CM2408

MEIJERS COMMITTEE COMMENT ON EUROPEAN TRANSPARENCY LAW AND THE PUBLIC'S RIGHT OF ACCESS TO APP-BASED INSTITUTIONAL COMMUNICATIONS: PROPOSALS FOR A FUTURE-PROOF LEGAL PRACTICE

October 2024

This Meijers Committee comment contains expert input from the Ministry of Justice of Finland; FragDenStaat, Germany; SPOON, the Netherlands; Citizens' Network Watchdog Poland, the Department of Legal Theory and Philosophy of Law at the University of Wrocław, Poland; and Handlingar.se, Sweden.

In the EU, the public's ability to obtain information about the activities of EU bodies and decision-making processes is governed by Regulation 1049/2001. Digital communications, including app-based messages, in principle fall within the scope of Regulation 1049/2001, the definition of a document being technology-neutral.

The increasing use of app-based communications by EU officials however has presented new challenges when it comes to arriving at even-handed and legally sound disclosure decisions. This is demonstrated by the Pfizergate scandal, which highlighted problems related to accessing text messages exchanged between EU officials and private companies.

There is an ongoing debate about how app-based communications disclosure should be accommodated within the scope of Regulation 1049/2001. In this light, insights and potential solutions are sought in law and practices at the EU Member State level (notably Finland, Germany, the Netherlands, Poland, and Sweden).

Meijers Committee

The Meijers Committee recommends that the EU institutions or legislator, as the case may be, should develop clear guidelines for the use, registration, archiving, and retrieval of app-based communications to ensure transparency. In this regard, best practices from EU Member States can be applied to enhance transparency of the public's right to access EU information.

The Meijers Committee further considers that oversight mechanisms beyond those currently foreseen in EU transparency law are essential for preventing the exclusion of relevant communications from public access and for maintaining a sufficient level of accountability in the implementation of EU body's transparency obligations.

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Meijers Committee Comment on European transparency law and the public's right of access to app-based institutional communications: proposals for a future-proof legal practice

1. Introduction

The European Union's commitment to transparency is highlighted by the public's right to access documents held by its institutions. This is enshrined in Regulation 1049/2001, which seeks to ensure that EU citizens can obtain information about the activities of EU bodies and decision-making processes. In recent years, communications related to the policy functions of European institutions have increasingly shifted to a digital format, become encrypted for person-specific accessibility, and reverted to non-formal, decentralised, and potentially ephemeral figures. An example of this shift can be seen in the rise of app-based communications, which would not be typically understood as documents in the traditional sense. Although Regulation 1049/2001 includes a wide definition as to what is understood by a 'document', it does not foresee the methods and practical administrative challenges that arise from modern communications formats. This is because the regulation was established during a time when paper documents were the norm, and as such the Regulation risks falling short in addressing digital communications. The Meijers Committee has previously highlighted these issues in its comments, emphasising the need for regulatory steps to ensure that the EU's transparency framework keeps up with technological advancements as well as changing communication practices.[1]

The issue of the increase in digital forms of communication used by EU institutions and the public's access to information became prominent during the 'Pfizergate' episode. In 2023, the *New York Times* filed a lawsuit against the European Commission for refusing to grant access to text messages between Commission President Ursula von der Leyen and the CEO of Pfizer, arguing that they are under a legal obligation to do so. The action, brought before the General Court,[2] seeks the annulment of the decision by the Commission to deny access to the messages under Regulation 1049/2001. The applicants claim the Commission unlawfully disregarded articles 3(a) and 2(3) of the Regulation by considering non-registered text messages to not qualify as documents, and by arguing without proper justification that the requested information does therefore 'not exist'. In addition, the applicants argue that the Commission's decision violates the fundamental right to receive information under Article 11 of the Charter of Fundamental rights of the European Union.

[1] In 1999, Herman Meijers, the founder and first chairman of the Meijers Committee, together with then Committee member Deirdre Curtin wrote a Draft Regulation with explanatory memorandum on the general principles and limitations of the right of access to documents of the EU institutions. See In Memoriam for Herman Meijers, *Nederlands Juristenblad* 2000, p.1786. Recent relevant comments on the subject include Meijers Committee, CM2004 Note on steps to take towards the improvement of the transparency of Council decision making during the upcoming EU Presidency of the Federal Republic of Germany, 4 mei 2020, punt 6. Meijers Committee, Transparantie van de EU-instellingen: Waar liggen de problemen? Wat zijn de mogelijke oplossingen? Position paper voor het rondetafelgesprek over EU-informatievoorziening, Commissie Europese Zaken van de Tweede Kamer, 2 February 2022. See also the very useful recent study by Curtin at the request of the European Parliament: Deirdre Curtin, Regulation 1049/2001 on the right of access to documents, including the digital context. Study requested by the PETI Committee. Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 762.890– August 2024, particularly pp. 36-40.

[2] Case T-36/23 Stevi and The New York Times v Commission, case brought on 25 January 2023.

The case, which is pending, raises questions about the application of EU access to documents law and risks to undermine the ability of citizens to follow decision-making processes. Recent reporting suggests that the European Commission has become notably more opaque under President Ursula von der Leyen, who was recently appointed for a second term as Commission President.[3] Despite soft guidelines from the European Ombudsman and an internal inter-institutional discussion initiated by the Commission in December 2022, a legal solution has not yet emerged, leaving the question about whether Regulation 1049/2001 should be reformed, or merely the underlying practices, undecided.[4]

The broader problem of transparency and app-based communications also plays out at the national level inside EU Member States. President von der Leyen's involvement in a previous scandal during her tenure as Germany's Minister of Defence suggests that national contexts have been struggling with similar questions of law and policy, and might thus form a locus of valuable insights.

With this in mind, the Meijers Committee sought input from experts in a diverse set of EU Member States: Finland, Germany, the Netherlands, Poland, and Sweden.[5] This comment compares practices in these national contexts with those at the EU level, aiming to identify common challenges and potential proposals derived from national legal practices that might be applied at the EU level to future-proof access to documents and uphold transparency.

2. Current situation under EU transparency law

Definition scope of access right/concept of a document

In the EU, the public's right of access to government information is governed by a legal framework of which Regulation 1049/2001 forms the backbone. This Regulation ensures transparency by granting the right to access to 'documents'. Regulation 1049/2001 was adopted in May 2001, that is to say, at an early point in the turn-of-the-century communications technology revolution. Consequently, the legislation was not able to foresee the developments and functions of communication technologies of the subsequent decades (including any smartphone-based technologies). Today, European leaders increasingly communicate from their phones and through privately owned social media, while European institutions have developed new modes of internal communication that go beyond documents attached to emails. In principle, this does not constitute a problem in terms of the public's right to access information under EU transparency law. With remarkable foresight, the legislator

[3] Follow the Money, "Ursula von der Leyen's Five Secrets," 29 April 2024.

[4] European Ombudsman, Practical recommendations for the EU administration: The recording of text and instant messages sent/received by staff in their professional capacity, 14 July 2022. European Commission, The use of modern communication tools such as text and instant messages in the EU professional context meeting: Summary record of the meeting of EU institutions on 9 December 2022. (Ares(2022)8894621)

[5] Input was provided by experts based respectively at the Ministry of Justice (Finland), the transparency advocacy NGO FragDenStaat (Germany), the transparency advocacy NGO SPOON (the Netherlands), the NGO Citizens' Network Watchdog Poland and the Department of Legal Theory and Philosophy of Law at the University of Wrocław (Poland), and the transparency advocacy NGO Handlingar.se (Sweden). In the selection of Member States, a diversity of transparency traditions, administrative legacies, and duration of EU membership was sought to be able to draw insights from a wide range of national laws and practices vis-à-vis the subject of inquiry.

defined a 'document' for the purpose of Regulation 1049/2001 in rather wide and open-ended terms as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)" (Regulation 1049/2001, article 3(a)). Materially, this definition suffices to accommodate the evolved practice of relying on app-based communication modes. Given the fact that virtually nothing prevents the European institutions and its decision makers from alternating between different communication technologies in the course of a decision-making process, this wide scope seems justified.

General mechanism, exceptions, remedies

At the same time, in order to be effective, a clarification of the public's right of access to new forms of relevant communication technologies (particularly app-based) presupposes that an additional set of preconditions is met.

First, a clear mechanism for determining which app-based communications qualify for public access. Regulation 1049/2001, article 3(a) stipulates that the public is in principle entitled to access all documents "concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility". This definition again casts a broad scope of application which may at the same time be insufficiently precise. While 'non-business' collegial invitations to lunch may form a clear-cut case of exclusion from the scope of requestable documents,[6] in other individual cases this categorization may be harder to apply.

Second, where 'scoping' has successfully taken place, the effective application of public access to documents still requires that a search for relevant documents takes place in a timely manner. Compared to most 'regular documents' drafted or held by the institutions, searching and locating app-based communications relevant to a request may be rendered more difficult due to their decentralised production and storage. This point is particularly salient in light of the purpose of Regulation 1049/2001. One of the objectives of this legislation is to allow the public to effectively participate in decision making, which in many cases presupposes swift access to relevant decision-making information (Regulation 1049/2001, preamble 2). To give effect to this objective, Regulation 1049/2001 foresees in a relatively short response deadline of 15 days, exceptionally extendable to 15 additional days, a timeline that repeats itself in the administrative appeal phase (Regulation 1049/2001, articles 7 and 8). In practice, the European institutions structurally breach these deadlines with virtually no adverse consequences,[7] a problem that might be exacerbated by the routine inclusion of app-based communications in document searches, if these communications are not registered in transparency-friendly manner.

Third, and relatedly, the effective implementation of the public right's of access requires a well-functioning and systematic approach to the registration and archiving of app-based communications. A complete documents archive chiefly serves two purposes. It provides for an institutional memory

[6] See comments made by prof. Päivi Leino-Sandberg at European Ombudsman conference "Access to documents: what next?", held 15 November 2021 in Brussels, as reported on the Open Government in the EU Blog, 25 November 2021.
[7] European Ombudsman, Decision in case OI/2/2022/OAM, 4 April 2022.

for European decision-making bodies, allowing them to reconstruct decisional outcomes, e.g. for purposes of review or accountability. It also serves as the basis for a public documents register, allowing the public to better identify documents of interest to it. Thus, a well-maintained archive constitutes a hallmark of good administration.

Experiences with access applications and emerging ambiguities

Experiences in recent years with the implementation of Regulation 1049/2001 demonstrate that the question of the transparency of app-based communications is far from an academic concern. Two access applications for app-based communications of then European Council President Tusk, filed in 2019, served as a test case with regard to the European institutions' handling of such requests (see box 1).

Box 1: The contents of Donald Tusk's work phone

Two requests filed by the same applicants to two European institutions sought access to communications of the European Council President in his formal capacity. The requests were directed to respectively the European Council (European Council, Document EUCO 8/1/19, Confirmatory application No 09/c/01/19, 15 May 2019) and the Council (Council of the European Union, Document 14580/19, Confirmatory application No 39/c/01/19, 28 November 2019), the latter acting as the European Council President's secretariat. The requests expressly included a variety of app-based communication modes such as WhatsApp, Telegram, and Facebook Chat in their scope.

In both responses, the Council Legal Service, responsible for appeals decisions in access requests related to both institutions, developed an approach that relied on the criterion of relevance as stipulated by Regulation 1049/2001, article 3(a) ("a content must concern a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"). However, it additionally introduced a new criterion of robustness. According to the latter, access requests must relate to "a content [that attains] a minimum degree of stability and formality", meaning that "ephemeral or short-lived" contents such as the requested app-based messages would not be admissible (European Council, Document EUCO 8/1/19, Confirmatory application No 09/c/01/19, 15 May 2019, point 5).

The approach chosen by the Council Legal Service is problematic in several respects. Importantly, it introduces an additional admissibility criterion that goes beyond the law and case law, which goes against the principle of the widest possible access enshrined in Regulation 1049/2001. The newly introduced criterion is also arbitrary in its application. It is easily possible to envisage app-based messages with a significant and durable effect on decisions reached. The text message exchange between Commission President Von der Leyen and Pfizer CEO Bourla (see above) could be characterised as an instance falling within this category. Moreover, certain 'traditional' documents drawn up in the course of institutional deliberations, such as state of play documents, could be construed as ephemeral as they are succeeded by updated versions. The case law however is clear that such documents cannot be excluded from the scope of Regulation 1049/2001 based on this sole argument.[8] Procedurally, the line chosen by the Council Legal Service appears to go beyond any reasonable interpretation of the letter of the law. Furthermore, there are no indications that the legislator intended to limit the right of access in the way envisaged by the Council Legal Service. To the contrary, a proposal to narrow down the legal definition of a 'document' through a recast

[8] See case C-280/11P *Council v Access Info Europe*, of 17 October 2013, where the Court of Justice stated in paragraph 13: "Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process."

procedure of Regulation 1049/2001[9] was blocked by the European Parliament for over 10 years to be finally withdrawn from the legislative agenda altogether by the first Von der Leyen Commission.[10]

Nevertheless, for the time being, a de facto narrowing of the scope of the definition of a 'document' is precisely what the Commission has achieved in its implementation practice, as evidenced by two Pfizer access applications filed by journalists (box 2).

Box 2: 'Pfizergate'

In 2021 in an interview with the *New York Times* Von der Leyen mentioned that she had negotiated the procurement of corona vaccines for the EU with Pfizer CEO Bourla in a personal intervention via SMS. When Austrian journalist Alexander Fanta requested access to these text messages, the Commission informed him that these messages did not constitute documents in the sense of its archiving decision (Commission, Decision C(2020)4482), therefore are not formally 'held' by the institution, and as such per definition fall outside of the scope of Regulation 1049/2001 (Commission, Decision concerning confirmatory application in access to documents request GESTDEM 2021/2908 (undisclosed). Fanta filed a complaint with the European Ombudsman about this line of reasoning, which she concluded, after an inquiry, with the finding that the Commission's handling of the request constituted maladministration (European Ombudsman, Decision in case 1316/2021/MIG, closed on 12 July 2022).

The Commission did not take specific action to reverse its course in light of the European Ombudsman's recommendations (European Ombudsman, Case 1316/2021/MIG, closed on 12 July 2022). Instead, in a written answer to parliament a question by MEP In 't Veld, Commission Vice-President Jourová confirmed the Commission's position that as text messages "are not meant to contain important information relating to policies, activities and decisions of the Commission", they are treated as falling outside the scope of Regulation 1049/2001 and are not registered (Parliamentary question P-005139/2021(ASW), 18 January 2022). In its reply to the European Ombudsman, the Commission clarified that the Council's internal staff guidelines on the appropriate use of message apps, which calls for restrictive use in a professional context, could serve as the starting point for an interinstitutional agreement (Reply of the European Commission to the Recommendation from the European Ombudsman, 27 June 2022). Speaking at a dedicated European Ombudsman event, a Commission representative further specified that in practice, under its internal archiving rules, it falls under the individual members of staff's responsibility to register any relevant phone-based communication (Open Government in the EU Blog, 25 November 2021).

After the *New York Times* was offered the same argumentation in a highly similar access request Commission, Decision C(2022) 8371 final, 15 November 2022), it brought an action before the General Court on 25 January 2023 (Case T-36/23, Stevi and New York Times v Commission, brought 25 January 2023). This case is currently pending.

The Commission subsequently organised a meeting between a number of European institutions (European Parliament, Council, European Court of Auditors, European Economic and Social Affairs Committee and European Ombudsman) in order to discussing the possibilities of developing a common line on the matter of 'the use of communication tools such as text and instant messages'.[11] The proclaimed intention, in drafting such guidelines, was to take into account the brief set of

[9] Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council, and Commission documents, 2008/0090 (COD), article 3(a).
[10] European Commission, COM (2020) 37 FINAL, 29 January 2020, annex IV, point 31.
[11] Commission, Ares(2022)8894621, Summary record of the meeting of EU institutions on 9 December 2022, 21 December 2022.

recommendations produced by the European Ombudsman in the wake of its 'Pfizergate' inquiry.[12] Since the Commission requested input from the other institutions in March 2023, no further signs of progress have been reported.[13]

The above overview indicates how the inclusion of unconventional digital communication technologies under the right of access confronts the European institutions with certain hitherto unconsidered questions. These relate, inter alia, to the interpretation of, and possibilities and limitations under existing applicable European law, but also to administrative organisation, capacity, and privacy. While the broad definition of a document under Regulation 1049/2001, being essentially technology-neutral, appears to remain functional under the changing conditions of institutional communication, there does appear to be a need for further clarification and operationalisation both at a legal and an administrative level. In this context, the Meijers Committee takes the view that the practical introduction of new communication technologies such as app-based messaging cannot a priori constitute a legitimate reason to restrict the public's right of access.

In order to develop a path forward in these legal, conceptual, and organisational conundrums, it can be useful to study similar challenges faced in other jurisdictions, and the responses (if any) that the relevant actors in these jurisdictions have developed to these challenges. Such an analysis may offer new insights and fresh thinking when considering these matters at EU level. In the following section, this comment considers the legal contexts and practices of transparency policies in Finland, Germany, the Netherlands, Poland and Sweden. In particular, it considers approaches to the definitional scope, exceptions and remedies, case law, and archiving of app-based communications drawn up in the context of professional activities of public servants. In each instance, the analysis also considers notable takeaways of said transparency policies at the practical level.

3. Legal practices at the national level

The problem of the public's access to app-based institutional communications is also evident at the national level, where it has surfaced in various circumstances. In light of the ongoing institutional discussion at EU level, the Meijers Committee considers it opportune to engage in an exploratory analysis of the issue in national jurisdictions, to learn how the problem is dealt with there. To this end, input was sought from freedom of information (FOI) experts in a diverse set of EU Member States: Finland, Germany, the Netherlands, Poland, and Sweden. With this analysis, we aim to identify common challenges, after which we enumerate potential proposals derived from national legal practice that might be applied at the EU level.

[12] European Ombudsman, Decision in case 1316/2021/MIG, 12 July 2022. European Ombudsman, Practical recommendations in case SI/4/2021/MIG, The recording of text and instant messages sent/received by staff members in their professional capacity, 14 July 2022.
[13] Commission, Ares(2023)1595460, The use of communication tools such as text and instant messages in EU professional contexts – scoping note, 6 March 2023.

Experiences with app-based communications transparency

Key take-away

From the collected examples, it becomes evident that the investigated problem is ubiquitous. Transparency questions resulting from an increase in the usage of modern communication technologies in public institutions and the public's right to access information exist everywhere, manifesting themselves at different levels and creating political and societal tensions. In some of these cases the non-disclosure of app-based government communications has had legal repercussions. This however is often far from guaranteed due to legal ambiguity and/or complexity or simply due to a gap in implementation.

A quick probe shows that the problem of relating the growing use of non-traditional communication technologies within public institutions to the established right of public access to information has manifested itself in many different ways in the analysed Member States. In Germany, for example, in 2019 the then-minister of defence Ursula von der Leyen became implicated in a scandal concerning the deletion of SMS messages from her work phone after a parliamentary committee had requested access to them. Shortly after she left the German government to take up the position of European Commission President, a parliamentary inquiry officially acquitted her from wrong-doing, although the opposition rejected the findings.[14] In the Netherlands, the problem surfaced in 2022 when Prime Minister Rutte admitted deleting the SMS messages on his work phone on a daily basis for years. A parliamentary committee subsequently established this to have been against the law, after which the Prime Ministers' office was placed under prolonged scrutiny.[15] The scandal came on the back of years of 'government by text message'.

In some cases, deleted text messages also relate to day-to-day decision making at the administrative level. In Sweden, a recent decision of a press officer at the Transport Administration to delete text messages around a traffic infarct under wintery conditions became a focal point of media scrutiny.[16] In Poland, app-based communications appear to have been central in recent scandals, such as the so-called 'Hater scandal' of 2019, involving a smear campaign coordinated via WhatsApp between staff at the Ministry of Justice and certain judges, and the Odra River environmental disaster which caused mass death in the river's fish stock. In neither case however were relevant app-based communications (as of yet) disclosed.[17]

[14] Spiegel, Justiz prüft SMS-Löschung auf von der Leyens Diensthandy, 19 March 2020; Spiegel, "Faktisches Komplettversagen", 23 June 2020.
[15] Volkskrant, Premier Rutte wiste jarenlange iedere dag zijn sms'jes, 18 May 2022; Inspectie Overheidsinformatie en Erfgoed, De archivering van chatberichten bij het ministerie van Algemene Zaken. Rapport over de naleving van de Archiefwet, 2 October 2022.
[16] Aftonbladet, Chef raderade sms om E22-kaos, 6 March 2022.
[17] Notes from Poland, Disciplinary proceedings launched to suspend judges who questioned government reforms, 24 December 2019; Notes from Poland, Poland must learn from mistakes that led to Oder river crisis, 12 October 2022.

Definition, scope, and exceptions

Key take-away

Definitions of documents and information falling within the scope of public access rights are typically broad, open-ended, and technology neutral. However, in a limited number of cases, exceptions exist that have a strong bearing on app-based communications.

In all Member States examined, the scope of what falls under 'documents' or 'public information' is cast very broadly. For example, in the Netherlands, under the 2022 Open Government Act (*Wet open overheid*, Woo), 'public information' is understood to include any document that relates to the tasks of governmental authorities, whereas the definition of a 'document' covers any kind of stored information of whichever type of information bearer. Moreover, the drafters of the predecessor of the Woo, Open Governance Act (*Wet openbaarheid van bestuur*, Wob) in the 1970s, argued that the changing means of communication should not be an impediment for requesting government information. A similar approach was taken in Finland, where the Act on Openness (*Julkisuuslaki*) of 1999 governs public access to official documents. Namely, according to the government proposal on access to documents, the concept of a document should be comprehensive, as it covers both traditional documents, electronic documents and other documents that can be identified by means of assistive technology. Therefore, although app-based messages are not specifically mentioned, the concept of a document is very broad. Similarly, in Sweden the Freedom of the Press Act (*Tryckfrihetsförordningen*) as well as the publicity principle imply a broad access to public documents which shall be made available by request. In Poland, access to public information is governed by the 2001 Law on Access to Public Information (*Ustawa o dostępie do informacji publicznej*, LAPI), which stipulates that information not published in a public institution's Public Information Bulletin must be provided upon request. This right is anchored in the Polish Constitution, particularly in Article 54, which guarantees freedom to acquire and disseminate information, and Article 61, which establishes the right to obtain information on the activities of public authorities. However, the law is unspecific about the technological aspects of public information. Finally, under the German Freedom of Information Act of 2005 (*Informationsfreiheitsgesetz*, IfG) Section 2 Nr.1, official information is understood to be any record serving official purposes, regardless of how it is stored.

Exceptions to the right of access to information typically do not contain provisions that are specific to app-based communications. Relevant exceptions include secrecy concerns related to national security, financial interests, and internal working methods. In Sweden, Germany, and Finland, exceptions for document drafts and notes exist, potentially elevating the possibility that certain app-based discussions would be exempt from disclosure. Moreover in the Netherlands, a relevant exception to the disclosure of app-based messages may arise where messages contain the personal professional opinions of the sender. This specific exception has for a long time been applied in a much broader manner than the legislator initially intended.

Case law

Key take-away

The number of cases addressing the applicability of a right of public access to app-based communications has been limited in the analysed Member States, though punctuated by a small number of important cases in Sweden and the Netherlands. Often extra-judicial investigations are favoured. Furthermore, the recognition of the right to access app-based communications is mostly implicit, with limited practical ground rules for effective implementation.

Jurisprudence addressing the specific question of the applicability of a right of public access to app-based communications has so far remained a relatively rare occurrence in the analysed Member States. In some cases, an implicit line can be inferred from court interpretations on adjacent matters. In Poland, for example, administrative courts have in the past found information on officials' social media profiles to fall outside of the scope of public information, and have been equivocal about a right to seek access to institutional email correspondence, recordings, or oral statements made at press conferences. Even when they have at times agreed that public information may be recorded in various formats, including written, audio, visual, or audio-visual forms, jurisprudence on this point is fragmented. The fact that the specific question of app-based communications as such has not presented itself before a court might be attributable to a negative anticipatory effect among FOI requesters.

In Sweden, by contrast, although no Supreme Court rulings exist directly addressing the topic, there have been a few cases and administrative court rulings related to SMS and app-based messages in the context of FOI requests. For example, the administrative court ruling *Kammarrätten i Stockholm* (2016-03-29, mål nr 1017-16) involved WhatsApp messages exchanged by municipal officials. In the ruling, the court found some messages accessible as they concerned public service tasks, while others were exempt as personal communication. Moreover, in *Kammarrätten i Jönköping* (2017-05-10, mål nr 1558-17), the court ruled against disclosing chat messages between employees, deeming them internal deliberations exempt under Chapter 2, Section 8 TF. Furthermore, a decision made by the Swedish Ombudsman (JO no. 3991/2017), criticised a municipality for denying access to WhatsApp messages related to public procurement, while highlighting the need for proper assessment of a FOI request based on content and purpose of the WhatsApp messages.

In the Netherlands, case law *has* established a precedent regarding freedom of information requests on app-based messaging. This was exemplified in the *BTN* case in 2019, where a branch organisation for residential health care sought information on how the Ministry of Health had investigated one of their members' financial situations. The Council of State judges confirmed that phone and digital messaging fall within the scope of Freedom of Information (FOI) requests, despite an argument equating messaging to telephone calls. In this way the court ruled that such communications are subject to FOI, even when conducted on privately owned phones by government employees. Similarly, the court emphasised that accessing messages on private phones does not constitute an invasion of privacy, as it only concerns messages with a public purpose and not the private phone as such. This jurisprudence has not been challenged in the courts since then, leaving no doubt that all kinds of

digital and phone messaging must be assessed for publication upon a request to do so, unless a specific ground for refusal applies to the content of the message.

Archiving

Key take-away
Clear and specific guidelines concerning the archiving of app-based communications are mostly not available. Moreover, a clear allotment of responsibility for archiving and transparency is often lacking. .

As we saw above, the issue of accessing SMS and app-messages is also linked to how governments archive their documents. When exploring how Member States approach the task of archiving relevant government information, different interpretations become apparent. For example, in the Netherlands, recent revelations about former Prime Minister Mark Rutte's messaging habits have prompted a closer examination of governmental archiving protocols. Namely, Rutte's choice to only keep some messages and delete others on his old-fashioned Nokia phone, led to investigations into archiving standards, exposing inconsistencies and sparking proposals for reforms. This resulted in recommendations to keep all messages of key officials, with the aim to address concerns about the manipulation of data and to enhance transparency. However, criticism emerged regarding the fact that lower-level employees could still potentially delete messages arbitrarily and that this approach goes against archiving standards for all other kinds of documents, i.e. according to significance.

In contrast to this, the approach taken by Finland does centre on archiving based on the significance of the content rather than the medium or platform. Therefore, the archival status is determined by the value of information. Furthermore, in Sweden, the National Archives Act (*Arkivlagen*) prescribes the responsibility of public authorities to archive their documents based on long-term value and accessibility, and it applies to all formats including electronic communication. Moreover, the Records Management Regulation (*Arkivreglementet*) provides more specific guidance on how to identify, classify, and archive documents, including digital records. Swedish authorities are increasingly recognising the importance of archiving app-based communications due to their potential long-term value and relevance to FOI requests.

In Poland, the archiving of documents is regulated by the Act of 14 July 1983 on National Archives Resources and Archives, known as NARA. An issue arises regarding how this legislation interacts with access to information laws, particularly the relevant provisions of the LAPI. Non-archival documents may be destroyed after their storage period expires if they have lost their significance. Article 16a of the NARA ensures everyone's right to access archival materials.

Lastly, the obligation of German government authorities to maintain proper records is rooted in the principle of the rule of law (*Rechtsstaatsprinzip*), as outlined in Article 20(3) of the Basic Law. This duty entails that an understandable basis for official decisions is established, and that transparency is maintained. While there is no standardised law governing this obligation, various legal statutes presuppose the necessity of proper file management, including the Administrative Procedure Act

(VwVfG) and the Freedom of Information Act (IfG). However, not all actions within an authority are required to be recorded; rather, the obligation applies selectively to actions or documents essential to administrative activities. This may include communication via telephone calls, text messages, or other informal means if deemed relevant to the administrative process. The aim within federal authorities is to maintain electronic files, with the E-Government Act guiding this transition. Additionally, the obligation to maintain files encompasses the preservation of records in accordance with state-of-the-art practices, prohibiting subsequent removal or falsification of file contents. Internal instructions and guidelines within individual federal ministries further regulate file management practices, ensuring compliance with legal requirements and the promotion of transparent administrative processes.

4. Potential areas for reform of EU transparency law

The last section of this comment is dedicated to the identification of potential improvements to the current situation vis-à-vis app-based decision-making information under EU law. Drawing from best practices observed in various EU Member States, the Meijers Committee identifies the following areas for reform of EU transparency law to ensure its adequacy in addressing challenges and opportunities presented by modern digital communication tools.

Recognise work-related text and instant messages as 'documents' in principle and practice

The definition of 'document' in Article 3(a) under Regulation 1049/2001 encompasses all content regardless of its format (whether written on paper or stored electronically), that relates to the policies, activities and decisions within the responsibility of the institution. Therefore, it is important to recognise that app-based communication falls within what constitutes a 'document', and to reverse the Commission's practice of narrowing down the scope of a 'document', both in implementing decisions and guidelines, and in their day-to-day enactment. In the Netherlands, for instance, case law has established that app-based messaging falls under Freedom of Information (FOI) requests. The BTN case of 2019 affirmed that all digital communications, including those conducted on privately owned devices by government officials, are subject to FOI unless specific grounds for refusal apply, providing clarity for citizens and government bodies alike.

Remove the criterion of 'robustness' in deciding on requests for app-based communications

In dealing with requests for app-based communications, the Council Legal Service has introduced an additional criterion of robustness, which requires access requests to relate to content with a minimum degree of stability and formality. It is clear that this criterion goes beyond the law and case law, restricting access to ephemeral or short-lived contents such as app-based messages. Removing this criterion will thus reestablish legal compliance while ensuring the widest possible access, in line with Regulation 1049/2001. This adjustment would not require any reform of EU transparency law as it currently stands.

Strictly enforce response deadlines

Regulation 1049/2001 stipulates a response deadline of 15 days, extendable by an additional 15 days in exceptional circumstances. However, European institutions often breach these deadlines without facing any consequences. The risk exists that an expansion of modalities of information to routinely include app-based communications is seized as an excuse to exacerbate this problem, or engage in selective compliance with deadlines. To address this, the legal introduction of enforceable consequences for breaching response deadlines, including, in egregious cases, financial penalties, could be considered. This would ensure consistent and timely access to information for the public, enhancing transparency and accountability across EU institutions – irrespective of the modality in which the requested information is contained.

Enhance EU institutions' document management system

Article 2(3) of Regulation 1049/2001 states that a document must be 'in the possession' of the institution to be accessible. EU institutions, including the Commission, have document management systems in place to handle the significant number of documents and requests. However, the registration criteria exclude short-lived or non-important documents, leading to incomplete and arbitrary archiving. While selection becomes necessary in a context of long-term, post-use archiving, complete and logically organised document systems must remain the norm in EU institutions' day-to-day document management. These principles are incongruent with the Commission's current categorical argument that text and instant messages typically do not contain important information due to their short-lived nature.[18] The Commission could draw inspiration from Sweden's practice, where archival status is determined by the value of information, and all formats –including electronic communication– are archived based on long-term value in this regard. This adjustment would not require any reform of EU archiving law as it currently stands.

Establish comprehensive guidelines for staff on the usage of instant messaging

Uniform procedural guidelines across all EU institutions regarding the use of instant messaging platforms should be implemented. While some institutions like the Council and the European Ombudsman have established guidelines, others lack specific policies or plans for development.[19] These guidelines should be comprehensive, and address security, data protection and governance principles, thus enhancing predictability and verifiability. To facilitate the workability of said guidelines, technological solutions should be put in place for easy registration of such messages in the document management system in a manner that connects seamlessly with other existing operational procedures. Furthermore, the EU institutions could develop an inventory of loci where messages could be stored. To this end, the number and type of permissible professional communication channels could be regulated and limited. This would decrease the risk of circumvention through other app-based channels and facilitate the swift discharge of requests for public access.

[18] Reply of the European Commission to the Recommendation from the European Ombudsman regarding the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID-19.

[19] European Commission, The use of modern communication tools such as text and instant messages in the EU professional context meeting: Summary record of the meeting of EU institutions on 9 December 2022. (Ares(2022)8894621)

5. Concluding words

The above-mentioned proposals constitute a number of interventions that might improve the legality, clarity, and efficiency of the EU's access to documents system in light of unfolding technological developments. While some could be implemented with relative ease, others might require greater efforts including institutional coordination, legislation, or possibly even Treaty change. Furthermore, the Meijers Committee is aware of the fact that different views are held with regard to the governance of access to documents policy, including app-based communications. In this regard, these proposals are offered primarily as a menu of options derived from existing practices and dilemmas at the level of EU Member State policy. As such, they could serve to restart and offer a direction in the institutional and political conversation on the matter. At the end of the day, different views in the debate converge on the point that existing EU access to documents policy should remain in lockstep with the evolving digital landscape and to be able to remain relevant and ensure robust oversight of its institutions.