Access to Documents in France:

Recommendations for Legal Reform

Access Info Europe & Open Knowledge France

About Access Info Europe

Access Info Europe is a human rights organisation established in Madrid in 2006 and dedicated to promoting and protecting the right of access to information. Access Info runs a range of projects designed to leverage the right to information to increase participation and accountability, to defend human rights, and to advance democracy.

About Open Knowledge France

Founded in 2013, Open Knowledge France is a non-profit organization committed to promoting knowledge and open data. Believing that access to public information and data fosters citizens' trust in elected officials and institutions, strengthens civic participation, stimulates innovation, and broadly improves society, the organization launched the Ma Dada platform in 2019.

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Executive summary

The French Constitutional Council confirmed that the right of access to administrative documents is a fundamental guarantee. [1] This right is rooted in Article 15 of the 1789 Declaration of the Rights of Man and of the Citizen and accorded to citizens for the exercise of their public liberties under Article 34 of the Constitution of France.[2] The primary legislation governing this right is the Code of Relations between the Public and the Administration (CRPA).

An analysis of the CRPA, however, reveals significant gaps when compared to the standards of the Council of Europe Convention on Access to Official Documents (Tromsø Convention) and international best practices (full analysis here). Key issues comprise the exclusion of draft documents and documents held by the legislative branch from the CRPA's scope, the presence of absolute exceptions, and the limited enforcement powers of the oversight body.

Despite being a member of the Council of Europe, France has yet to sign the Tromsø Convention, a step strongly recommended by GRECO in its Fifth Evaluation Report on France.[3] To align the French legal framework on access to documents with the Tromsø Convention and global standards, Access Info and Open Knowledge France recommend the following reforms to the CRPA:

1. All documents held by public bodies should be subject to disclosure, including draft documents;
2. The right of access to documents should apply to all branches of power, including the legislative branch;
3. Exceptions to disclosure should be brought into line with the Tromsø Convention, with all exceptions subject to a harm and public interest test;
4. Requesters should be assisted in identifying documents if needed and should always receive justification for a refusal;
5. Timeframes should be shortened and complied with in practice;
6. The oversight body should have stronger powers and a higher budget for effective operation.

1 Constitutional Council, Decision n° 2020-834 QPC (2020)
2 Council of State, N° 228830 (2002)
3 GrecoEval5Rep(2019)2

Legal Recommendations for Reform

1. All documents held by public bodies should be subject to disclosure, including draft documents

Article 2(b) of the Tromsø Convention defines "official documents" as all information recorded in "any form", drawn up or received and held by public authorities. The Explanatory Report to the Convention states that this is a very wide definition and should therefore apply to "any" information held by public authorities.[4]

The right of access to information is not an absolute right, therefore it can be limited. The Tromsø Convention contains an exhaustive list of exceptions where disclosure of documents can be limited to protect certain interests, such as national security, defence and international relations. The Convention does not, however, permit disclosure to be denied due to the current status of completion of a document. A document should only be withheld from disclosure if an exception applies and has been balanced against the public interest.

The CRPA explicitly states that unfinished administrative documents or those that are preparatory to a decision shall not be disclosed. Article L311-2 states:

> The right to disclosure only applies to completed documents.
>
> The right to communication does not apply to documents preparatory to an administrative decision while it is being prepared.... By way of exception to the provisions of the preceding paragraph, opinions which rule on the comparative merits of two or more applications submitted to the administration are not communicable until the administrative decision which they prepare has been taken.

This practice contravenes international standards, which emphasise that access exceptions should be determined based on the content of the requested document, not its format or storage method. Consequently, a draft document should not be automatically withheld solely due to its status as a draft.

Recommendation

- Unfinished or preparatory documents should not be automatically excluded from disclosure. All documents held by public bodies should fall under the law, with disclosure denied subject only to internationally accepted exceptions. These exceptions should concern the content of the document, not its status of completion.

4Explanatory Report to the Council of Europe Convention on Access to Official Documents. Council of Europe Treaty Series- No. 205, 18.VI.2009

2. The right of access to documents should apply to all branches of power, including the legislative branch

The UN Human Rights Committee in General Comment 34 has specified that the right to information includes "records held by public bodies" which include all branches of the State: executive, legislative and judicial.[5] According to the Tromsø Convention, "public authorities" covers legislative bodies and judicial authorities as well, insofar as they perform administrative functions. Parties to the Convention can choose to extend their national law to cover the entire legislative branch, or alternatively to only cover the administrative duties.

According to the legal regime in France, however, the legislative branch does not fall under the CRPA. Article L300-2 states:

> The acts and documents produced or received by parliamentary assemblies are governed by Ordinance No. 58-1100 of November 17, 1958 relating to the operation of parliamentary assemblies.

Ultimately this means that documents held by the legislative branch are not considered to be "administrative documents" under CRPA and therefore cannot be requested by the public under this law. This goes against international standards, for which France has been referred to the European Court of Human Rights.[6]

The French legal framework is out of line with common practice of other Council of Europe countries. In total, 38 out of 46 access to information laws in the Council of Europe member states apply to the legislative branch, and of these 31 apply to all information and a further 7 to administrative information only.[7] In these countries, a request for access to information held by the legislative branch would be processed.

At a minimum, the administrative duties of the legislative branch should fall under the national access to information law.

Recommendation

- Documents created and held by the legislative branch should be subject to disclosure under the CRPA. This should at least cover documents relating to administrative functions of the legislative branch.

5 UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 7.
6 REGARDS CITOYENS v FRANCE App no 1511/20 (ECtHR, 20 June 2022)
7 Data from the RTI Rating, www.rti-rating.org. See also the PACE, Media freedom, public trust and the people's right to know, Doc. 15308 of 07 June 2021

3. Exceptions to disclosure should be brought in line with Tromsø, with all exceptions subject to a harm and public interest test

The Tromsø Convention contains a set of exceptions where access to requested documents can be limited to protect certain interests. Article 3 of the Tromsø Convention lays out the following internationally accepted exceptions:

a. national security, defence and international relations;
b. public safety
c. the prevention, investigation and prosecution of criminal activities;
d. disciplinary investigations;
e. inspection, control and supervision by public authorities;
f. privacy and other legitimate private interests;
g. commercial and other economic interests;
h. the economic, monetary and exchange rate policies of the State;
i. the equality of parties in court proceedings and the effective administration of justice;
j. environment; or
k. the deliberations within or between public authorities concerning the examination of a matter

These exceptions however, while legitimate, are all subject to the following harm and public interest test under Article 3(2):

> Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

Therefore, whilst certain limitations are permitted to the right of access to documents, access should only be refused if it would or would be likely to cause harm to a protected interest, and in all cases the application of the exception must be balanced against a public interest test.

The exceptions regime under the CRPA goes against the standards within the Tromsø Convention. While the French framework does contain internationally accepted exceptions, it also contains extra absolute exceptions, exceptions that are only subject to a harm test, and others that are wide and deferring to different laws.

3.1 Absolute exceptions

Article L311-5 lists various types of documents that cannot be disclosed under the law. This is an absolute exception, therefore these documents are not subject to a harm or public interest test. The law states that the following are not communicable:

1° The opinions of the Council of State and the administrative courts, the documents of the Court of Auditors referred to in Article L. 141-3 of the Code of Financial Courts and the documents of the regional audit chambers referred to in Articles L. 241-1 and L. 241-4 of the same code, the documents prepared or held by the Competition Authority in the context of the exercise of its powers of investigation, instruction and decision, the documents prepared or held by the High Authority for Transparency in Public Life in the context of the missions provided for in Article 20 of Law No. 2013-907 of 11 October 2013 on transparency in public life, the documents prior to the preparation of the accreditation report for health establishments provided for in Article L. 6113-6 of the Public Health Code, the documents prior to the accreditation of health personnel provided for in Article L. 1414-3-3 of the Public Health Code, audit reports of health establishments mentioned in Article 40 of Law No. 2000-1257 of December 23, 2000 on the financing of social security for 2001 and documents produced in execution of a service provision contract executed on behalf of one or more specific persons;

3.2 Exceptions not subject to a public interest test

The law also lists another set of exceptions. While some of these exceptions are in line with international standards, they are only subject to a harm test, and not a public interest test. The law states that the following cannot be released:

2° Other administrative documents whose consultation or communication would undermine:

a. The secrecy of the deliberations of the Government and of the responsible authorities falling within the executive branch;

b. To the secret of national defense;

c. To the conduct of France's foreign policy;

d. State security, public safety, the safety of individuals or the security of government information systems;

e. To currency and public credit;

f. The conduct of proceedings before the courts or of operations preliminary to such proceedings, unless authorised by the competent authority;

g. To the investigation and prevention, by the competent services, of offences of any nature;

h. Or subject to Article L. 124-4 of the Environmental Code, to other secrets protected by law.

3.3 Wide exception deferring to other "secrets" protected by law

The Tromsø Convention makes clear that all exceptions should be clearly and narrowly defined. The explanatory report states that the list of limitations in Article 3, paragraph 1 is exhaustive. The limitations apply to the content of the document and the nature of the information.

These exceptions should be contained in the national access to information law and should not make general references to other laws or special provisions that regulate exceptions.

Exception 2(h) Article L311-5 states that administrative documents whose consultation or communication would undermine "other secrets protected by law" cannot be released. This exception is extremely wide and defers precedent to an indefinite number of laws that trump the CRPA.

Recommendations

- Exceptions to public disclosure should be in line with the Tromsø Convention;
- All exceptions should be subject to a harm and public interest;
- All exceptions should be narrowly defined within the access to documents law.

4. Requesters should be assisted in identifying documents if needed and should always receive justification for refusal

Article 5(1) of the Tromsø Convention contains the obligation for public authorities to assist the requester "as far as reasonably possible" to identify a requested document. The CRPA does not contain any such provision, therefore public authorities are not required to assist a requester.

The Tromsø Convention also states, under Article 5(5) that a request can be refused if "despite the assistance from the public authority," the request remains too vague to allow the official document to be identified, or if the request is "manifestly unreasonable". If an authority does decide to refuse a request, Article 5(6) states that the public authority refusing access to an official document must give the reasons for the refusal. It also states that the applicant "has the right to receive on request a written justification from this public authority for the refusal".

Article L311-2 of the CRPA states:

> The administration is not obliged to respond to abusive requests, in particular because of their number or their repetitive or systematic nature.

This means that a public body does not have to respond to a request if it considers it to be abusive. Additionally, according to a recent ruling by the Council of the State any request whose processing imposes a "disproportionate burden on the administration in light of the resources available to it" can be deemed abusive and therefore denied.[8]

This constitutes an additional obstacle to accessing administrative documents, one that was not explicitly provided for by the legislature and one that is difficult for the requester to challenge since it is not easy to determine the resources available to the administration in question or the time required to fulfil the request.

Recommendation

- There should be a general obligation to assist a requester as far as possible to identify a requested document;
- The requester should have the right to receive a justification for refusal in all circumstances, even if a request is deemed abusive by the authority.

5. Timeframes should be shortened and complied with in practice

The Tromsø Convention requirement is that requests should be responded to as rapidly as possible and within a maximum time limit (Article 5(4)), although the precise timeframe is not defined in the text itself. The Convention also permits for extensions in exceptional circumstances.

The CRPA states that a decision shall be taken one month from the receipt of the request by the competent administration. It does not offer the possibility of an extension.

It could be argued that giving a timeframe of one month to respond to a request is not dealing with a request “promptly”. In fact, good examples of shorter timeframes in countries that have ratified the convention include:

- Ukraine – a response should be given within 5 business days;
- Moldova – a response should be given within 10 days from the date of registration of the request;
- Hungary – a response should be given within 15 working days from receiving the request.

In addition to having a law with a timeframe that is longer than best practice examples, it is see n that this timeframe is often not complied with in practice. Data from the Ma Dada public request platform[9] in France shows that on average it took the requester 55

8 Council of State, Société pour la protection des paysages et l'esthétique de la France, November 14, 2018, No. 420055
9 https://madada.fr/

calendar days to receive documents for successful requests. There is also a high rate of administrative silence, with more than 90 % of requests on the platform receiving no answer.

The Commission for Access to Administrative Documents (CADA) has criticised this high level of administrative silence and has stated that 40% of the referrals it receives are "not justified". Indeed, "they pertain to situations that do not raise any new legal questions and for which the rules governing document accessibility are clearly established and well-known".[10] As a result, the administration should comply with these requests without requiring the Commission's intervention.

Recommendation

- Timeframe for response should shorted to be in line with best practice examples and to give effect to the principle of “prompt” responses under the Tromsø Convention;
- Timeframes should be complied with in practice.

6. The oversight body should have stronger powers and a higher budget for effective operation

As a universally recognised human right, States must take all necessary measures to give effect to access to information within their domestic systems.[11] To this end, having an independent and impartial oversight body, with a mandate to monitor and report on the implementation of the right of access to information, is crucial.[12]

The Tromsø Convention establishes under Article 8 that a review procedure, either before the court or before an impartial and independent body, must be established. Furthermore, this procedure should be expeditious and inexpensive.

The Commission for Access to Administrative Documents, more commonly called the CADA, is an independent administrative authority in France designed to oversee the implementation of the access to documents law.

The CADA has powers to issue opinions on appeals (Article L342-1), powers of inspection which include on-site inspection (Article R343-2) and it also responds to public bodies on their questions regarding application of the law (Article R342-4-1). The step of requesting an opinion from the CADA is a necessary step before any judicial action can be brought against a public body that refuses to grant access to administrative documents. The CADA however only has an advisory role so its

10 CADA, Annual Report, 2020, p. 5 https://www.cada.fr/sites/default/files/rapport_2020.pdf
11 Human Rights Committee (2011, 12 September), General comment. No. 34, para. 8.
12 Office of the United Nations High Commissioner for Human Rights (2022, 10 January), Freedom of opinion and expression, Report. A/HRC/49/38.

decisions are non-binding, and it cannot sanction non-compliance. This leads to many public bodies ignoring the decisions of the CADA.

In practice, it is also seen that the CADA raises awareness about the right to information to the public and monitors implementation of the law. It is not, however, specifically mandated to do so under law.

The powers granted to the CADA fall below best practice standards seen in other European countries. To ensure effective oversight and monitoring of the application of the law, the CADA should be granted the following powers:

- Binding decisions;
- Ability to Review and Declassify classified documents;
- Ability to order structural remedies in public bodies (such as improved record management, more training, etc.);
- Sanctioning authority.

While the CADA may carry out some education, awareness raising and monitoring in practice, its obligations to do so should be formally stated in law, leading to a more structured approach. Therefore, the CADA should have formalised powers relating to:

- Educating relevant public officials are educated on the Freedom of Information Act;
- Raising awareness about the law and educating the public;
- Monitoring implementation by public bodies.

To be more effective, a larger budget needs to be allocated to the CADA. In 2023 the CADA had a budget of €1.6 million, compared to €26.1 million for the CNIL (responsible for personal data). In terms of personnel, the CADA has 18 FTEs (full-time equivalents) versus 269 for the CNIL, which clearly illustrates the difference in resources.

Faced with a significant increase in the number of referrals over several years, the CADA has struggled to meet the one-month legal deadline allotted to it for issuing opinions. In 2019, the average processing time for a referral was approximately six months (185 days). The situation has relatively improved since then, as by 2021 this timeframe was reduced by a factor of 2.2 (resulting in an average response time of 82 days) — still far from the one-month deadline stipulated by the CRPA. This has led to

France receiving a formal notice and then a reasoned opinion from the European Commission.[13]

Recommendation

- The CADA should be granted stronger powers of oversight. This should specifically include binding decisions and sanctioning authority;
- To ensure that the CADA can successfully carry out its duties, a higher budget should be allocated.

Conclusion

The right of access to administrative documents is a cornerstone of democracy and transparency, embedded in France's legal and constitutional framework. The current implementation of this right under the CRPA, however, does not meet the standards set by international norms, particularly the Tromsø Convention.

To address these deficiencies, this paper highlights essential reforms that are necessary for France to align its legal framework with international best practices. Expanding the scope of the law to include draft documents, extending the right of access to the legislative branch, revising overly broad or absolute exceptions, and strengthening the oversight mechanism are crucial steps in enhancing transparency and accountability in public administration.

By implementing these recommendations, France would not only comply with international standards but also strengthen public trust in its institutions, promote better governance, and protect the democratic rights of its citizens. The proposed reforms are both practical and achievable and will ensure that the French access to documents regime meets the needs of a modern, open society.

13 European Commission , 'Infringement Decisions' <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?typeOfSearch=false&active_only=0&noncom=0&r_dossier=INFR(2020)4014&decision_date_from=&decision_date_to=&title=&submit=Search&lang_code=fr&langCode=EN> accessed 9 January 2025