Recent developments in public access to documents held by European Community institutions

In the past 20 years, most Member States of the European Union have adopted rules at constitutional or legislative level which confer on citizens a general right of access to documents held by public authorities.[1] With the development of such public access legislation, European integration becomes problematic. When certain areas of government — subject to democratic scrutiny and accountability under the legal orders of the Member States — are transferred to supra-national decision-making bodies, which hitherto have been based on a principle of secrecy, European citizens are deprived of their 'right to know' as regards the acts of their decision-makers[2] and a fundamental element of national and Community democracy is undermined.[3]

This dilemma was clearly illustrated in a judgment of the *Raad van State* (Netherlands Council of State) delivered on 7 July 1995 in the *Metten Case*.[4] In a decision of 2 October 1992, the Dutch Minister of Finance rejected a request, based on the provisions of the Dutch Act on Open Government, to provide access to the minutes of meetings of the Council of the European Communities (Economic and Financial Affairs) held by the Dutch Government. The latter, which normally champions transparency and public access to documents within the Community, took the view that the national Act on Open Government did not apply to such documents, because the meetings of the Council of the European Communities were subject to secrecy under Article 18 of the Council's internal Rules of Procedure. In its judgment, the *Raad van State* interpreted the case-law of the Court of Justice of the European Communities[5] — without referring the question to the Court for a preliminary ruling — and took the rather surprising view that the doctrine of primacy of Community law applied to the internal Rules of Procedure of the institutions, even though they have no direct effect. Thus, access to the requested documents was denied since the secrecy clause in Article 18 of the Council's internal Rules of Procedure was considered to take precedence over the access provisions in national legislation and in the Dutch Constitution.[6]

However, contrary to the assumption of the *Raad van State*, it is no longer true that all documents held by the Community institutions are hidden by a veil of secrecy, unless they have expressly been rendered public. The Community Courts, the European Ombudsman, the Community institutions and the Member States, acting as the constituent power of the European Union when amending the treaties, are progressively recognising a general principle of Community law of access to documents held by public authorities.

The progressive recognition of a general principle of access to documents in the Community legal order

Within the European Union, the importance of the right of access to documents was stressed, for the first time, in the Maastricht declaration on the right of access to information which links that right with the democratic nature of the institutions.[7] With the purpose of bringing the Community closer to its citizens, the European Council called on the Council and the Commission to implement such a right on several occasions. At the meeting held in Copenhagen on 22 June 1993, the European Council invited the Council and the Commission to pursue their work[8] on the basis of the principle of citizens' having the fullest possible access to information.[9]

Nevertheless, instead of enacting general rules on public access to documents,[10] the Council and the Commission preferred a more limited approach. They adopted by common agreement on 6 December 1993 a Code of Conduct, which enumerated the principles governing public access to documents in their possession. Each institution would implement those principles by means of specific measures before 1 January 1994. By Decision 93/731/EC of 20 December 1993 on public access to Council documents,[11] the Council adopted provisions for the implementation of the principles set out in the Code of Conduct. Similarly, the Commission adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents.[12]

However, in the *Netherlands v Council* case,[13] the Dutch Government challenged the legal basis for the adoption of the Council's decision 93/731, arguing that the Council wrongly used Article 151(3) of the EC Treaty and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council's internal organisation. The European Parliament intervened in support of the Dutch Government, arguing that, in basing the contested rules on Article 151(3) of the Treaty, the Council exceeded the powers of its internal organisation conferred upon it by that provision. The Parliament submitted that the requirement for openness constitutes a general principle common to the constitutional traditions of the Member States which is enshrined in Community law. Furthermore, it contended that the right to information, of which access to documents constitutes the corollary, is a fundamental human right recognised by various international instruments.

In this context, it should be recalled that it is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures.[14] For that purpose, the Court of Justice has on several occasions drawn inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have agreed or to which they have acceded. Furthermore, Article F(2) of the Treaty on European Union provides that 'the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

It is, therefore, not surprising that Advocate General Tesauro, in his opinion of 28 November 1995, considered that the basis for the individual's right to information should be sought in the principle of democracy, which constitutes one of the cornerstones of the Community edifice, as enshrined in the Preamble to the Maastricht Treaty and Article F of its Common Provisions. In the light of the recent changes which have taken place in the

legislation of the Member States, Advocate General Tesauro concluded that the right of access to official documents now constitutes part of that principle.[15]

In its judgment of 30 April 1996, the Court of Justice stressed that the domestic legislation of most Member States now enshrines, in a general manner, the public's right of access to documents held by public authorities as a constitutional or legislative principle.[16] The Court found that this trend 'discloses a progressive affirmation of individuals' right of access to documents held by public authorities'. Accordingly, the Council deemed it necessary to amend the rules governing its internal organisation, which had hitherto been based on the principle of confidentiality.[17] The Court added that,

> so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration'.[18]

Consequently, the Court found that as Community law stood at that time, the Council was empowered to adopt measures intended to deal with requests for access to documents in its possession. The Court therefore dismissed the application.[19]

The legal doctrine is divided as to whether the Court in effect followed its Advocate General and actually recognised a general principle of access to documents in Community law in *Netherlands v Council*.[20] If this is not the case, the legal basis for such a right must be sought elsewhere, for example in the internal rules of the institutions.

However, according to the case-law relied on by the Court in *Netherlands v Council*, the purpose of the Community institutions' Rules of Procedure is to organise the internal functioning of its services in the interests of good administration.[21] The essential purpose of such rules, particularly those with regard to the organisation of deliberations and the adoption of decisions, is to ensure the smooth conduct of the decision-making procedure. It follows that natural or legal persons may normally not rely on an alleged breach of such rules, since they are not intended to ensure protection for individuals.[22] Nevertheless, as the compliance with internal Rules of Procedure may constitute an essential procedural requirement, and may in some circumstances have legal effects vis-â-vis third parties, their breach can give rise to an action for annulment within the meaning of Article 173 of the EC Treaty.[23]

Indeed, as the Advocate General clearly underlined, the fact that internal rules of the institutions may be invoked by third parties in no way establishes that they are the basis for citizens' right of access to documents held by the Community institutions and other organs: that right existed before the Council's Decision 93/731 was adopted. Accordingly, Advocate General Tesauro considered those acts to be confined to organising the operation of the institution in the light of that right. Moreover, he considered that their scope could not have been otherwise, in that the very legal basis selected for their adoption shows that this was the sole objective pursued.[24] The Court seems to have followed this reasoning, since it considered that Decision 93/731 must only be regarded as a 'measure intended to deal with requests for access to documents in its possession', adopted in the interests of good administration.[25]

Therefore, Decision 93/731 cannot be regarded as a measure conferring a substantive right of access to documents held by the Council on European citizens,[26] intended to invest in them a formal 'right to know' about what is going on within the European institutions. If such were the case, it is in my view clear that the Court would have been compelled to strike down the Council's decision, since it manifestly would have been adopted on an incorrect legal basis. Thus, in the absence of general rules on the right of public access to documents held by the Community institutions, European citizens' 'right to know' must be sought in a general principle of Community law, drawn from the constitutional and legislative traditions common to the Member States, the existence of which constitutes the missing link in the reasoning of the Court in *Netherlands v Council*.

The consequence of this reasoning is that when assessing the legality of a decision refusing access to a particular document, the Community judicature will have to determine whether the rights conferred on citizens by virtue of this general principle were effectively guaranteed. In other words, 'a decision of refusal of access to documents, albeit adopted in full compliance with [the institution's] self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information'.[27]

Nevertheless, the Court of First Instance of the European Communities (CFI) has taken a diametrical opposite stand on the legal nature of the Council's and the Commission's internal rules of access to documents. In *Carvel and Guardian Newspapers v Council*, the CFI stated that Council Decision 93/731 is the only 'legislative measure' which deals with public access to documents and which govern citizens' rights of access to documents, containing provisions relating to the implementation of the principle of transparency.[28]

According to the CFI, the Commission has, by adopting Decision 94/90, indicated to citizens who wish to gain access to documents which it holds that their requests will be dealt with according to the procedures, conditions and exceptions laid down for that purpose. Although Decision 94/90 is in effect regarded as a series of obligations which the Commission has voluntarily assumed for itself as a measure of internal organisation, it is, according to the CFI, nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect.[29] In its judgment of 6 February 1998 in *Interporc v Commission*, the CFI went further and stated that Decision 94/90 is 'a measure conferring on citizens a right of access to documents held by the Commission'.[30]

Exceptions to public access to docum nts laid down in the internal rules of the institutions

The case-law of the Court of Justice and the Court of First instance show that the Community judiciary has not hesitated to undertake a 'comprehensive review' of challenged administrative decisions.[31] The facts and considerations on which such decisions are based are examined in considerable detail. In cases where the decision-making authority has had to assess complex economic or technical issues, the Community Courts have opted for a 'marginal review', meaning that it will only verify whether the relevant procedural rules have

been complied with, whether the statement of reasons is adequate, whether the facts have been accurately stated and whether there have been any manifest errors of appraisal or misuse of powers.[32]

However, in access to document cases decided to date,[33] the CFI seems to have opted for marginal judicial review. It thereby avoids the need to examine in detail the considerations on which a decision of refusal is based and to perform *in camera* examinations of requested documents. It concentrates its review on the duty of the institutions to give reasons when denying access to a given document. This quite limited approach is also illustrated by the CFI's interpretation of the exceptions to the right of access provided for in the internal rules of the institutions.

The Code of Conduct and the Council Decision 93/731 lay down, in almost identical terms, interests which may be invoked by the two institutions as grounds of rejection of a request for access to documents. Article 4(1) of Decision 93/731 lists the grounds on which access to a Council document may not be granted, namely 'where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

  the protection of the individual and of privacy,

  the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.'

In addition, Article 4(2) allows the Council to refuse access to a document in order to protect the confidentiality of its proceedings.

According to the case-law of the CFI, the exceptions to the citizens' right of access to documents held by the Council and the Commission must be construed and applied strictly, 'in order not to defeat the application of the general principle of giving the public "the widest possible access to documents held by the Commission".'[34] Thus, in the *Interporc* case, the third chamber, extended composition,[35] of the CFI seem to have recognised the existence of a general principle of access to Commission documents. However, in the *van der Wal* case, handed down a month later, the fourth chamber[36] of the CFI has taken a more restrictive view, stating that the basis for such a general principle should be sought in the internal rules of the institutions.[37]

As regards those internal rules, the CFI has considered that the Code of Conduct and Decision 93/731 contain two categories of exception to the general principle of citizens' access to Commission and Council documents: 'mandatory exceptions' (public security, international relations, monetary stability, court proceedings and investigations) and the 'discretionary exception', constituted by the confidentiality of its proceedings.[38]

According to the wording of the first category, drafted in mandatory terms, the Commission and the Council are, according to the CFI, *obliged* to refuse access to documents falling under any one of the exceptions contained in this category once the relevant circumstances are shown to exist.[39] In the *Interporc* and *van der Wal* cases, the CFI added that before deciding on a request for access to documents the Commission must consider, *for each document requested*, whether, in the light of the information in its possession, disclosure is in fact likely to undermine one of the interests protected under the first category of exceptions.[40] It should, however, be noted that in the *WWF* case, the CFI had previously ruled that the Commission is *not obliged* in all cases to furnish, *in respect of each document*, 'imperative reasons' in order to justify the application of the public interest exception. According to the CFI, it would be impossible, in practical terms, to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.[41]

By way of contrast, the wording of the 'discretionary exception' provides — still according to the CFI — that the Commission enjoys a *margin of discretion* which enables it, if need be, to refuse a request for access to documents which touch upon its deliberations. The CFI has held that the Council and the Commission must strike a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations.[42]

Moreover, attempts have already been made to widen the exceptions to public access to documents by amending the internal rules of the institutions. In a 1996 report on the implementation of Council Decision 93/731, the Secretary General of the Council noted that the Council has consequently refused to release documents containing legal positions of the Council Legal Service on the grounds that their content falls within the scope of Article 4(1), in particular the protection of the public interest (public security, court proceedings), or was part of the Council's proceedings that the Council deemed necessary to protect for reasons of confidentiality (Article 4(2) of Decision 93/731).[43] In order to cover this practice, the Secretary General suggested supplementing Article 4(1) of the Council's Decision with the words 'legal certainty' as a new ground for exemption of public access to documents held by the Council. This would, according to the Secretary General, be justified by the need to ensure the independence of the Legal Service as legal adviser to the Council, a relationship compared to legal privilege existing in attorney-client relationships. Nevertheless, the Council resisted the temptation of securing privileged legal advice when acting as the legislator of the European Union, since it did not see any need to alter the basic features of the Decision.[44]

In any case, if a general principle of access to documents does exist in Community law, independently of the internal rules of the institutions, it is questionable whether the Council would be entitled, by virtue of its power of internal organisation, to restrict a fundamental right, linked to the democratic nature of the institutions, by amending Decision 93/731. With the recognition of such a general principle, the CFI's interpretation of the exceptions laid down in the internal measures of the institutions would have to be revisited. The basis for the exceptions to public access to documents held by the institutions will instead have be sought in the numerous secrecy provisions laid down in the Treaties and in secondary legislation and, if need be, in general principles of law.

The European Ombudsman's inquiry into public acc ss to docum nts

With a view to setting a good example to others, presumably the Community institutions and organs, the European Ombudsman[45] Jacob Söderman has set out to act as openly as possible[46] by adopting and implementing provisions on public access to documents held by the Ombudsman.[47] Documents held by the Ombudsman's office, which do not concern complaints, are public unless the Ombudsman considers that confidentiality is required either by the Treaties, the Statute of the Ombudsman, any other provision of Community law, or — more regrettably — in order to protect his interest in the confidentiality of his proceedings or the running of his office.

In June 1996, the European Ombudsman launched an own-initiative inquiry into public access to documents held by Community institutions and bodies other than the Council and the Commission. Recalling the case-law of the Court in *Netherlands v Council*, the Ombudsman concluded that it appeared that, in relation to requests for access to documents, Community institutions and bodies have a legal obligation to take appropriate measures to act in conformity with the interests of good administration. The Ombudsman considered that the adoption of such rules promotes transparency and good relations between citizens and the Community institutions and bodies in several ways: the process of adopting rules requires the institution or body to examine, for each class of documents, whether confidentiality is necessary or not. In the context of the Union's commitment to transparency, this process itself encourages a higher degree of openness. Furthermore, the Ombudsman stressed that if rules are adopted and made publicly available, citizens who request documents can know their rights. Finally, the rules themselves can also be subject to public scrutiny and debate, and clear rules can promote good administration, helping officials deal accurately and promptly with public requests for documents.

Taking into account the case-law of the Court, the Union's commitment to transparency and the existence of a single institutional framework for the Union, the Ombudsman concluded in his Decision of 20 December 1996 that failure to adopt rules governing public access to documents could constitute an instance of maladministration.[48] He therefore made draft recommendations to the institutions and bodies concerned that they should adopt such rules in respect of all documents not already covered by existing legal provisions allowing access or requiring confidentiality and make them easily available to the public.

The full list of institutions and bodies covered by the inquiry included the European Parliament,[49] the Court of Justice,[50] the Court of Auditors,[51] the European Investment Bank,[52] the Economic and Social Committee,[53] the Committee of the Regions,[54] the European Monetary Institute,[55] the Office for Harmonization in the Internal Market,[56] the European Training Foundation,[57] the European Centre for the Development of Vocational Training (Cedefop),[58] the European Foundation for the Improvement of Living and Working Conditions,[59] the European Environment Agency,[60] the Translation Centre for Bodies of the European Union,[61] the European Monitoring Centre for Drugs and Drug Addiction[62] and the European Agency for the Evaluation of Medicinal Products.[63]

Unfortunately, the European Ombudsman did not make any recommendation concerning the substance of the rules to be adopted by the Community institutions and other bodies, but suggested that they consider the adoption of rules on public access to documents similar to those of the Commission and the Council.[64]

Out of the 14 other bodies to which the draft recommendations were addressed,[65] thirteen have as of 1 January 1998 adopted rules governing public access to their documents. This is the case with:

- the European Parliament's decision of 10 July 1997 on public access to European Parliament documents;[66]
- the Court of Auditors' decision no. 97-18 of 7 April 1997 establishing internal rules regarding the treatment of requests of access to documents held by the Court;[67]
- the European Investment Bank's rules on public access to documents adopted by the Bank's Management Committee on 26 March 1997;[68]
- the Economic and Social Committee's Decision on public access to ESC documents;[69]
- the European Centre for the Development of Vocational Training (Cedefop), which has adopted the Commission's rules and procedures;
- the European Monitoring Centre for Drugs and Drug Addiction, which has also adopted the Commission's rules and procedures;
- the decision of 17 September 1997 concerning public access to documents of the Committee of the Regions;[70]
- the decision of 21 March 1997 on public access to European Environment Agency documents;[71]
- the decision of the governing board on public access to European Training Foundation documents;[72]
- the decision no. 9/97 of 3 June 1997 concerning public access to administrative documents of the European Monetary Institute (EMI);[73]
- the Translation Centre for Bodies of the European Union's rules for access to Translation Centre documents, adopted on 17 November 1997;[74]
- the European Foundation for the Improvement of Living and Working Conditions;[75]
- the Decision on rules on access to documents of the European Agency for the Evaluation of Medicinal Products (EMEA).[76]

So far, the Court of Justice is the only institution that has not adopted internal rules on public access to documents.

In a Special Report of 15 December 1997 by the European Ombudsman to the European Parliament following his own initiated inquiry into public access to documents,[77] the Ombudsman concluded that the rules on public access to documents held by Community institutions and bodies are generally quite limited, compared to the provisions governing some national administrations. In particular, most internal rules of the Community administration do not give a right of access to documents held by one body, but originating in another.[78] Nor do they require the establishment of registers of documents which could both facilitate citizens' use of their right of access and promote good administration.

Towards a uniform interpretation of public access to documents in European Community law?

The Amsterdam Treaty[79] signed on 2 October 1997 clearly establishes the right of any citizen to have access to European Parliament, Council and Commission documents. Within a period of two years following the entry into force of the Treaty, the Community legislator will determine the general principles and limits governing the right of access to documents in a regulation to be adopted under a new Article 255 of the EC Treaty, which reads:

1 Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2 General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 189b within two years of the entry into force of the Treaty.

3 Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents.

In Declaration no. 35 to the Amsterdam Treaty,[80] the Conference agreed that the principles and conditions referred to in Article 255 will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. This declaration strengthens the view that the general principle of access to documents applies not only to documents drawn by a Community institution, but to all documents held by the European administration irrespective of their author.[81]

In his Special Report, the European Ombudsman considered that Article 255 of the Treaty and his own recommendations are complementary. Whereas Article 255 creates a specific right of access to documents held by three Community institutions, other Community institutions and bodies must also have internal rules governing such access, as declared by the Court of Justice in *Netherlands v Council*. In the Ombudsman's view, consistency and equal treatment of citizens require that when the Regulation foreseen by Article 255 of the EC Treaty becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration.

In the meantime, the discrepancies in the existing internal rules of the Community administration should, in the interest of a uniform interpretation of Community law, be addressed by the Community judicature when interpreting and developing the general principle of Community law of public access to documents. Indeed, Article C of the Treaty on European Union provides that 'the Union is served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives', which guarantees equal treatment of European citizens as regards public access to documents in Community law. This principle should exclude arbitrary differences in the application of the various measures adopted by the Community administration.

On the other hand, it is clear that public access to documents held by public authorities is not absolute. In the absence of general rules — even after the entry into force of the Amsterdam Treaty — the Community Courts will have to interpret the general principle of public access to documents held by public authorities and the numerous secrecy provisions laid down in the Treaties and in the secondary legislation, limiting that right. They will have to strike a balance on a case-by-case basis between the interest of European citizens in obtaining access to documents and the legitimate grounds for protecting secrecy within the European institutions.

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References

1. Constitutional provisions on public access have been introduced in Sweden (1766), Spain (1978), the Netherlands (1983), Austria (1987), Portugal (1989), Belgium (1994) and Finland (1995).

   Legislative provisions exist in France (1978), the Netherlands (1978), Denmark (1985), Austria (1987-1990), Ireland (1997), Greece (1986, subject however to numerous conditions and exceptions) and Italy (1990, where the law confers a right of access only on persons having an interest therein in order to protect legally relevant situations).

   Germany, the United Kingdom and Luxembourg remain the only Member States where such a right does not yet exist.

   However, an Akteneinsichts- und Informationszugangsgesetz (AIG) has been adopted in Germany at the regional level in the Land of Brandenburg, see <http://www.brandenburg.de/land/mi/recht/aig.htm>. Moreover, the UK Government has made a pledge to legislate for freedom of information, bringing about more open Government; a White paper, entitled 'Your Right to Know', was published in 1997 and is available on the World Wide Web at <http://foi.democracy.org.uk/>.
2. Ragnemalm, 'Démocratie et Transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires', in *Scritti in onore di Guiseppe Federico Mancini*, Giuffrè editore, 1998, Volume II, pp. 809-830 at 809.
3. Curtin and Meijers, 'The principle of open government in Schengen and the European Union: Democratic retrogression?', *Common Market Law Review*, 1995, pp. 391-442 at 392; from a Swedish perspective, see Strömberg, 'Offentlighet, sekretess och meddelarfrihet vid ett svenskt medlemskap i EG', *Förvaltningsrättslig Tidskrift*, 1993, pp. 111-117 at 114.
4. *Afdeling Bestuursrechrspraak, Raad van State,* 7 July 1995, no. R01.93.0067; for an English translation of the judgment, see *Maastricht Journal of European and Comparative Law*, 1996, pp. 179-183.
5. Case 6/64 *Costa v ENEL* [1964] ECR 1199; Case 14/68 *Walt Wilhelm* [1969] ECR 1; Case 106/77 *Simmenthal* [1978] ECR 629; Case C-68/86 *United Kingdom v Council* [1988] ECR I-855.
6. For a critical analysis of the *Metten* case, see Besselink, 'Curing a 'childhood sickness'?: on direct effect, internal effect, primacy and derogation from civil rights: the Netherlands Council of State Judgment in the Metten case', *Maastricht Journal of European and Comparative Law*, 1996, pp. 165-178.
7. Annexed to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992 [*Official Journal of the European Communities* (OJ) 1992 C 191, p. 101], the Maastricht declaration provides: 'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and

the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

8. In response to the Maastricht Declaration and the calls from the European Council, the Commission undertook a comparative survey on public access to documents in the Member States and in some non-member countries. The results of this survey were summarised in a communication 93/C 156/05 of 5 May 1993 entitled 'Public access to the institutions' documents' and were addressed to the Council, the Parliament and the Economic and Social Committee (OJ 1993 C 156, p. 5).
9. Bulletin of the European Communities, 6-1993, p. 16, point I.22.
10. In Annex II to a second Communication 93/C 166/04 of 2 June 1993 entitled 'Openness in the Community', the Commission formulated some basic principles and requirements which should govern access to documents, with a view subsequently to discussing them with the other institutions (OJ 1993 C 166, p. 4). It invited the other institutions to cooperate in this development and proposed that the policy of access to documents might take the form of an inter-institutional agreement.
11. OJ 1993 L 340, p. 43.
12. OJ 1994 L 46, p. 58.
13. Case C-58/94 *Netherlands v Council* [1996] ECR p. I-2169 [Full Court: Judges Rodríguez Iglesias (President), Kakouris, Edward, Puissochet, Hirsch, Mancini, Schockweiler, Moitinho de Almeida (Rapporteur), Kapteyn, Gulmann, Murray, Jann, Ragnemalm, Sevón and Wathelet].
14. See Opinion 2/94 of the Court of 28 March 1996 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, paragraph 33.
15. Opinion of Advocate General Tesauro delivered on 28 November 1995 in Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 19 .
16. Judgment of 30 April 1995 in Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 34.
17. Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 36.
18. Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 37.
19. Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 39.
20. In favour of such an interpretation, see Bergeres, who stresses that the importance of the ruling of the Court should not be neglected: 'Certes, celle-ci se situe dans une évolution normative et textuelle passablement confuse. Il n'en reste pas moins qu'un principe fondamentalement reconnu par les droits des États membres a été consacrée: celui de la liberté d'accès du public aux documents administratifs.' in *Recueil Dalloz Sirey*, 1997, Jur. pp. 19-20.

    According to De Smijter 'La Cour semble dire que le droit d'accès du public aux documents détenus par les autorités publiques constitue un principe général de droit communautaire.', in *Revue du marché unique européen*, 1996, pp. 257-258 at 257.

    Armstrong argues that the Court has appeared to recognise a Community law right of access to information (though in terms less express than those employed by the Advocate General), but 'such a right does not appear to operate as a substantive standard of transparency with which to test the acts of the institutions', in 'Citizenship of the Union? Lessons from Carvel and the Guardian', *Modern Law Review*, 1996, pp. 582-588 at 585.

    Chiti notes that optimistically, 'the silence of the Court upholds the position of Tesauro on the right of access to documents as part of the democratic principle; but the many cases of judicial activism tell us that the shortcut taken by the Court is, more probably, a genuine lack of interest for the matter.' in 'Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union', *European Public Law*, 1996, pp. 563-569 at 569.

    Some commentators, such as Lafay, take the view that the Court, albeit revealing the essence of a general principle of access to documents in Community law, failed to pursue it's reasoning and did not recognise the existence of a general principle, in 'L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire', *Revue trimestrielle de droit européen*, 1997, pp. 37-68 at 49.

    A minority view, represented by Dyrberg, believe that there probably does not exist such a general principle of access to documents in the present state Community law, in 'El acceso público a los documentos y las autoridades comunitarias', *Revista de Derecho Comunitario Europeo*, 1997, pp. 377-411 at 410.
21. Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 49.
22. Case C-69/89 *Nakajima v Council, supra* note 21, paragraph 50.
23. Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraphs 75 and 76.
24. Opinion of Advocate General Tesauro in Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 20. See Ragnemalm, op. cit. *supra* note 2, at 823, 830.
25. Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 39.
26. See also De Leeuw, '*WWF (UK) v Commission of the European Communities*', *European Public Law*, 1997, pp. 339-350 at 349.
27. Opinion of Advocate General Tesauro in Case C-58/94 *Netherlands v Council, supra* note 13, paragraph 21.
28. Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765, paragraph 62, [second chamber, extended composition: Judges Vesterdorf, Barrington (Rapporteur), Saggio, Kirschner and Kalogeropoulos].
29. Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 55.
30. Case T-124/96 *Interporc v Commission*, judgment of 6 February 1998, not yet reported.
31. Case 42/84 *Remia v Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62.
32. Case 255/84 *Nachi Fujikoshi v Council* [1987] ECR 1861, paragraph 21; Case C-156/87 *Gestetner v Council and Commission* [1990] ECR I-781, paragraph 63; Case C-174/87 *Ricoh v Commission* [1992] ECR I-1335, paragraph 68; Joined Cases T-39 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49, paragraph 109. See Lenaerts and Vanhamme, in 'Procedural rights of private parties in the Community administrative process', *Common Market Law Review*, 1997, pp. 531-569 at 560.
33. Case T-194/94 *Carvel and Guardian Newspapers v Council, supra* note 28; Case T-105/95 *WWF UK v Commission, supra* note 29; Case T-124/96 *Interporc v Commission, supra* note 30, and Case T-83/96 *van der Wal v Commission*, judgment of 19 March 1998, not yet reported.
34. Case T-124/96 *Interporc v Commission, supra* note 30, paragraph 49; compare Case T-105/95 *WWF UK v Commission, supra* note 29, paragraph 56.
35. Judges Vesterdorf (Rapporteur), Briët, Lindh, Potocki and Cooke.
36. Judges Lenaerts, Lindh and Cooke (Rapporteur).
37. Case T-83/96 *van der Wal v Commission, supra* note 33, paragraph 41.
38. Case T-105/95 *WWF UK v Commission, supra* note 29, paragraph 57; Case T-124/96 *Interporc v Commission, supra* note 30, paragraph 42; Case T-83/96 *van der Wal v Commission, supra* note 33, paragraph 50.
39. See, in relation to the provisions of Decision 93/731, Case T-194/94 *Carvel and Guardian Newspapers v Council,*

supra note 28, paragraph 64, and in relation to the Code of Conduct, Case T-105/95 *WWF UK v Commission*, *supra* note 29, paragraph 59.

40. Case T-124/96 *Interporc v Commission*, *supra* note 30, paragraph 52; Case T-83/96 *van der Wal v Commission*, *supra* note 33, paragraph 43.
41. Case T-105/95 *WWF UK v Commission*, *supra* note 29, paragraph 64.
42. See, in relation to the corresponding provisions of Decision 93/731, the CFI's judgment in Case T-194/94 *Carvel and Guardian Newspapers v Council*, *supra* note 28, paragraphs 64 and 65, and in relation to the Code of Conduct, Case T-105/95 *WWF UK v Commission*, *supra* note 29, paragraph 59.
43. Report on the Implementation of Council Decision 93/731/EC on Public Access to Council Documents (July 1996), 8330/96, SN 5015/96 EN, p. 42.
44. Council Conclusions on the Review of Council Decision 93/731/EC on Public Access to Council Documents, SN 5015/96, p. 61; Council Decision (96/705/Euratom, ECSC, EC) of 6 December 1996 amending Decision 93/731/EC on public access to Council documents, OJ L 325, p. 19.
    However, in an Order of 3 March 1998 on an application for a provisional ruling, the President of the Court of First Instance, Judge Saggio, upheld the Council's refusal to provide access to two opinions from the Council Legal Service. The necessity to ensure 'the protection of legal security and of the stability of Community law' as well as the need to safeguard 'the Council's possibility to obtain independent legal advice' constitute *prima facie* legitimate reasons to refuse access (Order of the President of the Court of First Instance of 3 March 1998, Case T-610/97 R *Hanne Norup Carlsen e.a. v Council*, not yet published, paragraph 47). The case is now being heard on its merits by the third chamber of the CFI [Judges Tiili (Rapporteur), Briët and Potocki].
45. URL: <http://www.euro-ombudsman.eu.int>.
46. Annual Report 1995, available on the World Wide Web at the following URL:
    <http://www.euro-ombudsman.eu.int/report/en/default.htm>.
47. URL: <http://www.euro-ombudsman.eu.int/decision/en/provis.htm>.
48. Decision of the European Ombudsman in the own initiative inquiry into public access to documents (616/PUBAC/F/IJH)
    URL: <http://www.euro-ombudsman.eu.int/decision/en/317764.htm>.
49. URL: <http://www.europarl.eu.int>.
50. URL: <http://www.curia.eu.int/en/index.htm >.
51. URL: <http://www.eca.eu.int/english/menu.htm>.
52. URL: <http://www.eib.org/index.htm>
53. URL: <http://www.esc.eu.int>.
54. URL: <http://www.cor.eu.int>.
55. URL: <http://www.ecb.int>.
56. URL: <http://europa.eu.int/agencies/ohim/english/title. htm>.
57. URL: <http://www.etf.it>.
58. URL: <http://www.cedefop.gr>.
59. URL: <http://europa.eu.int/agencies/efilwc/index.htm>.
60. URL: <http://www.eea.eu.int>.
61. URL: <http://europa.eu.int/en/agencies.html#tceu>.
62. URL: <http://www.emcdda.org>.
63. URL: <http://www.eudra.org/emea.html>.
64. For a critical analysis of those rules, see RAGNEMALM, op. cit. *supra* note 2, at 823-825.
65. On the basis of the information supplied to the Ombudsman, it seems that the Office for Harmonization in the Internal Market had already adopted such rules; those rules have not yet been rendered public.
66. OJ 1997 L 263, p. 27.
67. Décision n° 97-18 de la Cour des Comptes portant règles internes relatives au traitement des demandes d'accès aux documents dont dispose la Cour, not yet published in the Official Journal.
68. OJ 1997 C 243, p. 13.
69. OJ 1997 L 339, p. 18.
70. OJ 1997 L 351, p. 70.
71. OJ 1997 C 282, p. 5.
72. OJ 1997 C 369, p. 10.
73. OJ 1998 L 90, p. 43.
74. OJ 1998 C 46, p. 5.
75. Not yet published in the Official Journal.
76. The EMEA has made its rules public on the Word Wide Web through its homepage at the URL <http://www. eudra.org/emea/pdfs/EMRu_97EN.pdf>.
77. URL: <http://www.euro-ombudsman.eu.int/special/en/97_def.htm>, OJ 1998 C 44, p. 9.
78. Therefore, the right of access to such documents must be sought in a general principle of Community law, see Ragnemalm, op. cit, *supra* note 2, at 830.
79. OJ 1997 C 340, p. 173.
80. OJ 1997 C 340, p. 137.
81. See also Blanchet, 'Transparence et qualité de la législation', *Revue trimestrielle de droit européen*, 1997, pp. 915-928 at 925.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

CORRS CHAMBERS WESTGARTH and LEGAL AID COMMISSION OF VICTORIA (1996) 10 VAR 388

Decided: 9 October 1996 by Presiding Member Moshinsky.

Section 32 (legal professional privilege), Section 33(1) (personal affairs), Section 38 (secrecy provisions), Section 50(4) (public interest override).

Factual background

Corrs Chambers Westgarth (Corrs) was a firm of solicitors which had acted for a finance company (N). N had advanced money, by way of a loan, to two people (the McWs) who subsequently brought, with the assistance of the respondent Legal Aid Commission of Victoria (the LACV), successful proceedings against N in the Credit Tribunal of Victoria.

Procedural history

On 28 July 1995, the day after the Credit Tribunal made its order in favour of the McWs, Corrs requested access to documents relevant to the decision of the LACV to grant funding, details of funding provided, and details of any recoveries from either of the McWs by the LACV.

The LACV refused access to the documents. Corrs' request for review dated 27 September 1995