



2 July 1998

A4-0265/98

REPORT

on the Special Report by the European Ombudsman
to the European Parliament following his own-initiative
inquiry into public access to documents (C4-0157/98)

Committee on Petitions

Rapporteur: Mrs Astrid Thors

DOC_ENRR357357258

PE 226.263/fin.

- Consultation procedure
simple majority
- **I Cooperation procedure (first reading)
simple majority
- **II Cooperation procedure (second reading)
simple majority to approve the common position
majority of Parliament's component Members to reject or amend the common position
- *** Assent procedure
majority of Parliament's component Members to give assent
but simple majority under Articles 8a, 105, 106, 130d and 228 EC

- **I Codicision procedure (first reading)
simple majority
- **II Codicision procedure (second reading)
simple majority to approve the common position
majority of Parliament's component Members to adopt a declaration of intended
rejection of the common position, and amend the common position or confirm its rejection
- **III Codicision procedure (third reading)
simple majority to approve the joint text
majority of Parliament's component Members to reject the Council text

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Pursuant to Annex VI, title XX, to the Rules of Procedure, the Committee on Petitions is responsible for relations with the Ombudsman.

Rule 161(2) of the Rules of Procedure requires the Ombudsman to inform Parliament of his activities on a regular basis or when the committee responsible requests him to do so.

Article 138e(1) of the Treaty and Article 3(7) of the Statute of the European Ombudsman require the Ombudsman to send a report to the European Parliament if, following an inquiry, he has established an instance of maladministration.

By letter of 15 December 1997 the European Ombudsman forwarded to the European Parliament his special report following his own-initiative inquiry into public access to documents.

At the sitting of 13 March 1998 the President of Parliament announced that he had referred the special report to the Committee on Petitions as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights, the Committee on Civil Liberties and Internal Affairs and the Committee on Institutional Affairs for their opinions.

At its meeting of 16 and 17 March 1998 the Committee on Petitions appointed Mrs Thors rapporteur.

The committee considered the special report and its draft report at its meetings of 25 and 26 May and 29 and 30 June 1998. At the latter meeting it adopted the motion for resolution unanimously.

The following took part in the vote: Fontana, chairman; Newman and Ullmann, vice-chairmen; Thors, rapporteur and vice-chairman; Camisón Asensio, Kuhn, Marinucci, Perry, Schmidbauer and Smith.

The report was tabled on 2 July 1998.

The deadline for tabling amendments will be indicated in the draft agenda for the part-session at which the report is to be considered.

A
MOTION FOR A RESOLUTION

Resolution on the Special Report by the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents (C4-0157/98)

The European Parliament,

- having regard to the Special Report by the European Ombudsman following his own-initiative inquiry into public access to documents (C4-0157/98),
 - having regard to the Treaty on European Union and particularly Article 138e of the Treaty establishing the European Community,
 - having regard to Articles 3(1) and 3(7) of the Statute of the European Ombudsman,
 - having regard to Annex VI, title XX, and to Rule 161(2) of its Rules of Procedure,
 - having regard to its resolution of 14 July 1995 on the role of the European Ombudsman¹,
 - having regard to its resolution of 15 July 1997 on the annual report of the European Ombudsman in 1996 (C4-0293/97)²,
 - having regard to the annual report of the European Ombudsman (1997) (C4-0270/98),
 - having regard to the report of the Committee on Petitions and the opinions of the Committee on Legal Affairs and Citizens' Rights, the Committee on Civil Liberties and Internal Affairs and the Committee on Institutional Affairs (A4-0265/98),
- A. whereas, pursuant to the Treaty on European Union, the duties of the European Ombudsman are to conduct inquiries for which he finds grounds concerning instances of maladministration in the activities of the Community institutions or bodies, either on his own initiative or on the basis of complaints submitted to him, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role,
- B. whereas the activity of the European Ombudsman in resolving problems between citizens and Community institutions or bodies outside the courts in some ways represents a guideline for the measures which need to be taken to improve the activities of the bodies or institutions of the Community,
- C. whereas transparency in and of the decision-making procedure strengthens the democratic nature of the Community institutions and bodies and the public's confidence in the administration,

¹ OJ C 249, 25.9.1995, p. 200.

² OJ C 222, 21.07.97, p. 3.

- D. whereas transparency in the decision-making process helps to reduce the Union's democratic deficit and increases the confidence of citizens in Community administration,
- E. whereas the European Parliament sees as its priority the maintenance of an open and continuous dialogue with the citizens of the Union in order to ensure that they are closely involved in, and well informed about, the activities of the European Union and are able to use their civil rights,
- F. whereas the public's access to documents encourages a free exchange of views and a comprehensive and versatile enlightenment and awareness,
- G. whereas administrative action must on principle remain confidential in the European Union, as elsewhere, when the particular needs of individual data protection so require,
- H. whereas transparency is paramount to make administration in the Community institutions and bodies more efficient,
- I. regretting the fact that secrecy, confidentiality and discretion are too often the rule for the work of the Commission and the Council, and trusting that the confidential discussions which also form part of the parliamentary process, alongside public legislative decisions, will remain an exception for which special reasons must be given,
 - 1. Congratulates the European Ombudsman on a commendable initiative and a comprehensive special report and welcomes the Ombudsman's action in favour of transparency;
 - 2. Considers that the right of access to documents should primarily serve the interests of democratic debate and public scrutiny of the Community institutions and bodies, i.e. of both their political leaders and their services;
 - 3. Notes that the Ombudsman's own-initiative inquiry is a proper fulfilment of his mandate, pursuant to Article 138e of the Treaty;
 - 4. Agrees with the Ombudsman's conclusion not to make any formal recommendations in the special report to the Community institutions and bodies concerned, pursuant to Article 3(7) of the Statute of the European Ombudsman;
 - 5. Underlines, however, that recommendations or suggestions made in a special report might lead to political initiatives from the European Parliament for all Community institutions and bodies;
 - 6. Notes that the Ombudsman's suggestion in his 1997 annual report regarding a code of conduct on good administrative practice by Community institutions and bodies must be seen as closely linked to increased transparency and improved public access to documents, and therefore calls on the Council and the Commission to take the necessary steps with a view to the adoption of such a code of conduct for all Community institutions and bodies;
 - 7. Points out that those rules bestow on third persons rights which the institutions are obliged to respect;

8. Notes the positive response to the Ombudsman from the Community institutions and bodies concerned and considers that, in view of their direct significance for the rights of individuals, it is appropriate that rules on access to documents should, without exception, be published in the Official Journal of the European Communities;
9. Endorses the view expressed by the European Ombudsman that the European Court of Justice and the Court of First Instance should enact rules on access to documents as soon as possible and publish them in the Official Journal;
10. Calls on all Community institutions and bodies always to give citizens of the Union or natural or legal persons residing or having their registered offices in a Member State, at their request, information, guidance, advice and any similar assistance on questions relating to the institution's or body's field of activity;
11. Points out that Article 191a introduced by the Treaty of Amsterdam establishes a right of access to European Parliament, Council and Commission documents for any citizen of the Union and any natural or legal person residing or having their registered office in a Member State of the Union and mandates the Council and the European Parliament, within two years of the entry into force of the Treaty of Amsterdam, to determine the general principles and limits on grounds of public or private interest governing this right of access;
12. Points out that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the general principles of Community law and Directive 95/46/EEC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ensure that the right to privacy is respected;
13. Finds that Articles 164, 173 and 175 of the EC Treaty, in particular, the principle of interinstitutional balance and the caselaw of the European Court of Justice should be regarded as providing a legal framework;
14. Stresses that in the European Union, which is a Community governed by the rule of law, there must be recourse, either to the Court of First Instance or to the European Court of Justice, in particular to contest decisions refusing access to documents; points to the practical significance of such legal recourse as indicated by the judgments in the Carvel, Netherlands v Council, World Wildlife Fund UK, Interporc, Carlsen e.a. and Gerard van der Wal cases;
15. Notes that the new Article 191a of the EC Treaty constitutes the appropriate legal basis only for access to European Parliament, Council and Commission documents, but that the principles of openness and closeness to the citizen contained in Article A, second paragraph, of the EU Treaty apply to the EU as a whole and hence also to the other institutions, bodies and services;
16. Does not accept that the concept of the Council 'acting in its legislative capacity' contained in the new Article 151(3) of the EC Treaty can be used to establish a limited form of right of access where 'legislation' is involved and stresses that the Council cannot unilaterally determine what constitutes 'legislation';

17. Welcomes the position taken by the JHA Council of 19 March 1998 in favour of greater transparency in the JHA field, points out that the transparency of the decision-making process strengthens the democratic nature of the European institutions and urges the Council to take the necessary steps to enable Parliament to carry out its consultative and supervisory functions as laid down in the Treaty on European Union;
18. Notes that the Council is currently introducing a public register of its documents and stresses the importance of establishing, in all Community institutions and bodies, public registers for all documents received and drawn up and therefore calls on all Community institutions and bodies to establish such public registers in all the Community languages, making increased and more user-friendly use of the Internet, and invites the Commission to include this establishment as a requirement in its forthcoming proposal under Article 255 EC (ex 191a) in the form of the Amsterdam Treaty;
19. Calls once again for the resolutions adopted by the JHA Council and the decisions concerning 'A' items on the agendas of JHA Council meetings to be published officially, showing the position taken by each delegation within the Council;
20. Urges the various institutions to give budgetary priority to setting up the necessary infrastructure for enabling the right of access to documents to become a full reality in as short time as possible;
21. Underlines that the assistance will be given to an appropriate extent with regard to the request, the person's need for assistance and the institution's or body's field of activity; the assistance will be given as soon as possible; if, by mistake, a person turns to the wrong institution or body, that institution or body will direct him towards the appropriate one;
22. Calls on the European Ombudsman in particular to continue, in the wake of the special report under review, to study closely whether the administrative rules adopted and the register of documents received and drawn up which is to be introduced ensure the degree of transparency which Union citizens are entitled to expect in line with the principles enshrined in the Treaty of Amsterdam;
23. Calls on each Community institution and body to designate a specific person and/or service to act as an initial point of reference for any inquiries or applications for documents from concerned citizens; suggests further, that each institution and body ensure proper publicity for their new rules on access to documents by means of the Official Journal, informative brochures and the Internet, and also provide an opportunity for public comment on their rules;
24. Calls on the Commission and Member States to encourage administrative cooperation between national and Community bodies and institutions, so as to improve the transparency and understanding of Community law and the dissemination of the rights and duties of citizens, and welcomes the Community programmes for exchanges of civil servants that will enable them to meet the demands of a single internal area;
25. Instructs its President to forward this resolution and the report of the Committee on Petitions as well as the special report of the European Ombudsman to all institutions and bodies of the European Union, the parliaments and governments of the Member States, the national

Ombudsmen or similar office-holders and the national parliamentary committees responsible for petitions.

B **EXPLANATORY STATEMENT**

I. Background

1. Article 138e of the Treaty gives the European Ombudsman the power to conduct, on his own initiative, inquiries for which he finds ground concerning instances of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. In the Statute of the European Ombudsman, this power is described as being that the Ombudsman shall "conduct all the inquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies" (Article 3(1)).

In the cases where the Ombudsman establishes an instance of maladministration, he shall inform the European Parliament by way of a report, pursuant to Article 138e(1) of the Treaty and Article 3(7) of the Statute of the European Ombudsman.

By decision of 20 December 1996, the Ombudsman concluded an own-initiative inquiry into public access to documents held by Community institutions and bodies other than the Council and the Commission. The Ombudsman's decision and draft recommendations were presented to Parliament in the Ombudsman's Annual Report for 1996.

2. In his decision, the Ombudsman gave two reasons for conducting an own-initiative inquiry:
 - a) the Ombudsman had received a number of complaints which appeared to suggest that the staff of Community institutions and bodies are not always adequately instructed as to how to deal with requests for documents and that documents are sometimes disclosed only after a considerable delay;
 - b) "... part of the Ombudsman's mission is to enhance relations between the Community institutions and bodies and European citizens. The creation of the Ombudsman's office was meant to underline the commitment of the Union to democratic, accountable and transparent forms of administration."¹
3. The Ombudsman thus concluded that an own-initiative inquiry into public access to documents seemed appropriate, since it is an important aspect of transparency.

In his decision of 20 December 1996, the Ombudsman established that "failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration".

¹ Decision and recommendation in the own initiative inquiry 616/PUBAC/F/IJH; p. 1 para. 3.

By letter of 15 December 1997 to the President, the Ombudsman presented to the European Parliament a Special Report concerning the detailed opinions submitted by the institutions and bodies to which the Ombudsman's draft recommendations had been addressed. The Special Report was presented by the Ombudsman to the Committee on Petitions at its meeting of 19 and 20 January 1998.

II. Aim and purpose of the Report

4. The Ombudsman's Special Report is the first one ever submitted to the European Parliament and, subsequently, this Report is the first opportunity for parliamentary committees to scrutinize the conduct and results of an own-initiative inquiry.

At present there are no specific rules governing how a Committee Report on a Special Report by the Ombudsman should be formally treated by Parliament. For this reason, a short elaboration on this Committee's view on the form of Parliament's treatment of a Special Report in general, and this Report in particular, might be useful.

The reason for the Committee on Petitions being the committee responsible for drawing up this Report, is, supposedly, the Committee's responsibility for relations with the Ombudsman, pursuant to Annex VI, Title XX, of the Rules of Procedure. Henceforth, the Committee on Petitions sees, in general, its main objective and responsibility as ensuring that the parliamentary committees that possess a special competence and expertise in the question raised are given the opportunity to express their views in relation to this competence and expertise, while the Committee on Petitions concentrates on the fields which arise from its responsibility for relations with the Ombudsman.

5. The reason for this division is not to be found so much in the Special Report at hand as in the Committee's views on the principle for the treatment of future special reports, which might cover fields not directly connected to the special competence and expertise of the Committee on Petitions.

Accordingly, this Report, *pro primo*, seeks to give a factual and comprehensive presentation of the Special Report and, *pro secundo*, gives the Committee's views on the framework and legal basis for the Special Report.

Remarks of the progress made by the Community institutions and bodies concerned regarding the adoption and publication of rules on public access to documents is annexed to this report.

6. Furthermore, as can be seen in the concluding remarks, the Committee on Petitions would like to see, as an emanation from the Ombudsman's efforts in this particular field, a further development of a common set of general administrative rules for all institutions and bodies of the European Union, thus further elaborating what is good administration.

By choosing the subject of public access to documents for his first Special Report, the Ombudsman has not only pinpointed one of the more crucial subjects where openness and public debate are concerned, but also, which is of great value to the European Parliament, highlighted an issue with far-reaching implications once it is brought up on the political agenda.

III. Content of the Special Report

7. The Special Report by the Ombudsman to the European Parliament consists of one part (A) presenting the Ombudsman's inquiry and draft recommendations to the 15 institutions and bodies concerned¹, one part (B) presenting the responses to the Ombudsman's draft recommendations and one part (C) analysing the responses to his draft recommendations.

The Ombudsman has made no formal recommendations to the institutions and bodies concerned, in accordance with Article 3(7) of his Statute. However, in the third part (C), the Ombudsman has pointed to four different subjects, which he would like to see further investigated or pursued by the European Parliament.

IV. The legal basis for the Special Report

8. It is important to stress that the Ombudsman's initiative to choose to investigate the question of public access to documents is highly commendable and fully in line with Parliament's views on how to bring the work of the Union closer to the public.

In his decision of 20 December 1996, the Ombudsman concluded that "failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration", thus giving the formal prerequisite for proceeding with the inquiry by making draft recommendations and requesting detailed opinions from the institutions and bodies concerned.

In *Netherlands v. Council*², the European Court of Justice emphasized the effects of internal organization rather than the form governing it, by stating that Community institutions should "ensure that their internal operation is in conformity with the interests of good administration"³, without specifying what particular measures could be appropriate to undertake.

9. The Ombudsman has chosen not to comment on the substance of the rules, merely on their existence, but on the same time pointed out that "the European Parliament has the possibility

¹ The European Parliament, The Court of Justice, The Court of Auditors, The European Investment Bank, The Economic and Social Committee, The Committee of the Regions, The European Monetary Institute, The Office for Harmonization in the Internal Market, The European Training Foundation, The European Centre for the Development of Vocational Training (Cedefop), The European Foundation for the Improvement of Living and Working Conditions, The European Environment Agency, The Translation Centre for Bodies of the European Union, The European Monitoring Centre for Drugs and Drug Addiction, The European Agency for Evaluation of Medicinal Products.

² ECJ; Case C-58/94, [1996] ECR - I 2196.

³ Ibid.

to examine whether the rules that have been adopted ensure the degree of transparency that European citizens expect of the Union"¹.

As pointed out above, the Committee on Petitions sees as its main task to comment on the framework of the Special Report. However, the Committee on Petitions is of the strong belief that the adoption of rules governing public access to documents, which would not have been so expeditiously implemented without the Ombudsman's inquiry, is a step in the right direction and, as it is likely even to facilitate some daily routines for the civil servants, is in itself in the interest of good administration.

V. The substance of the Special Report

10. Among the institutions of the European Union the European Parliament, in close collaboration with the European Ombudsman, has a special duty to uphold the rights of citizens. One of the most important of these is the right to obtain a clear insight into the Community institutions and bodies which take decisions and carry out work which directly or indirectly affect the citizens.

In this respect, the substance of the Special Report, i.e. rules governing public access to documents seen as a tool in the interest of good administration, is an important step in raising the public's awareness of and access to the work of the Community institutions and bodies. Furthermore, it highlights, in a very concrete way, the general issue of transparency and, as such, gives the European Parliament a clear focus and a signal on how to proceed and build on ideas that are embraced by all parties involved, but that, up to now, have only been talked about as a goal to be achieved but basically only remained a frequently used catchword.

11. In *Netherlands v. Council*², the European Court of Justice not only foresaw the adoption of general rules by the Community legislature on the right to public access to documents, but also, as pointed out above, stated that Community institutions are obliged to ensure that their internal operation is in conformity with the interests of good administration. In his draft recommendations to the Community institutions and bodies concerned and in his Special Report, the Ombudsman emphasizes that the rules adopted should be easily available to the public. Taken together, this indirectly implies that the ideal situation for ensuring real institutional transparency and accessibility to the public, would be a common set of general administrative rules for all institutions and bodies of the European Union.

Such a system, which already exists in the Member States, would give the public a specific general rule, instead of 15 or more specific codes of conduct for all the different situations that might occur, following the public's contacts with the institutions and bodies.

12. From a transparent and accessible administration, the public has the right to demand that they are always given, at their request, information, guidance, advice and any similar assistance on questions relating to the institution's or body's field of activity. The public has a right to

¹ Special Report, C3(3).

² Supra, note 3.

demand that this assistance is given to an appropriate extent with regard to the request, the person's need for assistance and the institution's or body's field of activity. The public has a right to demand that the assistance is given as soon as possible.

Furthermore, it is in the interest of good administration that if a person by mistake turns to the wrong institution or body, that institution or body directs him towards the appropriate one.

VI. Conclusion

13. To begin with, it should be noted that work towards transparency took a great step forward when the Community institutions and bodies adopted rules for public access to documents. However, one could be forgiven for thinking that some of the institutions and bodies concerned have not been over zealous in their efforts to create and implement constructive rules. Many rules seem to have been created for their own sake and without too much consideration and reflection from the institution or body; in too many cases it seems that the work towards greater transparency and openness is looked upon as a necessary evil that should be implemented with the least possible effort and change to existing administrative routines.

The European Union has on many occasions pledged its allegiance to public access and transparency. In order for this to be a realistic goal, as well as from a democratic point of view, it is necessary to incorporate into Community law a set of common rules on public access and transparency - it is not enough with different internal rules for the different institutions and bodies.

14. Scrutinizing the different rules of the Community institutions and bodies concerned, the following observations can be made:

- The institutions and bodies do not release documents originating from the outside; there are no provisions on how to obtain access to such documents.
- The reasons for rejecting a request are too vague and generally worded; the overall impression is that the rules are normative but that the final decisions are taken *ad hoc* to a high degree, depending on the person who happens to make the individual decision.
- At almost all institutions and bodies there are one, or some, very high officials with a wide discretionary power who makes the decisions whether or not a document should be handed over to a member of the public, which not only makes it a very time consuming process, but also reflects the lack of exact rules.
- The time limits are too long.
- Some institutions are, according to their own rules, under no obligation to reply to a request, but an omission to reply can be regarded as rejection.
- The safeguarding of internal negotiations and procedures, which at almost all institutions and bodies is a reason for secrecy, calls for a more precise regulation.

- Some institutions and bodies do not hand over documents that have been, or are about to be published; this calls for a regulation to the effect that the institutions and bodies should be obliged to inform where and when the document could be obtained and, if the document is not going to be published in the immediate future, the document should be handed over.

15. It can furthermore be noted that during the deliberations of the Committee on Petitions, it was pointed out that the question regarding the European Parliament's procedures for adopting its own rules on public access to documents might be questioned¹.

¹ Cf Opinion of the Committee on Legal Affairs and Citizens' Rights.

The situation as regards the adoption, publication and availability of rules on public access to documents among the Community institutions and bodies can be described as follows (www – accessible on an Internet website):

Institution / body	Rules adopted	Publication	Comment
The European Parliament	Adopted 10 July 1997	OJ (all languages) + www	
The Court of Auditors	Adopted 7 June 1997	OJ (all languages) + www	
The European Investment Bank	Adopted autumn 1997	OJ (all languages) + order via www	Rules included in EIB's information policy brochure since September 1997 (all languages)
The Economic and Social Committee	Adopted 27 May 1997	OJ (all languages)	
The Committee of the Regions			[no reply]
The European Central Bank (The European Monetary Institute)	Adopted 3 June 1997	OJ (all languages)	
The Office for Harmonization in the Internal Market	Adoption foreseen for 2nd semester 1998; guidelines on inspection of files exists	OJ of the OHIM (Spa, Ger, Eng, Fr, It; OHIM's official languages) + www foreseen	Art 83, 84 of Council Reg No 40/94 (20 Dec 1993) on the CTMR and Rule 90 of Comm Reg 2868/95 (13 Dec 1995): files related to published tm applications and to registered Comm tm are open to inspection by the public

The European Training Foundation		All languages	
The European Centre for the Development of Vocational Training (Cedefop)	Adoption foreseen for 12 November 1998	To all staff + www (Eng, Ger, Fra)	
The European Foundation for the Improvement of Living and Working Conditions			[no reply]
The European Environment Agency	Adopted 21 March 1997	OJ (all languages) + www	
The Translation Centre for Bodies of the European Union	Adopted 17 November 1997	OJ (all languages)	www site planned to be operational as from November 1998; rules will be included
The European Monitoring Centre for Drugs and Drug Addiction	--->	[OJ (all languages)] --->	Fully applies the Commission's rules, i.e. no own rules
The European Agency for Evaluation of Medicinal Products	Adopted 3 December 1997	www (all languages)	

25 June 1998

OPINION
(Rule 147)

for the Committee on Petitions

on the special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents (C4-0157/98) (report by Mrs Thors)

Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr Wolfgang Ullmann

PROCEDURE

At its meeting of 15 April 1998 the Committee on Legal Affairs and Citizens' Rights appointed Mr Ullmann draftsman.

It considered the draft opinion at its meetings of 3 June and 24 June 1998.

At the latter meeting it adopted the following conclusions by 8 votes to 5.

The following were present for the vote: De Clercq, chairman; Palacio Vallelersundi, Rothley and Malangré, vice-chairmen; Ullmann, draftsman; Barzanti, Berger, Carlo Casini, Cassidy, Mosiek-Urbahn, Newman, Sierra González, Thors and Wijsenbeek,

1. Context

Under Article 138e of the EC Treaty the activities of the European Ombudsman must concern '*instances of maladministration* in the *activities* of the Community institutions or bodies'.

Pursuant to Article 138e(1) and Article 3(1) of the regulations and general conditions governing the performance of the Ombudsman's duties¹, the Ombudsman conducts inquiries *on his own initiative*.

¹ Decision 94/262/ECSC, EC, Euratom of 9 March 1994, OJ L 113, 4.5.1994, p. 5

2. The original inquiry

The Ombudsman began such an own-initiative inquiry in June 1996. It concerned public access to documents held by Community institutions and bodies (with the exception of the Council and Commission¹).

The inquiry was concluded by the Ombudsman's Decision of 20 December 1996; he considered that **'failure to adopt, and to make easily available to the public, rules governing public access to documents** could constitute **an instance of maladministration**².

This assessment is endorsed by your draftsman; as will be shown under point 5 below, it brings up legal questions which at present remain unanswered.

3. The special report

The special report sets out which rules on access to documents have been established and how they were published, i.e. it investigates merely the existence of rules on access. By contrast, the Ombudsman has deliberately refrained from making any assessment of the substance of the rules on access³.

4. Availability to the public

(a) The following bodies and institutions have published their rules on access in the Official Journal:

- the Council and Commission⁴
- the European Parliament⁵
- the European Environment Agency⁶
- the European Investment Bank⁷

¹ Council and Commission code of conduct (97/730/EC) of 6 December 1993, OJ L 340, 31.12.1993, p. 41, and corrigendum in OJ L 23, 28.1.1994, p. 34
Council Decision 93/731/EC of 20 December 1993, OJ L 340, 31.12.1993, p. 43, as amended by Decision 96/705/EC
Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994, OJ L 46, 18.2.1994, p. 58, as amended by Decision 96/567/ECSC, EC, Euratom

² Introduction to the special report

³ Section C(3), first paragraph of the special report; see also point 3.6 of the Ombudsman's annual report for 1996

⁴ See footnote 2

⁵ Decision 97/632/EC, ECSC, Euratom, OJ L 263, 25.9.1997, p. 27

⁶ OJ C 282, 18.9.1997, p. 5

⁷ OJ C 243, 9.8.1997, p. 13

- the Economic and Social Committee¹
- the European Monetary Institute²
- the Committee of the Regions³
- the European Training Foundation⁴
- the Translation Centre⁵.

- (b) The report by the Ombudsman should be consulted with regard to the other institutions or bodies.
- (c) The European Court of Justice informed the Ombudsman that it was considering draft rules on *administrative* documents. It subsequently informed him that it was having difficulties with documents relating to its *judicial* functions.

Your draftsman considers that the only practicable solution is probably an **adjustment to the Rules of Procedure** of the European Court of Justice and the Court of First Instance (Articles 168a(4) and 188(3) of the EC Treaty).

- (d) Your draftsman considers that, in view of the relevance of the rules on access to the legal position of individuals, **publication in the Official Journal of the European Communities** is appropriate.

5. The legal problems

- (a) Legal basis

Declaration No 17 on the right of access to information, which was annexed to the EC Treaty by the Maastricht Treaty, has no legal effect.

In its judgment in the Netherlands v Council case⁶ the European Court of Justice accorded no legal effects to the code of conduct agreed between the Council and Commission⁷, which cites that Declaration.

¹ OJ L 339, 10.12.1997, p. 18

² OJ L 90, 25.3.1998, p. 43

³ OJ L 351, 23.12.1997, p. 70

⁴ OJ C 369, 6.12.1997, p. 10

⁵ OJ C 46, 11.2.1998, p. 5

⁶ ECJ judgment of 30.4.1996, Case C-58/94, ECR I-2169, paragraphs 26 and 27

⁷ See footnote 2

The Council correctly¹ based its Decision on public access to Council documents² on Article 151(3) of the EC Treaty and Article 22 of its Rules of Procedure. The Decision thus takes the form of an offshoot of the Rules of Procedure. The same description can be applied, *mutatis mutandis*, to all the institutions or bodies which are entitled under the Treaty to have **Rules of Procedure**, i.e. to the Commission³, the European Parliament⁴, the European Court of Justice and the Court of First Instance⁵, the Economic and Social Committee⁶, the Committee of the Regions⁷ and the ECB⁸.

In addition, the **founding statutes** of the other Community bodies and institutions may either themselves include rules on access to documents or provide for delegated powers to issue such rules.

The present legal position as described above is **altered by the entry into force of Article 191a of the EC Treaty**. This provision concerns the European Parliament, the Council and the Commission. It should not be inferred from this, however, that the other institutions and bodies may not lay down rules governing access to documents, since Article A, second paragraph, of the Treaty on European Union makes closeness to citizens and openness principles applicable throughout the EU. In this connection, Article 235 of the EC Treaty could constitute a legal basis.

In the light of the remarks under (b) below, one has to conclude that other bodies and institutions may have their own rules on access and the power to determine access in individual cases only if they are, as it were, 'under the supervision' of a body whose acts are subject to review by the European Court of Justice or the Court of First Instance.

- (b) The fundamental role of the European Court of Justice is enshrined in Article 164 of the EC Treaty. Bodies and institutions must therefore take care to ensure that, when enacting legally binding measures, such as adopting rules on access and taking decisions on requests for access to certain documents, they do not place themselves outside the **supreme purview of the European Court of Justice or of the Court of First Instance**. In the Meroni case⁹ the European Court of Justice ruled that a delegating authority may not delegate powers to a subordinate authority other than those that have been conferred on it itself by the Treaty. Such delegation may involve only clearly defined **executive** powers, which (in the case in question)

¹ See paragraphs 33-41 and 43 of the judgment in Case C-58/94

² See footnote 2

³ Article 162(2) of the EC Treaty

⁴ Article 142 of the EC Treaty

⁵ Articles 168a(4) and 188(3) of the EC Treaty

⁶ Article 196(2) of the EC Treaty

⁷ Article 198b(2) of the EC Treaty

⁸ Article 12.3 of the Statute of the ECB

⁹ Meroni v High Authority, Case 9/56, ECJ judgment of 13 June 1958, ECR p. 133

had to be subject to the *supervision* of the High Authority. In general terms, it may be concluded from this that subordinate authorities must be under the supervision of the delegating authority, which in turn must be subject to review by the European Court of Justice or the Court of First Instance.

As various judgments show, judicial review meets a practical need¹. The Court assesses whether the authority making the decision on access to documents has carefully weighed the relevant interests and respected the procedural rights of the party concerned.

Article 173 of the EC Treaty provides only for review of the acts of Parliament, the Council, the Commission and the ECB or EMI². Even the very broad formulation³ used by the European Court of Justice in the 'AETR judgment'⁴ and confirmed consistently in its case-law is applicable only to acts of the institutions referred to in Article 173.

This leads to the finding that bodies and institutions which are not referred to in Article 173 may take legally binding decisions on access to documents which affect the legal position of third parties, e.g. those refusing access to a document, only under the supervision of a body which is passively legitimized under Article 173.

A broad interpretation of Article 173 of the EC Treaty following the judgment in the 'Les Verts' case⁶ is entirely conceivable.

6. Parliament's rules on access

Your draftsman considers that it is inadmissible for rules such as Decision 97/632/EC to be enacted solely by the Bureau, without any consultation of plenary. Rule 22 of the Rules of Procedure, which is cited as the legal basis, makes no provision for the Bureau to have such powers.

In addition, Articles 1(2), 2(3) and 5(2) of the Decision, in particular, appear to be ambiguous. The public, however, should be entitled to clear rules on access.

Conclusions

¹ See judgments in Cases T-194/94 (Carvel), C-58/94 (Netherlands v Council), T-105/95 (WWF UK), T-124/96 (Interporc), T-610/97 R (Carlsen) and T-83/96 (Gerard van der Wal), T-179195 (Svenska Journalistförbundet) of 17 June 1998

² See Article 109(f)(9) of the EC Treaty

³ An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.¹

⁴ ECJ judgment of 31 March 1971, Case 22/70, ECR p. 263, paragraph 42

⁵ Most recently in ECJ judgment of 20 March 1997, France v Commission, Case 57/95, ECR p. I-1627

⁶ ECJ Judgment of 23 April 1986, Case 294/83, ECR p. 1339, §§19-25

The Committee on Legal Affairs and Citizens' Rights calls on the Committee on Petitions, as the committee responsible, to incorporate the following conclusions in its report:

The European Parliament,

1. Welcomes the European Ombudsman's initiative and considers it to be justified on the grounds of the second subparagraph of Article 138e(1) of the EC Treaty;
2. Considers that, in order to achieve a satisfactory level of genuine transparency and accessibility, it is necessary to draw up a set of general administrative rules common to the institutions and other bodies of the Union; those rules bestow on third persons rights which the institutions are obliged to respect;

Points out, however, that the rules on access are linked to the case-law of the European Court of Justice, to the law of the Treaty and to validly enacted secondary legislation;

3. Points out that Article 191a introduced by the Treaty of Amsterdam establishes a right of access to European Parliament, Council and Commission documents for any citizen of the Union and any natural or legal person residing or having their registered office in a Member State of the Union and mandates the Council and the European Parliament, within two years of the entry into force of the Treaty of Amsterdam, to determine the general principles and limits on grounds of public or private interest governing this right of access;
4. Considers that the right of access to documents should primarily serve the interests of democratic debate and public scrutiny of the Community institutions and bodies, i.e. of both their political leaders and their services;
5. Points out that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the general principles of Community law and Directive 95/46/EEC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ensure that the right to privacy is respected;
6. Finds that Articles 164, 173 and 175 of the EC Treaty, in particular, the principle of interinstitutional balance and the case-law of the European Court of Justice, particularly in the Meroni case, should be regarded as providing a legal framework;
7. Stresses that in the European Union, which is a Community governed by the rule of law, there must be recourse, either to the Court of First Instance or to the European Court of Justice, in particular to contest decisions refusing access to documents; points to the practical significance of such legal recourse as indicated by the judgments in the Carvel, Netherlands v Council, World Wildlife Fund UK, Interporc, Carlsen e.a. and Gerard van der Wal cases;
8. Points out that, on the basis of Article 191a(3) of the Treaty of Amsterdam, the European Parliament, the Council and the Commission are each to elaborate specific provisions regarding access to its documents;
9. Notes that the new Article 191a of the EC Treaty constitutes the appropriate legal basis only for access to European Parliament, Council and Commission documents, but that the

principles of openness and closeness to the citizen contained in Article A, second paragraph, of the EU Treaty apply to the EU as a whole and hence also to the other institutions, bodies and services;

10. Does not accept that the concept of the Council 'acting in its legislative capacity' contained in the new Article 151(3) of the EC Treaty can be used to establish a limited form of right of access where 'legislation' is involved and stresses that the Council cannot unilaterally determine what constitutes 'legislation'.
11. Considers that, in view of their direct significance for the rights of individuals, it is appropriate that rules on access to documents should, without exception, be published in the Official Journal of the European Communities;
12. Endorses the view expressed by the European Ombudsman that the European Court of Justice and the Court of First Instance should enact rules on access to documents as soon as possible and to publish them in the Official Journal;
13. Finds, as part of the assessment of the substance of the European Parliament's rules on access to documents (Decision 97/632/EC), that the enactment of that Decision by the Bureau is not covered by Rule 22 of the Rules of Procedure; calls, therefore, for rules on access to documents to be adopted by means of an amendment to the Rules of Procedure by plenary;
14. Considers that it would be appropriate, when amending the Rules of Procedure, to observe the following guidelines:
 - rules on access to documents should in no circumstances be open to being misused as a pretext for a refusal by Parliament's administration to supply information to the directly elected Members of the European Parliament;
 - *preliminary* draft texts prepared by committee secretariats for rapporteurs and draftsmen should be accessible only with the consent of the rapporteur or draftsman; *final* draft texts approved by the rapporteur or draftsman should be generally accessible.

4 June 1998

OPINION

Rule 147

for the Committee on Petitions

on the special report from the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents (C4-0157/98) (report by Mrs Thors)

Committee on Civil Liberties and Internal Affairs

Draftsman: Mrs Claudia Roth

PROCEDURE

At its meeting of 19 March 1998 the Committee on Civil Liberties and Internal Affairs appointed Mrs Roth draftsman.

It considered the draft opinion at its meetings of 28 April and 3 June 1998.

At the latter meeting it adopted the following conclusions by 9 votes to 4, with 1 abstention.

The following were present for the vote: d'Ancona, chairman; Wiebenga, vice-chairman; Roth, draftsman; Buffetaut, Cederschiöld, Elliott, Nassauer, Oostlander (for Posselt), Palacio Vallelersundi (for Colombo Svevo), Pirker, Schulz, Terrón I Cusí, Van Lancker (for Lindeperg), Wemheuer (for Crawley) and Zimmermann.

I. INTRODUCTION

Open, transparent and accountable decision-making is the essence of any democratic system. Secrecy is its enemy and produces distrust, cynicism and apathy among voters and closed minds among policy makers. EU governments must not assume that they know best and can legislate without informing the public and without allowing any debate. The current campaign to obtain documents produced by the Justice and Home Affairs Council is central to maintenance of democratic standards within the EU. Citizens have the right to be informed of new policy proposals and the practices that flow from them. Citizens have the right to be able to comment upon them, and citizens must have the right through democratic processes to oppose or alter them. None of these rights currently exists in relation to policing, immigration and asylum. Dozens of new policies have been developed in secret and agreed in secret. These policy areas pose the biggest threat to civil liberties and the human rights of citizens both within the EU and those who seek to enter as refugees and asylum-seekers. It is in these areas that it is essential to have the most open and transparent system of policy-making. Yet policy-making in these areas is highly secretive and undemocratic. The fundamental issue is for parliaments and people to have access to proposals before they become law so that they can seek to influence, amend or oppose them. At the very least, people and parliaments have an absolute right to get all the documents which have led to a decision and which

have been agreed. In the case of the JHA area this means documents considered by the Council itself, Coreper, the K4 committee and the three steering groups.

In this context it is not surprising that many complaints have been submitted to the Ombudsman or have been brought before the Court of Justice, most of them concerning the Council's refusal to make public the documents that it has adopted. John Carvel, for example, a journalist working for the *Guardian*, won his case in proceedings against the Council which were brought before the ECJ in 1995. In January 1997 the Ombudsman ruled that six appeals lodged by Tony Bunyan on behalf of the NGO Statewatch, against refusals to grant access to documents in the JHA field, were admissible. Shortly after Sweden joined the EU the Swedish journalists' union asked the Swedish Government for 20 documents concerning Europol; 18 were supplied. The same request was made to the Council, several times; only four of the 20 documents were sent. More recently Heidi Hautala, a Finnish Member of the European Parliament, initiated proceedings against the Council before the Court of First Instance of the European Communities, on the basis of Article 173 of the Treaty, on the grounds of the Council's refusal to grant her access to a document entitled 'Arms exports - conventional weapons'. In each case the pretexts put forward by the Council for not complying with the requests were of the nature of 'repeated requests', 'very bulky documents', 'very large number of documents requested', 'public interest', etc.

Jacques Delors, for his part, considers that transparency does not just mean the right of access to documents, but above all the comprehensibility to citizens of what is happening at European Union level'. The least that can be said is that the third pillar does not live up to these expectations. In this context, the establishment of an Ombudsman, pursuant to Article 138e of the TEU, was a first step in the right direction.

The European Ombudsman, Mr Jacob Söderman, reflecting sensitivities which are particularly well developed in Scandinavia, considers that failure to adopt and make available to the public rules governing public access to documents might constitute an instance of maladministration (and thus open to complaints from citizens and to intervention by him).

It was in this context, and by virtue of Article 3(7) of the Regulations on the Ombudsman, that in June 1996 he began an inquiry concerning public access to documents held by the Community institutions and bodies. Following this inquiry, which was concluded on 20 December 1996, the Ombudsman submitted draft recommendations to the institutions and bodies concerned that they should adopt, and make easily available to the public, rules concerning public access to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality.

II. THE COMMUNITY INSTITUTIONS AND TRANSPARENCY

The Council and the Commission have drawn up a code of conduct in this area¹ which includes a long list of restrictions. The two institutions refuse access to any document the disclosure of which might undermine:

¹ OJ L 340, 31.12.1993, p. 41

- 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 persons that supplied the information or as required by the legislation of the Member State that supplied the information.

The question of transparency is different for Parliament, since Parliament's deliberations are, in principle, open to the public. It published a decision on 10 July 1997¹ on public access to its documents, which includes a system of restrictions similar to that in force at the Commission and the Council. In addition, access to a European Parliament document may be refused in order to protect the confidentiality of deliberations of the political groups, of the parliamentary bodies when they meet in camera, or of the relevant services of its Secretariat.

III. ANALYSIS OF THE QUESTION OF TRANSPARENCY IN THE CONTEXT OF THE UNION

Among the Member States, two fairly divergent cultures confront each other. One Commissioner, João de Deus Pinheiro, has claimed that there are two currents in Europe. In one, which he describes as Napoleonic, everything is secret except that which is in the public domain. In the other, everything is public, except a very limited portion which, for various reasons, has to be kept secret.

Denmark, the Netherlands, Finland and Sweden stand for open administrative practices, while the United Kingdom, Germany, France, Belgium and Luxembourg are the kernel of a more closed administrative tradition.

Article 255 of the draft Treaty of Amsterdam stipulates:

- '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
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.'

It can be seen that the permitted restrictions, and above all the discretion granted to the institutions to refuse public access to all documents that are not specifically covered by legal obligations, drastically limit such access and make it haphazard. In addition, in the absence of any public register of documents, citizens find it impossible to request documents of whose existence they are unaware. Increased use of the Internet, however, might improve communication with the public.

¹ OJ L 263, 25.9.1997, p. 27

CONCLUSIONS

The Committee on Civil Liberties and Internal Affairs calls on the Committee on Petitions, as the committee responsible, to incorporate the following conclusions in its report:

- A. whereas transparency in the decision-making process helps to reduce the Union's democratic deficit and increases the confidence of citizens in Community administration,
- B. regretting the fact that secrecy, confidentiality and discretion are too often the rule for the work of the Commission and the Council, and trusting that the confidential discussions which also form part of the parliamentary process, alongside public legislative decisions, will remain an exception for which special reasons must be given,
- C. whereas administrative action must on principle remain confidential in the European Union, as elsewhere, when the particular needs of individual data protection so require,
 - 1. Considers it vital for transparency and the right of public access to documents of the Union institutions to be guaranteed and for restrictions on that right to be kept to a minimum;
 - 2. Welcomes the introduction of Article 255 of the draft Treaty of Amsterdam on public access to documents; regrets, however, the excessive number of restrictions that it permits and the discretion that it grants to the institutions;
 - 3. Welcomes the position taken by the JHA Council of 19 March 1998 in favour of greater transparency in the JHA field, points out that the transparency of the decision-making process strengthens the democratic nature of the European institutions, and urges the Council to take the necessary steps to enable Parliament to carry out its consultative and supervisory functions as laid down in the Treaty on European Union;
 - 4. Welcomes the Ombudsman's action in favour of transparency;
 - 5. Advocates increased use of the Internet by the European institutions to promote public access to their documents;
 - 6. Calls on the Commission and Member States to encourage administrative cooperation between national and Community bodies and institutions, so as to improve the transparency and understanding of Community law and the dissemination of the rights and duties of citizens, and welcomes the Community programmes for exchanges of civil servants that will enable them to meet the demands of a single internal area;
 - 7. Urges the European institutions to make public a constantly updated register of the documents that they have adopted or discussed;
 - 8. Calls once again for the resolutions adopted by the JHA Council and the decisions concerning 'A' items on the agendas of JHA Council meetings to be published officially, showing the position taken by each delegation within the Council;

9. Urges the various institutions to give budgetary priority to setting up the necessary infrastructure for enabling the right of access to documents to become a full reality in as short a time as possible;
10. Calls for support, and particularly financial support, to be granted to NGOs who campaign for greater transparency in the Union's decision-making process.

25 June 1998

OPINION
(Rule 147)

for the Committee on Petitions

on the Special Report by the European Ombudsman to the European Parliament following his own initiative inquiry into public access to documents (C4-0157/98) (report by Mrs Thors)

Committee on Institutional Affairs

Draftsman: Ms Maj-Lis Lööw

PROCEDURE

At its meeting of 3 June 1998 the Committee on Institutional Affairs appointed Ms Maj-Lis Lööw draftsman.

It considered the draft opinion at its meeting of 24-25 June 1998.

At that meeting it adopted the following conclusions unanimously.

The following were present for the vote: De Giovanni, chairman; D'Andrea, vice-chairman; Lööw, draftsman; Aglietta, Brinkhorst (for Haarder), Cederschiöld (for Majj-Weggen), Delcroix, Hager (for Vanhecke), Herzog, Mendez de Vigo, Neyts-Uyttebroeck, Schäfer, Schlechter, and Spaak.

BACKGROUND

1. In June 1996, after having received a number of complaints about the difficulty of receiving certain documents, the Ombudsman undertook an own-initiative inquiry into public access to documents held by all Community institutions and bodies other than the Commission and Council, which had already adopted their own codes on public access to their documents. The Ombudsman wrote to 15 institutions and bodies, including the European Parliament. The Ombudsman then took a decision on 20 December 1996. He concluded that failure to adopt and make easily available to the public rules governing public access to documents could constitute an instance of maladministration, and he made draft recommendations to the various institutions and bodies that he had contacted that they should thus adopt their own codes of conduct on public access to their documents. These institutions and bodies later responded to this request in a variety of ways, which are described in a special report by the European Ombudsman that was transmitted to the Parliament on 15 December 1997. This was the first such Special Report by the Ombudsman.
2. The Committee on Petitions has since been authorized to draw-up a report on the Ombudsman's Special Report, and the Committee on Institutional Affairs has been asked to give an opinion. The rapporteur of the Petitions Committee, Ms Astrid Thors, presented an initial draft report on 25 May 1998 (PE 226.263).

3. Your rapporteur has already been authorized to write a wider ranging report on openness within the European Union and has drawn-up an initial working document (PE 225.912), outlining the scope of her inquiry. The Ombudsman's Special Report essentially covers procedural matters rather than going into the merits of different types of openness or even of the contents of public codes of openness. Your draftsman will thus examine the various issues of substance in more detail in her forthcoming draft report and on the present occasion will only make a few comments on the main conclusions of the Ombudsman's Special Report. Finally, she puts forward a few suggested amendments to the draft report of the Petitions Committee.

COMMENTS ON THE SPECIAL REPORT

4. Your draftsman warmly welcomes the initiatives taken by the Ombudsman, firstly in undertaking his original inquiry and secondly in following-up his recommendations to the Community institutions and bodies concerned. This has undoubtedly accelerated progress in the preparation and, in many cases, adoption of new rules on public access to the documents of these institutions and bodies.
5. Your draftsman's second observation, however, is that the quality of the response to the Ombudsman's initiatives on the part of the different Community institutions and bodies has been a somewhat variable one. Some have drawn-up their own rules and others have adopted the Commission's rules and procedures. Some replied relatively quickly and other rather more slowly. One institution, the European Court of Justice, has not drawn-up rules at all, claiming that it has found it to be extremely difficult to establish a clear separation between documents which relate to its judicial role, which are outside the cope of the Ombudsman's inquiry, and documents of an administrative nature, which should fall within his inquiry. The Court of Justice has told the Ombudsman that it is also examining questions of access to its judicial as well as administrative documents and that this might later result in amendments to the Court's Rules of Procedure. The Ombudsman has welcomed this extension of the Court's inquiry into openness but regrets that no timetable for completion of this work has been established.
6. A third general comment relates to the substance of the rules that have been adopted. This is not the main concern of the Ombudsman's inquiry and he has refrained from making any detailed comments, although the Special Report does suggest that the rules that have been adopted are generally quite limited compared to those in some national administrations, especially in that the rules adopted give no right of access to documents held by one body, but originating in another. The Ombudsman also suggests that the Community institutions and bodies consider the establishment of publicly accessible registers of their documents.
7. Your draftsman intends to return to the substance of these codes in more detail in her forthcoming draft report but wishes to make a few initial comments. She agrees with the Ombudsman's comments that the codes do not appear to go far enough, and that the establishment of public registers of documents would appear to be an excellent idea. In this context, she welcomes the initiative taken by the Council to set up just such a register.
8. Your draftsman would go further than the Ombudsman, however, in regretting that many of the codes that have been adopted, including that adopted by the Bureau of the European Parliament, have been based to too great an extent on the pre-existing code adopted by the Commission, which itself is very close to that of the Council. The Commission and Council codes are themselves not

fully satisfactory, in particular in their sweeping references to the need to protect the confidentiality of their proceedings and also in their provision that a failure to reply to an inquiry within a specific period of time constitutes a refusal of the request. The rather curious world in which lawyers sometimes live is shown by the fact that this latter provision is honestly considered by some in the Commission as a genuine safeguard for those applying for documents. In the more open and transparent Community environment which your draftsman hopes will prevail in the future, such provisions will have to be changed, and an obligation introduced that there should be a reply to each request, outlining the reasons for any refusal to provide the documents demanded.

9. An opportunity to make these changes will come with the implementation of the Amsterdam Treaty provisions on openness, which will involve the Parliament and Council deciding by co-decision on a proposal from the Commission on "general principles and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents" (new Article 191(a) of the Treaty). While it is regrettable that the Amsterdam Treaty only refers to documents of these three institutions, and not to those of other Community institutions and bodies, the new rules to be established should also serve as a basis for the establishment of common principles for access to documents of all Community institutions and bodies. By then there will also have been some experience of the practical operation of the existing codes of practice, and this should help in drawing-up the new and more far-reaching rules that will then be required.
10. Your draftsman's final set of general comments relates to the need for proper publicity for the new codes and for providing an opportunity for concerned citizens to comment on these codes. The Ombudsman had recommended that any rules adopted should be easily available to the public and the various institutions and bodies have responded in different ways, whether by publishing their rules in the Official Journal, or on the Internet, and so on. It is essential that this be done by all Community institutions and bodies. Like the Ombudsman in his Special Report, your draftsman welcomes the fact that one body, the European Agency for the Evaluation of Medicinal Products, has already engaged in public consultation on its rules and has invited the public to comment on its provisional rules. This is an example to follow for other Community institutions and bodies.

COMMENTS ON THE DRAFT REPORT BY MS THORS

11. Your draftsman agrees with the general thrust of the draft resolution that has been suggested by Ms Thors. She believes, however, that the wording of the draft resolution should be slightly modified in a couple of places, and that there are a few other points that could usefully be added to the resolution.
12. Firstly, paragraph 7 of the draft resolution calls on the Commission and Council to take the necessary steps to adopt common administrative rules for all Community institutions and bodies, and paragraph 9 goes on to call on the Council to take the necessary steps to establish public registers at all Community institutions and bodies. Given that the Parliament will be involved by means of co-decision in the implementing rules on public access to documents to be adopted pursuant to Article 191(a) of the Amsterdam Treaty it is surely not just up to the Commission and Council to take the necessary initiatives and the Parliament must play a proactive and not just passive role. Your draftsman would thus suggest amendments to both paragraphs. In addition, she considers that it might be wiser to refer in paragraph 7 to "common principles" rather than

"common rules", since the situation in different institutions and bodies might well be slightly different and a minimum of flexibility might well be required.

13. Your draftsman would also suggest a number of additions to the draft resolution. Firstly, paragraphs 6 and 10 call for all necessary assistance to be given to all those inquiring about the activities of a particular Community institution or body. In this context it would seem appropriate for each institution or body to designate a specific person and/or service initially responsible for such interface with the public. Secondly, your draftsman would suggest adding a paragraph to encourage other institutions and bodies to follow the excellent procedures of the European Agency for the Evaluation of Medicinal Products and to engage in public consultation on its rules, so that they can be improved in the future. Finally, and following on from the previous comment, your draftsman would suggest adding a reference to the fact that the present codes of conduct of the various Community institutions and bodies should be considered as provisional in nature, and subject to further revision on the basis of regular review as to how they have been working in practice and also on the basis of the new guidelines to be laid down by Parliament and Council in implementation of the Amsterdam Treaty's provisions on openness and transparency.

CONCLUSIONS

14. The Committee on Institutional Affairs draws the following conclusions to the attention of the Committee on Petitions:
 - (i) the Committee strongly endorses the Ombudsman's initiatives on openness, and believes that this has helped to accelerate the adoption of rules on public access to the documents of all Community institutions and bodies;
 - (ii) the Committee calls on the Court of Justice to resolve problems in distinguishing between its judicial and administrative documents, and to adopt its own code of access to its documents as soon as possible;
 - (iii) the Committee notes that the Ombudsman's Special Report does not examine the specific contents of the codes that have been adopted, but believes that these will now need to be carefully reviewed. The Committee regrets, however, that the codes that have been adopted appear to be too closely based on the pre-existing Commission and Council codes, which themselves need to be improved, not least by more tightly defining what is meant by protection of the confidentiality of their proceedings, and by introducing an obligation to explicitly reply to a person requesting a document within a determined time period. The Committee further notes that the Council is now introducing a register of its documents and trusts that this practice, which is the subject of one of the recommendations of the Ombudsman, will be extended to other Community institutions and bodies;
 - (iv) the Committee calls for all Community institutions and bodies to ensure proper publicity for their new codes of access to their documents and also to provide an opportunity for concerned citizens to comment on these codes. It also considers that a person and/or service should be designated as the initial point of reference to handle any enquiries from citizens;
 - (v) the Committee emphasises the fact that the Amsterdam Treaty includes a new commitment to openness and transparency and to the right of public access to EU documents and notes

that these new provisions will have to be subject to detailed implementation on the basis of a proposal from the Commission, and of co-decision between the European Parliament and the Council. The Committee regrets that the Amsterdam Treaty only refers to access to documents of the Commission, Council and Parliament and calls for the existing codes of all Community institutions and bodies to be adapted to any new requirements that are laid down, and in the light of practical experience with the existing codes.

15. The Committee on Institutional Affairs further calls on the Committee on Petitions to adopt the following amendments to its draft resolution contained in PE 226.263.

(Amendment 1)

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| 7. Calls on the Commission and Council to take the necessary steps to adopt common administrative rules for all Community institutions and bodies to this effect. | 7. <u>Undertakes to help ensure that the necessary steps are taken for the adoption of administrative rules by all Community institutions and bodies that follow a set of common principles, and that guarantee the highest possible level of openness calls for resolution of any special problems of access to documents posed by institutions such as the European Court of Justice and the European Central Bank, and calls for any exceptions to common principles of openness to be restricted to a minimum.</u> |
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(Amendment 2)

Replace paras. 8 and 9 by a single new paragraph

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| 8. Stresses the importance for establishing, at all Community institutions and bodies, public registers for all documents received and drawn up; | 8. <u>Notes that the Council is currently introducing a public register of its documents and undertakes to push for such registers to be introduced in all other Community institutions and bodies.</u> |
| 9. Calls on the Council to take the necessary steps to establishing such public registers at all Community institutions and bodies; | |

(Amendment 3)
Add new paragraph

10(a) Calls on each Community institution and body to designate a specific person and/or service to act as an initial point of reference for any inquiries or applications for documents from concerned citizens. Further suggests that each institution and body ensure proper publicity for their new rules on access to documents by means of the Official Journal, informative brochures and the Internet, and also provide an opportunity for public comment on their rules.

(Amendment 4)
Insert new paragraph

10(b) Considers that the rules that have been adopted by the various Community institutions and bodies are of a provisional nature only, and will have to be reviewed and adapted in the light of practical experience and of the new implementing rules on public access to documents that are to be drawn-up pursuant to Article 191(a) of the Amsterdam Treaty and that should not just apply to the Commission, Council and Parliament but to all Community institutions and bodies.