(2).
93 Ibid., Art. 8(3).
95 Art. 10(1) of the Access to Documents Regulation 1049/01. Special requirements for visually impaired applicants are taken into account (such as the supply of large print or Braille copies): see Ibid., Art. 10(3).
96 Ibid., Art. 10(1).
97 In conjunction with Ibid., Art. 9.
98 A principle now well established by EU court jurisprudence, as in Case T-110/03 Sison (para. 45 of judgment).
99 Art. 4(6) of the Access to Documents Regulation 1049/01.
100 Ibid., Art. 4(7).
101 Case T-2/03 Verein für Konsumenteninformation (VKI) v Commission (para. 69 of judgment), Case T-144/05 Muñiz v Commission (para. 74 of judgment), Case T-166/05 Borax v Commission (para. 50 of judgment) and Case C-39/05P Sweden and Turco (para. 43 of judgment).
102 Case T-2/03 Verein für Konsumenteninformation (VKI) v Commission (para. 69 of judgment), Case T-144/05 Muñiz v Commission (para. 74 of judgment), Case T-166/05 Borax v Commission (para. 50 of judgment) and Case C-39/05P Sweden and Turco (para. 43 of judgment).
103 Art. 4(1)(a) first indent of the Access to Documents Regulation 1049/01.
104 Ibid., Art. 4(1)(a) second indent.
105 Ibid., Art. 4(1)(a) third indent.
106 Ibid., Art. 4(1)(a) fourth indent.
107 Ibid., Art. 4(1)(b).

108 Art. 4(4) final subpara. of the Århus Convention.

109 In any event the factors of public interest of disclosure and environmental emissions need only be ‘taken into account’ by the EU organ, which indicates that they are not to be construed as mandatory overriding factors.

110 Case C-28/08P Commission v Bavarian Lager (para. 59 of judgment).

111 Namely Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community (OJ 2001 L8/1).

112 Case T-166/05 Borax Europe Ltd v Commission.

113 At the time of the case the relevant EU legislation was former Directive 67/548 (OJ 1967 (I) SpEd, p. 234) now superseded by Regulation 1272/08 on classification, labelling and packaging of substances and mixtures (OJ 2008 L353/1).

114 See also a similar finding in Case T-144/05 Muñiz v Commission.

115 Arguably, an approach more in keeping with the balance of interests underpinning Art. 4(1)(b) of the Access to Documents Regulation 1049/01 would have been for the Commission to have disclosed the working group’s recommendations, but omitting the participants names and countries of origin. This was apparently offered by the applicant but refused by the Commission. In addition, it is submitted that it would be also be appropriate to provide details on the formal professional and academic qualifications of such experts, to the extent that this information would not reveal their identity.

116 Art. 4(4)(h) Århus Convention.

117 COM(2013)515 (FN1), p. 9. The breakdown of refusals in 2012 based on the other exceptional grounds contained in Art. 4(1) of the Access to Documents Regulation was as follows: public security (1.34%); defence and military matters (0.11%); international relations (3.58%); and financial, monetary or economic policy (1.4%).

118 Art. 4(2) first indent of the Access to Documents Regulation 1049/01.

119 Ibid., Art. 4(2) second indent. Pleadings before the CJEU as well as legal opinions issued by the Commission or Council Legal Services are notable examples that fall under the headings of ‘court proceedings’ and ‘legal advice’ respectively.

120 Ibid., Art. 4(2) third indent.

121 Case T-545/11 Stichting Greenpeace Nederland and Pesticide Action Network (PAN) Europe v Commission, at the time of writing subject to appeal before the CJEU in Case C-673/13P.


123 Case T-545/11 Stichting Greenpeace Nederland and Pesticide Action Network (PAN) Europe v Commission (para. 46 of judgment). The GC also held that Arts. 16–17 EUCFR (re freedom to
conduct a business and the right to property) and the provisions of the TRIPS Agreement are not capable of calling into question to validity of a clear and unconditional provision of secondary legislation such as Art. 6(1) (paras. 44–5 of judgment).

124 COM(2013)515, p. 9 (Table 4).
125 Ibid., p. 4 (section 4.5).
126 Based on the Commission’s annual reports for 2008–12 on access to documentation held by the EP, Council and Commission cited in n. 2 above.
127 COM(2013)515, p. 10 (Table 7).
129 Ibid.
130 See e.g. Case T-144/05 *Muñiz v Commission* (para. 75 of judgment).
131 Ibid.
132 COM(2013)515, p. 9 (Table 4). Between 2008 and 2012 this exception ground was used a basis to refuse documentation on average for 9.2% of all access-to-documentation requests (based on Commission reports cited in n. 1 above).
135 Ibid.
136 Ibid.
137 Art. 4(1)(b) of the Access to Documents Regulation in conjunction with Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community (OJ 2001 L8/1).
139 See notably Case C-64/05P *Sweden v Commission* and Case T-362/08 *IFAW Internationaler Tierschutz-Fonds v Commission* (para. 73 of judgment).
141 Ibid. (para. 106 of judgment).
144 Art. 8(3) of the Access to Documents Regulation.
Persons entitled to file a complaint with the EO under Art. 228 TFEU only include EU citizens (i.e. persons with nationality of one of the Union’s member states) and any natural or legal person residing or having its registered office within one of the EU member states. Accordingly, unlike the right to request environmental information from EU organs under the combined framework of the Access to Documents and Århus Regulations, the right to complain to the EO extends neither to natural persons resident outside the EU nor to those legal persons without a registered office located within the Union. Arguably, this limitation does not appear to accord with the requirements of Art. 9 of the Århus Convention, which requires that ‘any’ person who considers their information request to be wrongfully ignored or refused shall be entitled to have access to a review procedure before a court of law or another independent and impartial body established by law which is, *inter alia*, ‘fair and equitable’ (Art. 9(1) in conjunction with Art. 9(4) of the Århus Convention). The EO may, though, open an own-initiative investigation in order to follow up complaints from persons not formally entitled to submit complaints; however, the EO is not required to do this. Art. 24 TFEU confirms the right of EU citizens to apply to the EO in accordance with Art. 228 TFEU.

At the time of writing the EO incumbent in 2013/14 is Emily O’Reilly, former National Information Commissioner and Ombudsman for Ireland.

The EO hosts a website containing information about their role and activities, including decisions relating to complaints of maladministration: http://www.ombudsman.europa.eu/en/home.faces.

According to the EO’s *Overview Report for 2012* (OOPEC 2013), 69% of inquiries undertaken by the EO were completed within a year, the average time being 11 months. According to the report, 79% of all inquiries were completed within 18 months.


See e.g. Decision of the EO on complaint 2229/2003/MHZ against the European Commission, which concerned a request for a disclosure of an LFN issued under Art. 258 TFEU. The EO decision is contained in the EO’s annual report for 2003 (the annual reports are available for scrutiny on the EO website: http://www.ombudsman.europa.eu/en/activities/annualreports.faces).

Decision of the EO on complaint 1437/2002/IJH against the European Commission.

OJ 1973 L228/19.

See para. 2.5 of EO Decision.

Decision of the EO on complaint 412/2003/GG against the European Commission.
See Special Report from the EO to the European Parliament following the draft recommendation to the Council of the EU in complaint 1542/2000/(PB)SM and the EO’s Draft recommendation to the Council in complaint 1015/2002/(PB)IJH.

Case T-610/97 Norup Carlsen.


Another (indirectly related) factor raised by the EO was the fact that at the material time of the Carlsen case, the former treaty provision Art. 207 EC had not at that stage yet been amended (by the 1997 Amsterdam Treaty) to include the general requirement on the Council to take steps to allow greater access to its documents where it acts in a legislative capacity.

Such a procedure could be conceivably modelled on the ‘fast track’ litigation procedure contained in Art. 114(9) TFEU which provides the Commission with possibility to refer directly to the CJEU if it considers that a member state is abusing its powers to maintain or introduce stricter measures than those contained in an EU measure harmonising an area of law relating to the operation of the internal market.


The applicant has legal standing to bring an action as an addressee of the EU organ’s response under Art. 263(4) TFEU.

Art. 8(3) of the Access to Documents Regulation 1049/01.

This legislative obligation is complemented by Art. 296 TFEU which requires, _inter alia_, that legal acts must state the reasons upon which they are based. The CJEU has confirmed that by virtue of this treaty obligation the statement must be appropriate to the measure in issue and must disclose in a clear and unequivocal fashion the institution’s reasoning for the measure, in such a way so as to enable persons concerned to ascertain the reasons for the measure and to enable the EU judiciary to exercise its power of review: see e.g. Case C-265/97P _VBA_ (para. 93 of judgment) and Case T-250/08 _Batchelor_ (para. 42 of judgment).

See e.g. Case T-112/05 _Akzo_ (para. 94 of judgment) and Case T-42/05 _Williams v Commission_ (notably, paras. 95–6 of judgment).

See e.g. Lee (2014), p. 199.

Art. 17 TEU.

Notably, the modification introduced by Art. 6(1) of the Århus Regulation 1367/06 that requires an OPI in disclosure to be deemed to exist regarding information relating to environmental emissions does not apply to the ‘exception of investigations, in particular those concerning possible infringements of Community law’.
Ibid., Art. 6(1) final sentence.

Case T-29/08 *Liga para Protecção da Natureza (LPN) v Commission.*

Ibid. (paras. 101–2 of judgment).

Ibid. (para. 108 of judgment).

Ibid. (para. 110 of judgment).

Ibid. (paras. 113–15 of judgment).

Following Case T-2/03 *VKI* (para. 75 of judgment) and Joined Cases C-514, 528 and 532/07P *Sweden, API and Commission* (para. 58 of judgment).

Following on from Joined Cases C-39 and 52/05P *Sweden and Turco* (para. 50 of judgment).

Case T-29/08 *LPN* (para. 116 of judgment).

Ibid. (para. 117 of judgment).

See Regulation 1/03 (OJ 2003 L1/1).

Case T-186/08 *LPN v Commission.*

Ibid. (para. 127 of judgment).

Ibid. (para. 128 of judgment).

Ibid. (para. 138 of judgment).

Case T-111/11 *ClientEarth v Commission* (at the time of writing subject to appeal before the CJEU in Case C-612/13P).

Ibid. (para. 50 of judgment).


This is subject to Art. 6(1) of the Århus Regulation, which stipulates that the Art. 4 exception must be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the requested information relates to environmental emissions.

See e.g. Joined Cases C-514, 528 and 532/07P *Sweden, API and European Commission*.


Joined Cases T-92/98 and C-41/00P *Interporc v Commission*.

Joined Cases C-514, 528 and 532/07P *Sweden, API and European Commission*.

Ibid. (para. 94 of judgment).

See ibid. (paras. 85–93 of judgment).

Case T-36/04 *API*.

Joined Cases 514, 528 and 532/07P *Sweden, API and European Commission* (para. 104 of judgment).

Ibid. (para. 92 of judgment).
198 Joined Cases C-514, 528 and 532/07P Sweden, API and European Commission.

199 Ibid. (para. 118 of judgment).

200 See ibid. (paras. 118–23 of judgment).

201 See ibid. (para. 132 of judgment).

202 See ibid. (paras. 130–31 of judgment).

203 Specifically, the Annex to former Decision 94/90 on public access to Commission documents (OJ 1994 L46/58) stipulated that disclosure of documentation could be denied if it ‘could undermine’ the protection of, inter alia, ‘the public interest (Public security, international relations, monetary stability, court proceedings, inspections and investigations)’.

204 Case T-105/95 WWF UK v Commission.

205 Para. 63 of judgment.


207 Notably, Art. 15 TFEU.


209 See Commission website:


210 See following DG ENV webpages in particular:


213 The Commission has fleshed out its strategy on improving communications and co-operation with stakeholders (incl. the public and national authorities) on implementation issues concerning EU environmental law in 2012: COM(2012)95, Commission Communication, Improving the Delivery of Benefits from EU Environmental Measures: Building Confidence through Better Knowledge and Responsiveness, 7 March 2012.


217 Ibid., section 3.4 (Exceptions subjected to a public interest). The Commission’s 2012 Communication COM(2012)154, Updating the Handling of Relations with the Complainant in
Respect of the Application of Union Law provides summary guidance to complainants of alleged infringements of EU law by member states of the Commission’s policy of disclosure of infringement file documentation. See Ch. 5 above for an analysis of this document.

218 See paras. 30–1 and 35 of the Working Paper.
219 Ibid., para. 33.
220 Ibid., para. 34.
221 Joined Cases C-514, 528 and 532/07P Sweden, API and European Commission.
222 At p. 12 of the Working Paper.
223 Ibid., para. 2.
224 See e.g. De Leeuw (2003).
229 See e.g. Weatherill/Beaumont (1999), p. 223.
230 See Declaration 35 attached to the Treaty of Amsterdam 1997 on former Art. 191a EC (now succeeded by Art. 15 TFEU).