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Answers to the questionnaire, prepared by the Information Commissioner of Republic of Slovenia, arranged in alphabetical order, save for the institution of European Ombudsman.

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<td>United Kingdom</td>
<td>99</td>
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1. How many cases (complaints or notifications) have you received?
  1.1 How many of these have been:
  - due to absence of reply (silence) or inactivity of the body of first instance?
  - due to decision by which access to information has been rejected?

Access to documents cases closed in:
2005: 16
2006: 12
2007: 12
Cases currently under inquiry: 23

Statistics are not readily available for cases on access to information. Most of the access to documents cases concern rejection of applications, in whole or in part. Complete failure to answer is rare, though replies to applications are often late. (NB: the European Commission has recently proposed extension of the deadline for replying to confirmatory applications on the grounds that “experience shows that it is almost impossible to reply” within the current deadline of 15 working days).

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?

Out of the total of 24 access to documents cases closed in 2006 and 2007, 17 resulted in the institution either apologising for an error, or changing its position, or in criticism by the Ombudsman.

3. For Ombudspersons:

3.1 In how many cases has your recommendation proved as correct in the court proceeding?

As explained in the answer to Question 6 below, there is no provision for appeal from, or judicial review of, the European Ombudsman’s decisions, so they are not tested directly in court proceedings.

In one case, the Commission failed to comply with a recommendation from the Ombudsman, despite a Resolution of the European Parliament. The complainant then made a further application for access to the same document, which the Commission
refused. The Court of First Instance (CFI) annulled the Commission’s refusal, on the basis of essentially the same analysis of the law as the Ombudsman had used to support his Recommendation (Case T194/04, Bavarían Lager v Commission, judgment of 8 November 2007). The Commission’s appeal to the Court of Justice in the case is pending.

In a Special Report to the European Parliament in 2001, the Ombudsman took the view that the exception for “court proceedings and legal advice” applied only to opinions given by the legal service of an institution in the context of possible future court proceedings. In contrast, opinions from a legal service prepared during the process of drafting legislation should be exempt from disclosure only if they fell within the exception that protects the decision-making process of the institution.

The CFI gave a different interpretation in Case T-84/03, Maurizio Turco v Council [2004] ECR II-4061. It held that the exception to protect “court proceedings and legal advice” applies to all legal service opinions. The Ombudsman therefore suggested that Parliament take no further action on the Special Report and closed the inquiry into another complaint in which a draft recommendation had been based on the same reasoning as the Special Report.

On 1 July 2008, (in joined Cases C-39/05 and C-52/05, Sweden and Turco v Council and Others), the Court of Justice set aside the judgment of the CFI. The Court stated that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process.

3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?

Taking 2006 and 2007 together, three cases were settled after the institution changed its position and one draft recommendation was accepted (116/2005/MHZ).

3.3 In how many cases have your recommendations not been successful?

Taking 2006 and 2007 together, four cases were closed after the institution did not accept a draft recommendation: 617/2003/IP, 1844/2005/GG, 1919/2005/GG, 2350/2005/GG.

3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?

As far as we are aware, Bavarian Lager (see above) is the only case in which the CFI has dealt with access to the same document as an inquiry by the Ombudsman.

3.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops
the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?

According to Article 2 (6) of the Statute of the European Ombudsman 1, “[c]omplaints submitted to the Ombudsman shall not affect time limits for appeals in administrative or judicial proceedings.” Furthermore, the Ombudsman cannot inquire into a case that is being, or has been, dealt with by a court. However, there is nothing to prevent an applicant who turns to the Ombudsman after his/her application for access has been refused from subsequently making a new application and exercising the right to go to court if access is again refused.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

The third sentence of Article 8 (1) of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001 OJ L 145 p. 43) reads as follows: “In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.”

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):

See the answer to Question 4 above. The applicant has a choice of remedy: s/he can either bring proceedings in the Court of First Instance, or complain to the Ombudsman.

- following the decision by the Information Commissioner or Ombudsperson (which court):

There is no provision for appeal from, or judicial review of, the Ombudsman’s findings. It is possible to obtain a form of judicial review of the Ombudsman’s work through an action for damages (Case C-234/02 P, Lamberts v European Ombudsman, 2004 ECR I-2803) but it is difficult to imagine circumstances in which this possibility could be relevant to the Ombudsman’s assessment of whether an institution has complied with Regulation 1049/2001.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

In some cases, the European Commission has sought to invoke the exception to protect “the privacy and integrity of the individual” when the applicant is the relevant data subject. In such cases, the applicant is of course a party to the proceedings before the Ombudsman.

In cases where the relevant data subject has not been the complainant, the Ombudsman has not, so far, contacted the data subject directly. The Ombudsman would expect the institution which invokes the exception to inform the relevant data subject of the complaint and seek his or her views, if appropriate.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?

See the answer above.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?

NA

7. What are your competences during the procedure of investigation?

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?

The European Ombudsman’s powers of investigation are laid down in the Statute of the Ombudsman.

Article 3 (1) of the Statute provides for the Ombudsman to “conduct all the enquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies.”

According to the first sentence of the first paragraph of Article 3 (2), “The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested from them and give him access to the files concerned.”
7.2 Are you authorised to examine computer or information system of the body?
This matter is not expressly regulated by the Statute and has never arisen in practice. The above-mentioned general provisions seem broad enough to encompass such examination, if the Ombudsman considered it necessary for the purposes of an inquiry.

7.3 Are you authorised to enter the premises of the body without its consent?
Not expressly. The power to conduct “conduct all the enquiries which he considers justified” could presumably include entry to the premises of the institution or body concerned, if the Ombudsman considered it necessary for the purposes of an inquiry.

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes. Articles 13 and 14 of the Ombudsman’s Implementing Provisions exclude, respectively, the complainant and the public from having access to confidential documents or confidential information obtained by the Ombudsman as a result of an inspection of the file of the institution concerned.

7.5 Are you authorised to question civil servants?
Yes. The last paragraph of Article 3 (2) of the Statute states that “Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall continue to be bound by the relevant rules of the Staff Regulations, notably their duty of professional secrecy.”

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
According to the second sentence of the first paragraph of Article 3 (2) of the Statute: “Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001 shall be subject to compliance with the rules on security of the Community institution or body concerned.” The Ombudsman is required to have agreed in advance with the institution or body concerned the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data…)?
The Institution is not required automatically to send the document. In accordance with Article 3 (2) of the Statute (see above) the institution concerned must allow the Ombudsman to inspect the document if he asks to do so.
8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

The basic principle enshrined in Regulation 1049/2001 is that public access to all documents must be given on request unless one or more of the exceptions applies. All the exceptions involve a harm test. The case law of the courts requires a concrete examination, on a case by case, of whether an exception applies.

In the case of reconciling data protection and the right of access, the European Data Protection Supervisor has produced a background paper which provides valuable guidance:

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer below.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
My presentation in the open session of the conference lists the exceptions to the right of access in detail.

All of the exceptions involve a harm test, which is that disclosure would undermine (in one case, seriously undermine) the protected interest.

Some of the exceptions are subject to an “exception to the exception”. That is to say, even if harm to the protected interest would occur, the document must nonetheless be released if there is an “overriding public interest in disclosure.”

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
In cases involving transparency, the Ombudsman gives weight to the fact that Article 1 (3) of the Treaty on European Union envisages that “decisions are taken as openly as possible”.

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
What counts as a “difficult” case?
Case 1693/2005/PB, closed in 2007, raised complex legal problems concerning the application of Regulation 1049/2001 to electronic databases. The case is briefly described in the extract from the 2007 Annual Report provided in answer to point 12 below.

Case 3643/2005/(GK)WP, which gave rise to a draft recommendation in 2007, was difficult because it required (i) careful balancing of the right to privacy with the public interest in openness and (ii) careful explanation of the precise role of the Ombudsman in dealing with the case.

A journalist complained against the refusal of the European Parliament to give access to data detailing the allowances paid to the five Maltese MEPs. In its opinion on the complaint, the EP said that its Committee on Budgetary Control and the Court of Auditors carry out public scrutiny of the use of EU funds. The EP also explained the refusal to give public access by invoking data protection. The Ombudsman consulted the European Data Protection Supervisor who advised that, whilst MEPs are entitled to protection of their privacy, the basic consideration in a transparent and democratic society must be that the public has a right to be informed about their behaviour, especially in relation to the expenditure of public funds.

In September 2007, the Ombudsman made a draft recommendation to the European Parliament to disclose the requested data, while deleting the names of the MEPs' assistants. In response, the EP maintained its refusal as regards certain allowances on the grounds of data protection. It announced, however, a proactive policy of publishing on its website information about the different allowances to which MEPs are entitled.

The Ombudsman welcomed the provision of information on the website. As regards Parliament’s position on the complainant’s legal rights under Regulation 1049/2001, the Ombudsman was glad to note that Parliament had implemented the relevant aspect of the draft recommendation as regards access to details of one of the allowances. As regards other aspects, the Ombudsman maintained the findings of maladministration. Since there had been an intense political discussion in Parliament following the Ombudsman’s draft recommendation, the Ombudsman considered that no useful purpose would be served by making a special report to Parliament. The case was, therefore, closed with a critical remark, which expressed regret that the European Parliament had sought to justify its refusal fully to accept the draft recommendation by relying on a legal interpretation that weakens the principle of transparency and which had been rejected by the Court of First Instance in the Bavarian Lager case.

The decision closing the case is available online at:
10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.

The full text of the reports is available on the European Ombudsman's website in all the official languages of the European Union. Here are links to the English versions:


Each report contains a section (2.8.1) dealing specifically with access to documents and information and with data protection. Parts of the relevant section for 2006 and 2007 are reproduced below.

2006
Access to documents

(...) 

A high proportion (25%) of the inquiries conducted in 2006 concerned allegations of lack of openness. Article 1 of the Treaty on European Union refers to decisions in the Union being taken "as openly as possible", while Article 255 of the EC Treaty provides for a right of access to European Parliament, Council, and Commission documents. This right is governed by Regulation 1049/2001. Following own-initiative inquiries by the Ombudsman in 1996 and 1999, many other Community institutions and bodies have also adopted rules on access to documents.

During 2006, the Ombudsman closed inquiries into eleven complaints concerning the application of Regulation 1049/2001, nine of which were against the Commission, one against the Council, and one against the European Parliament. (...)

Two inquiries were closed into complaints concerning access to documents and information, which were directed against the European Investment Bank (EIB). (...

As regards exceptions to access, the Ombudsman pointed out in case 617/2003/IP that Regulation 1049/2001 does not contain an exception that would oblige the European Union to refuse access to documents purely because the disclosure of the documents in a Member State is not free of charge. In case 582/2005/PB, the Ombudsman did not accept the Commission's argument that the dispute settlement procedure of the World Trade Organisation should be assimilated to "court proceedings" for the purpose of Article 4(2), second indent of the Regulation. In case 1463/2005/TN, the Ombudsman considered that the first sub-paragraph of Article 4(3) of the Regulation, concerning documents drawn up by an institution for internal use, does not apply to documents that the Commission has sent to, or received from, the authorities of Member States. Nor could the Commission rely on the third indent of Article 4(2), regarding protection for the purpose of investigations, since it had not established that disclosure would undermine the purpose of the relevant investigations, which was to make sure that the Member States' national...
plans for the allocation of greenhouse gas emission allowances were in conformity with Community law. In case 1919/2005/GG, the Ombudsman took the view that Article 4(1)(b) of the Regulation did not justify the European Parliament’s refusal of access to a list of applicants in a selection procedure. The Ombudsman found it difficult to imagine how disclosure of the fact that a certain Community official has applied for another post in the Community service could undermine his or her privacy.

Article 11 of Regulation 1049/2001 requires each institution to provide public access to a register of documents in which references to documents shall be recorded without delay. In case 1764/2003/ELB, the Ombudsman found that the Commission’s register was inadequate as regards documents related to an audit carried out by the Commission. The Ombudsman pointed out that sound financial management is of great concern to the public and that audit reports are valuable sources of information on the way Community funds are used.

In case 1776/2005/GG, the European Investment Bank (EIB) responded to a suggestion from the Ombudsman by agreeing to disclose parts of an audit report, under its own rules on public access. In addition, it allowed the complainant’s company to have private access to sections of the report that specifically concerned the group of companies to which the complainant belonged. The Ombudsman publicly welcomed the EIB’s constructive approach in this case, pointing out that although privacy and commercial confidentiality are legitimate interests that may limit public access, the very person whose privacy or commercial interests are concerned should not be denied access on that ground.

**Access to information**

In case 3436/2004/ELB, the complainants had made a complaint to the European Anti-Fraud Office (OLAF), alleging that they were victims of fraud. The Ombudsman considered that they were entitled to expect OLAF to pay special attention to their interest in obtaining information on relevant inquiries carried out by OLAF. However, he also pointed out that, in order to avoid imposing an unreasonable administrative burden on an institution, the duty to respond to requests for information under the European Code of Good Administrative Behaviour is subject to limits.

In case 3501/2004/PB, the Ombudsman found that, during the course of his inquiry, the EIB had given valid reasons for refusing to provide the information requested by an NGO. For future purposes, however, he invited the EIB, to complement an eventual refusal to provide information with an adequate explanation of the reasons for doing so, addressed to the person requesting the information before the problem reaches the stage of becoming a complaint to the Ombudsman.
Access to documents and information

(...)

During 2007, the Ombudsman closed inquiries into eleven complaints concerning the application of Regulation 1049/2001, eight of which were against the Commission, two against OLAF and one against the Council.

One inquiry was closed into a complaint against the European Investment Bank concerning access to documents under its own rules.

(...) In case 3697/2006/PB, the Ombudsman found that the requirement to give "detailed reasons" for extending the deadline for reply to a confirmatory application under Regulation 1049/2001 was not met by a mere reference to the need to consult other Commission services. He further stated that the Commission should organise its administrative services so as to ensure that applications for access are registered no later than the first working day following receipt.

In case 668/2007/MHZ, the Ombudsman criticised the Commission for a delay of over eight months in publishing its annual report on the operation of Regulation 1049/2001 in 2005. The Ombudsman pointed out that the publication of reports is a key mechanism of accountability to, and communication with, European citizens.

The Ombudsman dealt with three cases concerning exceptions to public access.

In case 1844/2005/GG, the Ombudsman expressed the view that a general reference to the perceived risks of disclosure for the internal decision-making process would not be sufficient to justify applying the second subparagraph of Article 4(3) of Regulation 1049/2001. Although the Commission had put forward arguments related to the specific document, the Ombudsman considered, after inspecting the document, that the Commission had not established that disclosure would seriously undermine the Commission's decision-making process.

In case 3269/2005/TN, the Ombudsman took the view that Article 4(1) (b) of the Regulation (privacy and integrity of the individual) did not justify the Commission's decision to blank out the names of industry lobbyists from a document. In reaching this view, the Ombudsman relied on the Background Paper on Public access to Documents and Data Protection published by the European Data Protection Supervisor, whom the Ombudsman also consulted on this matter. Moreover, the Ombudsman emphasised the need for transparency of lobbying activities in case 2740/2006/TN.

In case 948/2006/BU, the Ombudsman recognised that the European Investment Bank's dual role, as both a banking institution and a Community body, is reflected in the provisions of its rules on public access to documents concerning the professional

2 “Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.”
obligation of banking secrecy. The Ombudsman also noted that the EIB is bound by Regulation 1367/2006, which applies the Aarhus Convention to the Community institutions and bodies. However, that Regulation was not in force when the complainant's request for access was made.

Article 11 of Regulation 1049/2001 requires each institution to provide public access to a register of documents in which references to documents shall be recorded without delay. In case 2350/2005/GG, the Ombudsman took the view that, as long as there is no easily accessible or sufficiently complete register, the EU institutions must be prepared to provide citizens with ad hoc lists upon request, even if their preparation constitutes a considerable burden.

The application of Regulation 1049/2001 to electronic databases presents technical as well as legal problems. In case 1693/2005/PB, the Commission argued that accounting information supplied to it by Member States did not constitute a document or documents, since the reports containing the information had been loaded onto a database and no longer existed as such. The Commission's approach in such cases was to treat the outputs of routine retrieval operations as documents. The information requested by the complainant, however, would require complex new programming, it said. Although considering the Commission's approach to be unsatisfactory, the Ombudsman did not pursue the matter since the legal issues were new and complex and could be examined by the Community legislator, from a general perspective, in the context of the announced reform of Regulation 1049/2001.

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Bosnia and Herzegovina

1. How many cases (complaints or notifications) have you received?
1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?

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<th>2006</th>
<th>2007</th>
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<tr>
<td>Absence of reply (silence)</td>
<td>157</td>
<td>209</td>
</tr>
<tr>
<td>Decision by which access to information has been rejected</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>158</td>
<td>210</td>
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2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?

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<th>2006</th>
<th>2007</th>
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<td>Application rejected by the RS Ombudsman since the first-instance body acted correctly in procedural sense</td>
<td>30</td>
<td>36</td>
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<tr>
<td>Public body granted access to information following the recommendation of the RS Ombudsman</td>
<td>127</td>
<td>173</td>
</tr>
<tr>
<td>Public body did not comply with the recommendation of the RS Ombudsman</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>158</td>
<td>210</td>
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3.1 For Information Commissioners:

3.1.1 How many decisions of the body of first instance have you changed?
NA

3.1.2 Are your decisions legally binding?
NA
3.1.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?
- By the bodies of first instance, holders of the document?
NA

3.1.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?
The Law on free Access to information of RS does not prescribe court procedure.

3.2 For Ombudspersons:
3.2.1 In how many cases has your recommendation proved as correct in the court proceeding?
The Law on free Access to information of RS does not prescribe court procedure.

3.2.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
NA

3.2.3 In how many cases have your recommendations not been successful?
NA

3.2.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
NA

3.2.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?
NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?
The Law on freedom of Access to Information of Republika Srpska/B&H in its Article 14, prescribes the following:

Procedure Upon Receipt of a Request by the Competent Authority

1. Upon receiving a request for access to information, the competent authority shall take all reasonable measures to collect the requested information and shall consider all facts and circumstances pertinent to the processing of the request.

2. If access to the information is granted, either in whole or in part, the competent authority shall notify the requester in writing thereof. The notice shall:
   a. inform the requester that the information is available for access in person at the premises of the competent authority; and
   b. inform the requester whether duplication is possible, the estimated cost of the duplication, and that the duplication shall be provided to the requester upon payment. Where the duplication of the information is unusually complex or time-consuming, the duplication shall be provided to the requester at a time that is mutually acceptable to the requester and the competent authority; and/or include a copy of the requested information where it can be supplied at no cost as provided for under Article 16.

3. If access to the information is denied, either in whole or in part, the competent authority shall inform the requester with notice thereof. The notice shall:
   a. include the legal grounds for the exempt status of the information including the Articles of this Act being relied upon, and all material issues relevant to the decision including public interest factors taken into account; and
   b. inform the requester of the availability of appeal, the specific body to whom the appeal should be addressed including the necessary contact information, and the deadline for and cost of filing an appeal. This notice shall also inform the requester of his or her right to apply to the Ombudsman of the Republika Srpska, and shall include the necessary contact information.

Notices referred to in subsection (2) and subsection (3) shall be sent out no later than 15 days from receipt of the request. For requests that necessitate processing under Article 7 and/or Article 9(3), this 15 day time limit shall be correspondingly extended by the time limits provided for in those Articles. The requester shall immediately be notified in writing of any extension including the reasons for the extension.

5. Please explain complaint procedure according to FOIA
   - following the decision of the body of first instance (where can the applicant primarily seek legal protection):

The Law on Free Access to Information of RS prescribes informing requestor in the form of a “letter”. Situation is clear if request has been fully satisfied. But what is the situation in
case when access to information has been denied?! Namely, if the first instance body
denies access to information or if in the prescribed period of time it does not answer to
the request, requester has the right to appeal to the second instance body. Second
instance body also may deny access to information. Then procedure is concluded
because applicant cannot initiate the court procedure. The court procedure may be
initiated only on the basis of an administrative document. Letter is not administrative
document. In these situations, the only possibility is that requester addresses Ombudsman
RS, who by its effort had succeeded to get requested information in numerous cases.
However, Ombudsman’s decision does not have executive power.

- following the decision by the Information Commissioner or Ombudsperson (which
court):
The Law on free Access to information of RS does not prescribe court procedure.

6. When examining cases where a question of existence of exemption of protected
personal data or protection of privacy arises, do you involve in the proceeding the
persons to whom the data in question relate?
The Ombudsman of Republika Srpska has not processed such cases.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as
a party to the proceeding or only informally informed of the proceeding)?
NA

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the
proceeding or assessment of free availability of requested information (if the person
concerned does not allow disclosure, is such request complied with in the proceeding or
is the purpose of involvement more about informing the person that actual proceeding is
taking place)?
NA

7. What are your competences during the procedure of investigation?
(see the answer under 7.7)

7.1 Do you have inspection competences to conduct investigation without consent of the
body which possesses the document which is subject to the applicant’s request?
(see the answer under 7.7)
7.2 Are you authorised to examine computer or information system of the body?
(see the answer under 7.7)

7.3 Are you authorised to enter the premises of the body without its consent?
(see the answer under 7.7)

7.4 Do you have the possibility to conduct so called in camera inspection?
(see the answer under 7.7)

7.5 Are you authorised to question civil servants?
(see the answer under 7.7)

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
(see the answer under 7.7)

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
The BH Law on the Protection of Confidential Data regulates the issue of access to the confidential data in the area of: public safety, defense, foreign affairs, intelligence and security interests of B&H, communication and other systems relevant to the national interests, judiciary, projects and plans of defense and intelligence activities in B&H.
Pursuant to this law data are classified in four different groups:
- very secret
- secret
- confidential and
- internal.

Pursuant to the BH Law on the Protection of Confidential Data the Ombudsman is entitled to access to all the data falling in category confidential and internal with no special authorization of the relevant body.

In all other cases provisions of the Law on RS Ombudsmen are to be implemented as follows:

Article 23
1. Governmental, judicial and all public authorities and agencies of the Republika Srpska, including private agencies performing public functions, are obliged to provide
the Ombudsman with requested assistance in the Ombudsman’s investigations and inspections.

2. During the investigation, the Ombudsman, or a person to whom the Ombudsman has entrusted investigation tasks, may present himself/herself at any governmental office or agency or service in order to check all the requisite information, conduct personal interviews or study the necessary files and documents.

3. The Ombudsman may not be denied access to any file or administrative document or to any document relating to the activity or service under investigation, including to the provisions of Article 26 of this law.

Article 24
1. When the case under investigation concerns the conduct of persons employed in government service and is connected with the duties they perform, the Ombudsman shall inform the person concerned and either his/her superior or the body to which he/she is attached.

2. The official concerned shall reply in writing and submit all the documents and evidence which he/she considers relevant, within the time limit indicated to him/her. Upon request, the time limit may be extended.

3. The Ombudsman may check the veracity of the elements submitted and propose a hearing of the official involved in order to obtain further information. Officials who refuse this hearing may be required by the Ombudsman to give a written explanation of the reasons for their refusal.

4. The information provided by an official during an investigation through personal evidence is confidential, without prejudice to the provisions of the criminal legislation on the concealment of acts that may be of a criminal nature.

Article 25
Superior officials or bodies which prohibit officials subordinate to them or in their service from responding to a request from the Ombudsman or from being heard by the Ombudsman shall declare that they have done so in a written document, stating their grounds. This document shall be communicated to the official and the Ombudsman. The Ombudsman shall then approach the said superior in respect of all the operations necessary to the investigation.

Confidential and Secret Documents and Duty of Discretion
Article 26
The Ombudsman may require the public authorities to hand over any documents he/she considers necessary to perform his/her duties, including those classified as confidential or
secret in accordance with law. In such cases, the Ombudsman shall apply the requisite discretion to these and shall not make them available to the public.

Investigations conducted by the Ombudsman and the Ombudsman's staff, and procedural measures, shall be conducted with the greatest discretion, where both individuals and public services and bodies are concerned, without prejudice to the elements which the Ombudsman finds it appropriate to include in the reports. Special protective measures shall be taken in respect of documents classified as confidential or secret.

Where the Ombudsman believes that a document classified as confidential or secret and not handed over by the government could be crucial to the proper conduct of the investigation, he/she shall advise the National Assembly of this fact.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

See the answer below.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.

The Law on freedom of Access to Information of Republika Srpska/B&H in its Article 9, prescribes the following:

Public Interest Test

1. A competent authority shall disclose the requested information, notwithstanding that it has claimed an exemption, where to do so is justified in the public interest having regard to both any benefit and harm that may accrue from doing so.

2. In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.

3. If disclosure of the requested information for which a competent authority has claimed an exemption under Articles 7 or 8 is determined to be in the public interest, the competent authority shall notify the third party in writing that the information shall be disclosed upon the expiry of 15 days of receipt of the notice. The notice shall inform the third party of the availability of appeal, the specific body to whom the appeal should be addressed including the necessary contact information, and the deadline for and cost of filing an appeal. The notice shall also
inform the third party of his or her right to apply to the Ombudsman of the Republika Srpska and shall include the necessary contact information.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
No, there is not, but there is Public interest test.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
Case No. 1 (2007)
Under number 340-181/07 registered was complaint of D.M. from Banja Luka in which he claims that he had approached the Tourist organization of Republika Srpska to provide him, pursuant to the Law on Freedom of Access to Information, with certain information, but, in spite of two reminders it was not done. Therefore he suggested the RS Ombudsman to take legally provided measures to obtain required information to the applicant.
Since the applicant was not provided with the requested information, the Ombudsman recommended the Tourist organization of Republika Srpska, as soon as it receives the recommendation, pursuant to Article 14 of the Law on Freedom of Access to Information to do the following
- take all regular measures to gather requested information and consider all the facts and activities relevant to processing the request of the applicant D.M.,
- should the access to information be granted fully or in part, the public body in question shall, with no further delay, inform the applicant about the possibility of personal access to information, possibilities of copying it, estimated costs of copying the material and other as provided for in Article 14, paragraph 2, item b of the Law,
- should the access to information be denied fully or in part, the public body in question shall, pursuant to Article 14 paragraph 3 items a and b Zakona,
- with no delay (within 30 days) to appoint liaison officer to process the requests for access to information pursuant to the Law and inform the Ombudsman on his hers identity, together with contact data,
- with no delay (within 60 days) to submit the guide to the Ombudsman of Republika Srpska, pursuant to Article 20 of the Law on Freedom of Access to Information,
- within 30 days following the receipt of this Recommendation (from the delivery date) to inform the Ombudsman on its realization.

The Tourist organization of Republika Srpska, on 29.05.2007 informed the Ombudsman that the liaison officer was appointed pursuant to the the Law on Freedom of Access to Information that publishing of the guide on free access to information attached to the letter is under way. Further on, it is mentioned that the particulars on the liaison officer will be submitted to the Ombudsman very soon.

Case No.2 (2006)
The RS Ombudsman, the Office of Banja Luka under number 2832-1808/2006 registered an application of J.M. from Banja Luka for violation of the right to free access to information pursuant to the provisions of the Law on Freedom of Access to (“Official Gazette of RS”, No.20/01). In her application to the Ombudsman she pointed out that she approached the City of Banja Luka – General Information Department – Market Inspections asking them to furnish her with the information on the seat of the SZR "ILIGRAF" Banja Luka, however, this information was not provided in legally specified deadline.

Following the intervention of the Ombudsman, the required data were submitted to the requestor.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
1. How many cases (complaints or notifications) have you received?

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
  10 (2008)

- due to decision by which access to information has been rejected?
  78 (2008)

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
Most of the cases.

3. For Information Commissioners:

3.1 How many decisions of the body of first instance have you changed?
No trustful information available.

3.2 Are your decisions legally binding?
No.

3.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?

- By the bodies of first instance, holders of the document?
  NA

3.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?

NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

Federal Law of 14 April 1994 on Access to Administrative Documents
Royal Decree of 29 April 2008 concerning the composition and functioning of the Commission for access to and reuse of administrative documents

The King establishes by a royal decree deliberated in the Council of Ministers the composition and the functioning of that Commission.

§ 2. When the applicant has difficulties to have access or to change an administrative document on ground of this law, he can address to the federal administrative authority a demand of reconsideration. At the same time, he asks that the Commission gives an advice.
The Commission communicates his advice to the applicant and the federal administrative authority concerned within 30 days after the reception of the demand. In case of absence of this advice is the prescribed time, the advice is not taken into account.
The federal administrative authority communicates its positive decision or its refusal on the demand of reconsideration to the applicant and to the Commission within 15 days after the reception of the advice of the Commission or in the delay the advices had to be communicated. If the communication of the decision is not done in time, the authority is considered to have refused the demand.
The applicant can introduce an appeal against that decision in conformity with the laws on the Counsel of State. The appeal before the Counsel of State must be accompanied by the advice of the Commission.

§ 3. The Commission can also be consulted by a federal administrative authority.

§ 4. The Commission can on its own initiative, give an advice on the general application of the law on access to administrative documents. She can send to the legislative power propositions concerning its application and a possible revision.

Royal Decree of 29 April 2008:
Art. 8. The Commission executes her takes in complete independence and neutrality. In the treatment of the demands for advice or appeals, she can receive instructions.
Art. 19, § 1. The section access to administrative documents can, if she has received a demand for advice, look at all information in situ or asked for it by the federal, provincial or communal administrative authority concerned.
She can also hear all parties concerned and specialists and ask the personnel of the federal, provincial or communal administrative authority concerned for additional information.

5. Please explain complaint procedure according to FOIA
   - following the decision of the body of first instance (where can the applicant primarily seek legal protection):
     The applicant has to make to steps:
     - demand for a reconsideration
     - demand for an advice to the Commission for Access to Administrative Documents.
     Or he can immediately go to court.
     The Commission has 30 days to make an advice and sends it to the applicant and to the administration. Afterwards the administration has 15 days to take a new decision.

   - following the decision by the Information Commissioner or Ombudsperson (which court):
     Against the decision of the administration on the demand for consideration: possibility to go to the Council of State (objective conflict) or to the normal courts (subjective right).

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?
   See the answer below.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
   See the answer below.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
   The person is in the first step not involved in the decision if the exception on damage to the protection of privacy is at stake. Only when that answer is positive answered the person to whom the data in question relate is asked if he agrees to make the information
available. This second step is foreseen in the law itself. If the person doesn’t agree, there is no disclosure of the information.

7. What are your competences during the procedure of investigation?
NA

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
NA

7.2 Are you authorised to examine computer or information system of the body?
Yes

7.3 Are you authorised to enter the premises of the body without its consent?
Yes

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes

7.5 Are you authorised to question civil servants?
Yes

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
The Commission can ask for it.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
(See below)
8.1 Is there a public interest test in FOIA? Please attach text of relevant article.

Yes.

Art. 6, § 1. A federal or non federal administrative body refuses the demand of consultation, explanation or communication in the form of a copy of an administrative document if it esteems that the interest of access is not weighting higher that the protection of the following interests:
1° the security of the population;
2° the liberties and fundamental rights of the citizens;
3° the federal international relations of Belgium;
4° the public order, the security or national defence;
5° the acquisition and prosecution of penal facts;
6° a federal economic and financial interest, the money or the public credit;
7° the confidential nature of information of enterprises or fabrication communicated to the administration;
8° the secret of the identity of the person who has communicated a document or information to the administrative body confidential for denouncing a penal fact or a fact that is supposed to be penal

8.2 Is there a harm test in FOIA? Please attach text of relevant article.

Yes.

Art. 6, § 2. A federal or non federal administrative body refuses the demand of consultation, explanation or communication in the form of a copy of an administrative document if the making public of the administrative document will damage:
1° the privacy, unless the person concerned has given his written consent preliminary to make public the document;
2° a secrecy obligation established by law;
3° the secrecy of the deliberations of the federal Government and the responsible authorities linked to the federal executive power.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?

NA

8.4 Can you use Constitution or any other law which allows weighing tests?

NA
9. Please describe briefly two of the most difficult cases from 2006 and 2007.

**Case 1:** access of one player on the market of Telecommunications to have access to documents of the Belgian Institute for Postal Services and Telecommunications: plans that are made by an other firm that are protected by intellectual property legislation. These plans are used to calculate prices the Telecommunication firm is allowed to ask.

**Case 2:** access to information of a concurrent pharmaceutical firm to its demand to enter the market of a generic drug.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
1. How many cases (complaints or notifications) have you received?
CROATIAN OMBUDSMAN DOES NOT RECEIVE INFO REQUESTS IN SENSE OF FOIA, IN 2007. WE RECEIVED ONLY ONE REQUEST WHICH WAS PROCESSED AND SOLVED WITHIN PRESCRIBED TIMEFRAME. WE GENERALLY PROVIDE INFORMATION AND ADVISE TO CITIZENS. The ombudsman’s mandate is to react against state administrative bodies and bodies vested with public powers. Here we apply General Administration Act.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?
NA

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
NA

3. For Ombudspersons:

3.1 In how many cases has your recommendation proved as correct in the court proceeding?
NA

3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
NA

3.3 In how many cases have your recommendations not been successful?
NA
3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
NA

3.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she miss the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?
NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law – please attach relevant article)?
NA

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):
This is one of several shortcomings in the Croatian FOIA: the applicant can appeal to “the head of the first instance body”! AND AFTER TO THE ADMINISTRATIVE COURT.

- following the decision by the Information Commissioner or Ombudsperson (which court):
WE DO NOT HAVE INFORMATION COMMISSIONER.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?
NA

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
NA

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or
is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA

7. What are your competences during the procedure of investigation?
NA

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
NA

7.2 Are you authorised to examine computer or information system of the body?
NA

7.3 Are you authorised to enter the premises of the body without its consent?
NA

7.4 Do you have the possibility to conduct so called in camera inspection?
NA

7.5 Are you authorised to question civil servants?
NA

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
NA

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
NA

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
NA
8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
NA

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
ANOTHER SHORCOMING IN CROATIAN FOIA: NO THREE-PART TEST

8.3 If neither of the two tests exist does that mean that there is no weighing and that a
document which fits in definition of any of the exemptions is a priori unavailable (absolute
exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
NA

10. If annual reports for 2006 and 2007 are available in English (which will be official
language of the conference) in electronic format, please attach them.
CROATIAN ANNUAL REPORTS, PUBLISHED BY THE CENTRAL STATE ADMINISTRATIVE OFFICE, IS
NOT AVAILABLE IN ENGLISH.
1. How many cases (complaints or notifications) have you received?
1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?

In 2006 the Parliamentary Ombudsman received a total of 230 complaints concerning requests for disclosure (out of a total of 3,764 overall complaint cases). Of these 230 cases, 154 were complaints regarding refusal of disclosure requests and 76 were complaints about the case processing time in disclosure cases.

In 2007 the Parliamentary Ombudsman received a total of 246 complaints concerning requests for disclosure (out of a total of 3,732 overall complaint cases). Of these 246 cases, 158 were complaints regarding refusal of disclosure requests and 88 were complaints about the case processing time in disclosure cases.

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?

In 2006, 179 of the 230 cases were rejected for formal reasons (lodged too late, outside our jurisdiction, unused channel of complaint, etc.). 51 cases were investigated to conclusion. In 23 of these 51 cases, the authority in question received criticism and/or recommendations.

In 2007, 212 of the 246 cases were rejected for formal reasons. 34 cases were investigated to conclusion. In 16 of these 34 cases, the authority in question received criticism and/or recommendations.

3. For Ombudspersons:

3.1 In how many cases has your recommendation proved as correct in the court proceeding?

See the answer below.
3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?

See the answer below.

3.3 In how many cases have your recommendations not been successful?

See the answer below.

3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?

See the answer below.

3.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?

Pursuant to section 22 of the Danish Ombudsman Act, the Danish Parliamentary Ombudsman may express criticism, make recommendations and otherwise state his or her views of a case. Thus, the ombudsman’s statements are not binding.

In a case where a citizen has been refused access to public records, any recommendation from the ombudsman will seldom be that the authority in question should disclose the requested records. In most cases the ombudsman will “settle” for criticising that the authority has refused access according to a specific freedom of information act provision. In such cases the ombudsman will recommend that the authority resumes the case and again considers whether access to the records in question can be granted after all. Sometimes the authorities will resume the case but still exempt the records on the grounds of a different provision. In such cases the ombudsman’s recommendation will be considered to have been followed.

It is rare that the ombudsman’s recommendations are not complied with. In 2006 and 2007 this has only happened once in cases relevant to this questionnaire. That one instance concerned a case which did not directly involve disclosure but concerned a situation in which the Danish prime minister had refused to give an interview to a journalist.

Should an authority as an exception refuse to comply with a recommendation to change or reconsider a decision, the ombudsman may recommend that the citizen be granted free legal aid for legal proceedings against the authority.

Pursuant to section 63 of the Danish Constitution the courts of justice are empowered to try the public administration’s decisions. This also includes decisions which have previously been considered by the ombudsman. Thereby, the ombudsman’s statement in the case
figures as an element in the legal proceedings, and the court will often examine the statement indirectly.

The ombudsman’s opinion will most often be followed in the few cases which are brought before the courts subsequent to the ombudsman’s investigation. In recent times, only one case has been brought before the courts after investigation by the ombudsman as to the question of access to public records, and the ombudsman’s opinion was followed in this case.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

The ombudsman’s competence in disclosure cases is the same as in all other cases where a citizen complains about a decision or about the case processing of the public administration. Thus, the competence follows the general provision in section 7 of the Ombudsman Act (please see our homepage www.ombudsmanden.dk for the full text) which states that the jurisdiction of the ombudsman extends to all parts of the public administration.

5. Please explain complaint procedure according to FOIA

- following the decision of the body of first instance (where can the applicant primarily seek legal protection):

See the answer below.

- following the decision by the Information Commissioner or Ombudsperson (which court):

Disclosure requests concerning documents that form part of a case in which an administrative authority has made, or will make, a decision shall be decided by the authority which is to decide on the real point of the case. Disclosure requests which are not part of a decision case are decided by the authority in possession of the requested document(s).

Decisions regarding disclosure requests may be appealed specifically to the authority which is the complaint instance in relation to the decision or to the processing otherwise of that case which the disclosure request concerns.

Complaints concerning decisions which may be appealed to another administrative authority cannot be lodged with the ombudsman until that authority has made a decision on the matter. This means that in those cases where it is possible to complain about a refusal of disclosure to another administrative authority, this possibility must be exhausted before a complaint may be lodged with the ombudsman.
With regard to the last part of Question 5, and as mentioned above under Question 3.2: Pursuant to section 63 of the Danish Constitution the courts of justice are empowered to try the public administration’s decisions. This also includes decisions concerning requests for disclosure, even when they have previously been considered by the ombudsman.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate? See the answer below.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)? See the answer below.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?

Pursuant to section 12(1)(1) of the Danish Access to Public Administration Files Act, the right to access does not include information about individuals’ private and/or financial circumstances. The provision is absolute in the sense that confidentiality is not conditional on a concrete weighing of interest but is solely dependent on whether the document(s) requested contain information concerning “the private circumstances of individual persons, including their finances”.

If the ombudsman receives a complaint about a refusal to disclose such information, we do not consider the person to whom the information relates as a party to the case. However, according to circumstances we inform the person that data about him or her is being processed pursuant to the provisions of the Danish Act on Processing of Personal Data (which implements the Directive on the protection of personal data).

7. What are your competences during the procedure of investigation? See the answer below.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?
See the answer below.

7.2 Are you authorised to examine computer or information system of the body?
See the answer below.

7.3 Are you authorised to enter the premises of the body without its consent?
See the answer below.

7.4 Do you have the possibility to conduct so called in camera inspection?
See the answer below.

7.5 Are you authorised to question civil servants?
See the answer below.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
See the answer below.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data…)?
The Danish Parliamentary Ombudsman considers cases on a written basis.

The authorities are obliged to furnish the ombudsman with that information and to hand over those documents, etc. which the ombudsman asks for.

The ombudsman is entitled to receive all information and documents, whether they be drafts, internal notes, protocols, data stored electronically or in networks, etc. The decisive factor is whether the information or document must be assumed to be of importance to the ombudsman’s investigation of the case.

Thus, also in disclosure cases the authorities are obliged to give the ombudsman access to see those documents, or that information, which have been exempt from disclosure. Usually, the documents will be sent to the ombudsman but in certain cases – where, for instance, there are a lot of documents – the ombudsman may also examine the documents on the authority’s premises.
8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
See the answer below.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer below.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
See the answer below.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
See the answer below.

8.4 Can you use Constitution or any other law which allows weighing tests?
The Danish Access to Public Administration Files Act does not contain a “public interest test”.

As mentioned above, the act contains an absolute exemption with regard to information concerning an individual person’s private circumstances, including their finances.

In addition, the act contains exceptions with regard to business secrets (section 12(1)(2)) and with regard to information which it is necessary to keep confidential out of regard for specific public or private interests (section 13(1-6)). The provisions are as follows:

“Section 12(1)(2). The right to access to administration files shall not apply to...
(2) information on technical plant or processes or on operating or business procedures or the like, provided it is of material importance to the economy of the person or enterprise that grant of the request be refused.”

Section 13. The right of access to administration files may be subject to limitation where protection is essential with regards to
(1) the security of the State or the defence of the realm;
(2) protection of Danish foreign policy or of Danish external economic interests, including relations with foreign powers or international institutions;
(3) prevention and clearing-up of any infringement of the law, prosecution of offenders, execution of sentences and the like, and protection of persons accused, of witnesses or others in matters of criminal or disciplinary prosecution;
(4) implementation of public supervision, control, regulation, or planning activities, or of measures planned under taxation law;
(5) protection of public financial interests, including interests relating to public commercial activities; or
(6) protection of private or public interests where secrecy is required because of the special nature of the matter.”

As is apparent, these are not absolute exceptions. Information about business matters, etc. may only be exempted if it is of vital importance to that person or company to whom the information relates that the request not be granted. Information may only be exempted out of regard for the special interests mentioned in section 13 if it is deemed necessary for the protection of important interests. The provisions are therefore only applicable if the granting of access according to a concrete assessment must be considered to result in immediate danger of substantial damage to the interests mentioned.

With regard to disclosure of environmental information, the exceptions are even more restricted. In these cases a concrete weighing of the public interest in granting the disclosure as opposed to the interest in refusing disclosure must be carried out.

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

1. In connection with an action plan to reduce the growing use of antibiotics in the pork industry, the Danish Veterinary and Food Administration (DVFA) invited 18 of the veterinaries prescribing most antibiotics for pigs to a meeting with the DVFA. The invitation stressed that this was not a measure meant to result in fines or police reports for the individual vets but that the intention was to open up a dialogue.

A citizen requested disclosure of the names of the 18 vets but the DVFA refused the request with reference to the provision in section 12(1)(2) of the Access to Public Administration Files Act about trade secrets. The DVFA alleged that a disclosure might give the impression that the vets' prescription of antibiotics was illegal and/or disproportionately high and this could mean that the vets' clients would opt out of using the vets. In the DVFA's opinion, there was consequently an immediate risk that the publicity could have a serious effect on the competitive power of the vets and thereby also lead to financial repercussions for them.

The citizen appealed the decision to the Ministry for Family and Consumer Affairs which maintained the DVFA's decision. The citizen then lodged a complaint with the ombudsman.

The ombudsman stated that the risk of an applicant or others abusing or misunderstanding the information to which the applicant is granted access in
accordance with the act cannot ordinarily be considered important when the authorities consider requests for disclosure. Notwithstanding that the authorities in the case had deemed that the risk of damaging effects was imminent, the ombudsman did not think that the risk was sufficiently substantiated and convincing in such a way and to such a degree that the authorities could rightfully refuse disclosure on the basis of section 12(1)(2) of the act. In this connection the ombudsman referred particularly to the fact that the grounds for the risk assessment was of a general nature and was not, e.g., substantiated by concrete experience of material damaging effects following disclosure in similar cases. On this basis the ombudsman recommended to the ministry that the case be resumed and a new decision made to grant access to the information.

2. A journalist complained to the ombudsman that the Ministry of Refugee, Immigration and Integration Affairs had refused her access to documents concerning international meetings in Vienna and Pristina concerning deportation to Kosovo of rejected asylum seekers. As grounds for limiting the access to documents the ministry had referred to section 13(1)(2) of the Access to Public Administration Files Act. According to this provision the right to access may be restricted to the degree necessary for essential protection of Danish foreign policy or Danish external economic interests, including relations with foreign powers. Prior to giving the refusal, the ministry had asked the other countries involved in the meetings for their response to a granting of the request. One country opposed the release of the information while others stated that they had already released the documents in accordance with their respective freedom of information acts. The ombudsman stated that the countries' subsequent notifications regarding the disclosure issue seemed to reflect a considerable level of doubt as to their respective assumptions about the confidentiality of the information given as part of the international cooperation with regard to deportation. As the information was already subject to disclosure in several of the countries, this could also give rise to a certain doubt as to whether any reservations regarding discretion had been observed and respected. The ombudsman thought that this doubt should have given the ministry occasion to examine whether the reservation regarding discretion which was mentioned in the ministry's decision presented the required clarity and security when the information was given, and whether it had been observed and respected in practice by the other participating countries.

Considering that only one country had opposed the release of the information, the ombudsman was of the opinion that the ministry had not had the required basis for assuming that the information was confidential and subject to professional secrecy, and that neither did the ministry therefore have the requisite grounds for refusing disclosure with reference to section 13(1)(2) of the Danish Access to Public Administration Files Act.
10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.

The ombudsman's disclosure cases are part of the usual annual report which thus also contains many other case types.

Regrettably, the full annual reports are only available in Danish, and the 2007 report is not submitted and published yet.

An abbreviated annual summary in English is published and can be found on our homepage, www.ombudsmanden.dk, though not for 2007 yet of course.
Germany

Preliminary remarks
The German Federal Freedom of Information Act (FOIA) is applicable for the federal public sector only. This includes the Federal Government and any public body, authority or agency on the federal level. Therefore the Federal Commissioner for Data Protection and Freedom of Information is monitoring FOI issues exclusively on the federal level. Consequently the figures and answers given below are referring to the federal public sector only.

On the level of the federal states (Laender) currently in 10 out of 16 Laender FOI legislation exists. In 2 of them a commissioner is not established. The Laender and municipal administrations altogether are much bigger than the federal administration and they have - due to their tasks in the federal system - the closer contact to the citizens. Thus, the figures concerning the federal sector could show only a small extract of the overall figures in Germany.

Therefore the number of cases and complaints is many times higher than the figures suggest.

1. How many cases (complaints or notifications) have you received?
2006: 196 written requests and complaints by citizens.
2007: 122 written requests and complaints by citizens.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?
In our statistics we sum up these 2 categories and do not register them separately.
2006: 119 out of 196 cases (61 per cent) concerned the inactivity of the body or the rejection of FOI requests.
2007: 90 out of 122 cases (74 per cent).

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
NA
3.1 For Information Commissioners:

3.1.1 How many decisions of the body of first instance have you changed?
NA

3.1.2 Are your decisions legally binding?
NA

3.1.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?
- By the bodies of first instance, holders of the document?
NA

3.1.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?
NA

3.2 For Ombudspersons:

3.2.1 In how many cases has your recommendation proved as correct in the court proceeding?
NA

3.2.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
NA

3.2.3 In how many cases have your recommendations not been successful?
NA

3.2.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
NA

3.2.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops
the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?

Since the German Information Commissioners act as Ombudspersons in the meaning of this questionnaire there is no formal procedure the Commissioner has to follow to. If an applicant decides to appeal to the Commissioner this consequently does not suspend the time limit of one month to appeal to the court.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

FOIA refers to the relevant sections of the Federal Data Protection Act (FDPAct) defining the competences of the Federal Data Protection Commissioner (see Sec. 12 FOIA in conjunction with Sec. 24 to 26 FDPAct).

5. Please explain complaint procedure according to FOIA

- following the decision of the body of first instance (where can the applicant primarily seek legal protection):

The applicant may seek legal protection either by appealing to the Commissioner or by following the administrative court procedure. Both procedures are independent from each other and may be followed in parallel.

- following the decision by the Information Commissioner or Ombudsperson (which court):

Regardless a decision or even a procedure before the Commissioner at all an applicant may always challenge a rejection of an FOI request by appealing to the court.

According to the Administrative Court procedural law as a first step the applicant has to file an objection on which the superior authority decides. If the superior authority dismisses the objection (or does not react within 3 months) the applicant may appeal to the administrative court.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

See the answer below.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?

The public authority holding the requested information is obliged to inform any third party whose interests are affected by the information request. Third party includes natural persons whose personal data are concerned (data subjects).

The third party is granted the opportunity to submit a written statement within one month. Based on the statement and all additional relevant aspects the authority has to balance the interests of the applicant and the data subject. The applicant would obtain the requested information if his/her interest outweighs the data subject’s interest to have the personal data excluded from access. If special categories of personal data within the meaning of Art. 8 Directive 95/46/EC are concerned an explicit unambiguous consent by the data subject is needed.

7. What are your competences during the procedure of investigation?

See the answer below.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?

In principle, the Commissioner has the same competences as in his role as Data Protection Commissioner. That includes the right to carry out on-site inspections regardless whether the procedure is pending or not.

7.2 Are you authorised to examine computer or information system of the body?

Yes.

7.3 Are you authorised to enter the premises of the body without its consent?

Yes.

7.4 Do you have the possibility to conduct so called in camera inspection?

Yes.

7.5 Are you authorised to question civil servants?
Yes (and they are obliged to cooperate).

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes. Also staff members could have access provided that they passed a security check.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
Yes.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
See the answer below.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer below.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
There are some provisions (Sec. 5, 6) in the Federal FOIA concerning the balance of interests in certain cases:
- If personal data are concerned access to information is granted only if the applicant’s interests to obtain the information outweigh the interests of the data subject to exclude the information from being disclosed, Sec. 5 (1) 1 FOIA.
- If sensitive data in the meaning of Sec. 3 (9) of the FDPAct (=Art. 8 Directive 95/46/EC) are concerned the data subject has to give his/her explicit consent, Sec. 5 (1) 2 FOIA.
- If HR related data, data on a (political) mandate or data protected by an official or professional secrecy are concerned the interest of the applicant shall not predominate, Art. 5 (2) FOIA.

If the third party has submitted a statement in proceedings as a consultant or expert the applicant’s interest shall generally outweigh the third party’s interests if the information is limited to name, academic title, profession, official address and contact details, Sec. 5 (3) FOIA.
8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
Constitution: principally yes
Other law: no

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

1. A number of applicants wants to have access to a contract concluded between the Federal Ministry of Transport, Building and Urban Affairs and a consortium which runs the toll system for heavy vehicles (trucks) on the German Highways (“Autobahnen”).

The Ministry rejected the application arguing that the contracting parties concluded on the confidentiality of the content of the contract and that the entire contract is a business secret of the consortium. Additionally the Ministry justified the rejection with pending arbitration proceedings between the Ministry and the Consortium (concerning contractual penalties due to a considerably delayed start of the system).

The applicants lodged a complaint to the commissioner and at least one of the applicants filed a claim with the Administrative Court.

The Commissioner was not convinced by the arguments of the Ministry:
- Clauses on confidentiality are usually void. Otherwise this could be a very simple possibility to avoid the complete application of the FOIA. Exemptions of the FOI principle have to be provided for in the FOIA.
- Considerable parts of the contract do not contain business secrets of the consortium. At least this applies to the contract itself whereas the numerous attachments containing the technical details of the system may contain business secrets. Additionally there is no real competitive environment.
- The commissioner agrees that arbitration proceedings have to be considered as judicial proceedings in the meaning of Sec. 3 Nr. 1 g FOIA. The ministry agreed that this exemption protects only those information which are relevant to the proceedings. But there is still a dissent to what extent information is relevant.

The Administrative Court dismissed the claim. The claimant appealed against this decision with the Higher Administrative Court. The proceedings are still pending.
2. A number of applicants want to have access to names and addresses of recipients of EU subsidies in the agricultural sector. The information is held by different authorities among others a customs office.

The customs office rejected the application arguing that the information is protected by the business secrets of the agricultural enterprises.

The commissioner’s opinion is that this information does not constitute a business secret. The disclosure of this information would not cause an economic damage of the enterprises. Anyway there is no competition on being funded by subsidies.

In parallel the applicants took legal action with the Administrative Court. The court agreed with the Commissioner’s opinion. Since the Customs office appealed the case with the Higher Administrative Court the case is still pending.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.

There is no English translation of the annual reports available.
1. How many cases (complaints or notifications) have you received?
About 1800 (since 1995). This total contains about 300 cases giving opinions on draft legislation related to with FOI. About half of 1500 cases are so called consultation questions submitted by public bodies. The amount of complaints takes about 750.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
About half of 750 complaints.

- due to decision by which access to information has been rejected?
About half of 750 complaints.

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
The proportion of the unjustified complaints is not more then 5% of cases.

3.1 For Information Commissioners:

3.1.1 How many decisions of the body of first instance have you changed?
We have not an exact data. According to our estimation in 80% of cases.

3.1.2 Are your decisions legally binding?
No. Therefore the Commissioner’s statements and recommendations related to FOI are not revised by court.

3.1.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
Nobody has initiated judicial proceeding against the Commissioner’s FOI decision because it is not legally binding.

According to Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Public Information (hereinafter: DP&FOIA) the applicant may choose:
- in the case of any violation of the access to public information, the applicant may reported to the information commissioner or
- may applied to the courts.

- By applicants?
- By the bodies of first instance, holders of the document?
NA

3.1.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?
NA

3.2 For Ombudspersons:

3.2.1 In how many cases has your recommendation proved as correct in the court proceeding?
There is no such a judicial review process.

3.2.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
In about 80-90% of cases.

3.2.3 In how many cases have your recommendations not been successful?
In about 10-20% of cases each year.

3.2.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
There is no correct information.

3.2.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?
NA
4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?
Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Public Information

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):
Anyone may report to the Commissioner if he thinks his right have been violated, or that there is an imminent danger thereof, in connection with access to public information, except when judicial proceedings are already pending concerning the case in question. In performing his tasks the Commissioner may request the body to supply information on any question that might be related to public information, and he may inspect all such documents.
The Commissioner may enter any premises where data are processed.
The secrets shall not prevent the Commissioner from exercising his rights, but the provisions on confidentiality shall be binding on him as well. In cases of data processing involving state or service secrets the Commissioner shall exercise his rights in person or through members of his staff who passed the national security screening initiated by him.
The Commissioner’s statements and recommendations are not legally binding.

- following the decision by the Information Commissioner or Ombudsperson (which court):
The applicant may institute court proceedings if his application for public information is refused. The burden of proof that the refusal was lawful and well-founded shall lie with the data processing organ. There is no defined any special court in these cases.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?
6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
The data protection and right of access to public information have been enshrined in the Constitution of Hungary since 1989. DP&FOIA sets out the rules on the exercise of these two rights together.
According to DP&FOIA the definition of public information is the following:
‘Public information’ shall mean any knowledge and information, not falling under the definition of personal data, processed by an organ or person performing a state, local government or other public function determined by law regardless of the method or format in which it is recorded and its independent or collected character.

So protection of personal data is not one of the exceptions in Hungarian FOI regime, not part of the right to access, it is an independent constitutional right. The two informational rights are ruled parallel in DP&FOIA.

According to the DP&FOIA personal data shall not be processed unless the data subject has given his consent; or ordered by an Act, or – based on authorisation conferred by an Act, and within the range of data specified therein – ordered by a local government decree.

The Hungarian Commissioner is responsible for data protection and freedom of information both.

The conflicts of these rights have caused difficulties for beginning. The Commissioner has stated many times, that the transparency of public sphere is not guaranteed without the access to certain personal information on activity of public function holders.

The amendment of the DP&FOIA of 2005 in harmony with Commissioner’s proposals has intended to solve this problem. The new regulation is the next:
Unless otherwise prescribed by law, the personal data of any person acting in the name and on behalf of the State or local public authorities and agencies connecting with his public duties, shall be deemed public information.

With regard to this way of regulation the persons to whom the data in question relate are generally not involved in the Commissioner’s investigations.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA
7. What are your competences during the procedure of investigation?
7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?
Yes.

7.2 Are you authorised to examine computer or information system of the body?
Yes.

7.3 Are you authorised to enter the premises of the body without its consent?
Yes.

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes.

7.5 Are you authorised to question civil servants?
Yes.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
Yes.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
No.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
Verbatim there is no harm test in Hungarian FOI regime. But there are some similar provisions.

In connection with the decisions-making process the DP&FOIA says the following:
Any data compiled or recorded by a public body as part of and in support of a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these data may be authorized by the head of the agency that controls the data in question.

A request for disclosure of data underlying a decision may be rejected after the decision is adopted, but within the time limit referred to in Subsection (1), if disclosure is likely to jeopardize the agency’s legal functioning or the discharging of its duties without any undue influence, such as in particular the freedom to express its position during the preliminary stages of the decision-making process on account of which the data was required in the first place.

In connection with the protection of trade secrets the Act IV of 1959 on the Civil Code contains the next provision:

Business secrets shall comprise all of the facts, information, conclusions or data pertaining to economic activities that, if published or released to or used by unauthorized persons, are likely to imperil the rightful financial, economic or market interest of the owner of such secrets, provided the owner has taken all of the necessary steps to keep such information confidential.

Any data that is related to the central or local budget; the appropriation of moneys received from the European Communities; any subsidies and allowances in which the budget is involved shall not be deemed business secrets, unless data pertaining to technological procedures, technical solutions, manufacturing processes, work organization, logistical methods or know-how.

**8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?**

In the Hungarian FOI regime there is no absolute exemption because of the constitutional right character of the access.

**8.4 Can you use Constitution or any other law which allows weighing tests?**

The Hungarian Constitution does not allow weighing test it prescribes only the next:

Article 61

(1) In the Republic of Hungary everyone has the right to freely express his opinion and furthermore and distribute of public information.
9. Please describe briefly two of the most difficult cases from 2006 and 2007.

2006:
The provision of the Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Public Information (DP&FOIA) Article 19 paragraph (4) on the disclosure certain data of people performing public duties effective as of 2005 would raise various questions of interpretation. Pursuant to this provision: „Unless otherwise stipulated by the Act, data of public interest are the personal data of the person acting on behalf of organisations specified in paragraph (1) relevant from the aspect of his tasks, as well as personal data of other persons performing public duties relevant from the aspect of his tasks. With respect to access to these data, the provisions of the Act applicable to the access to data of public interest must be applied.” Submissions received for this subject during the year 2006 addressed almost all elements of the new provision. In connection with the cases, it was proved true that the earlier warning of the Commissioner had been reasonable: modification of the DP&FOIA without amending Acts regulating legal relationships of persons performing public duties would make broad application of the new provision cumbersome. For this reason, the Commissioner started an ex officio investigation to determine the fields where the Acts must be harmonised.

The investigation explored that the amendment of the DP&FOIA effective as of June 2005 is already a relevant step toward the resolution of the conflict of the two rights. This modification, however, was not accompanied by the modification of the Acts regulating the legal status of employees working in different fields of public life (such as civil servants, public servants, prosecutors, judges, forensic employees, professional members of the armed forces, professional soldiers of the Hungarian Army). Today, these Acts allow the disclosure of personal data of the persons acting on behalf of the organisations performing public duties in different ways and in a very narrow scope. In addition, with respect to other data they - indirectly - prohibit disclosure. Because of this, amendment of the DP&FOIA has not brought relevant changes, since the earlier restricting rules continue to exist and be effective as exemptions from the effect of the DP&FOIA. As a consequence, there is a significant risk that Article 19 paragraph (4) will become practically empty and forceless for most of the concerned individuals.

Based on the entire praxis of the Commissioner, the recommendation summarises the possible aspects of interpreting new provisions of the DP&FOIA: which organisations belong to the group of organisations performing public duties, who can be regarded as a person performing public duties, which data can be related to the tasks and authority of the persons performing public tasks. The recommendation also addresses in detail the characteristics of the basic data registers related to the employment of the persons performing public duties. Based on this, the Commissioner states that the currently effective regulations applicable to the basic data registers should be revised, because both the logic and certain provisions of the regulation are in conflict with Article 19
paragraph (4) of the DP&FOIA. For this reason, the Commissioner invited the Minister heading the Prime Minister's Office to review together with the other competent ministers the laws regulating the legal status of the persons performing public duties, and to initiate the necessary modifications in order to ensure harmony with the DP&FOIA.

2007:

A citizen wanted to access the contents of the contractor agreement entered into by the National Infrastructure Development Corporation (Zrt.) and a consortium, but its request was denied with the reasoning that the content of the contract is business secret, and is not to be considered as public information.

In its position, the Commissioner stated that the Zrt. is a State owned company responsible for the construction of the motorway network, which performs public duties. The Act on the State Budget prescribes the obligation for the electronic publication of specific contractual data. Both the Ministry of Economy and Transport and the Zrt. comply with this obligation. However, this rule cannot be taken so as to mean that only this narrow scope of data is public from the data of the contracts, and other information could be sealed off from disclosure.

The Commissioner stressed that motorway construction contracts, as contracts signed by an organisation performing public duties related to the use of public funds on the subject of activities of public interest, are fundamentally public, and the only data that can be managed as business secret is data regarding the confidentiality of which data subjects have actual lawful interest in line with the Civil Code. The investigation determined that the wording of the contract did not contain any information which may be regarded as business secret. The Commissioner requested that the Zrt. review its practice related to contracting and the disclosure of contracts. Finally, both the Ministry of Economy and Transport and the Zrt. accepted the position of the Commissioner, including both the concrete case and general practice.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.


The annual report of 2007 will be published soon on our website.
1. How many cases (complaints or notifications) have you received?
In the first 2 years of the application of the Law on Free Access to Public Information in the Republic of Macedonia, ending with September 1, 2008, the Commission received 945 cases, out of which 904 are complaints and the others are general contacts with the information holders and the applicants for information, as a part of the regular communication.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
NA
- due to decision by which access to information has been rejected?

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
No records.

3. For Information Commissioners:

3.1 How many decisions of the body of first instance have you changed?
For the same period the Commission adopted 225 decisions that accept the complaints, 38 decisions are returned for a second review; 514 conclusions for stopping the procedure are adopted, because the information holder issued the information after an intervention by the Commission, 116 decisions for rejection of the complaints on different grounds are adopted. 11 complaints are partially accepted and partially rejected. 7 complaints are in procedure. The decisions are obligatory.

3.2 Are your decisions legally binding?
See the answer above.

3.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?
3.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?

No records. In the meantime, in the RM, the jurisdiction of the Supreme Court for the FOI cases was terminated and a new Administrative Court authorized for this field was formed. The transfer of the cases from the one to the other Court prevents us from obtaining the precise number of cases.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

The procedure for submitting complaints is described in the Law on Free Access to Public Information, in the articles 27, 28 and 35. Quotation-article 28, paragraph 1. (see www.komspi.mk)

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):
- following the decision by the Information Commissioner or Ombudsperson (which court):

The same answer as above. The Commission is the first degree of legal protection.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

In the RM there is a special Direction with jurisdiction in the field of protection of personal data. In the cases where the requested documents contain personal data, the Commission contacts the mentioned Direction.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?

See the answer above.
6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
See the answer above.

7. What are your competences during the procedure of investigation?
The Commission does not have special authorization to conduct investigations.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
See the answer above.

7.2 Are you authorised to examine computer or information system of the body?
NA

7.3 Are you authorised to enter the premises of the body without its consent?
NA

7.4 Do you have the possibility to conduct so called in camera inspection?
NA

7.5 Are you authorised to question civil servants?
NA

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
The members of the Commission possess certificate for viewing all degrees of classified documents.

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
NA
8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity? In such cases we always apply the test in 3 parts (test of public interest) in order to determine the predominant public interest.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer above.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
NA

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
First case: Police intervention case. A citizen requests a description of the police action, names of participation officers, “modus operandi” etc. The Commission inspected the requested documents, and after the application of the public interest test, decided that the protection of personal data and of safety of the police methods is predominant.

Second case: Doubt for conflict of interests. A state official person, active on several important state posts refuses to give information requested by a journalist, concerning the paid taxes. The Commission invited the mentioned person to reveal the information himself, pointing out that the public interest is bigger than the requested data. The journalist informed the Commission that he obtained the requested information.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
I believe that the Annual report for 2007 will be available in English by the beginning of the Conference. See: www.komspi.mk
Norway

1. How many cases (complaints or notifications) have you received?
The Parliamentary Ombudsman of Norway received a total of 2,027 complaints in 2006 and 2,126 in 2007. Of these 91 and 91, respectively, concern access to information.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
A total of 305 complaints in 2006 and 358 in 2007 concern absence of reply or inactivity. Unfortunately, I do not have statistics on how many of these cases are related to access to information.

- due to decision by which access to information has been rejected?
See the answer above.

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
Of the 91 cases related to access to information in 2006, 19 were closed with criticism or recommendation. Of the 91 cases on this field in 2007, 20 were closed with criticism or recommendation.

3. For Ombudspersons:

3.1 In how many cases has your recommendation proved as correct in the court proceeding?
I am not aware of any cases the previous two years, in which a recommendation from the Norwegian Ombudsman has been tried before a court of law.

3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
I do not have complete and updated statistics on how often the public administration complies with my recommendations. The general impression, however, is that the
authorities comply with the requests and recommendations of the Ombudsman, and it is a rarity that an administrative body openly defies the Ombudsman’s recommendations.

3.3 In how many cases have your recommendations not been successful?
See the answer above.

3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
NA

3.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?
NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?
The scope and range of the Ombudsman’s authority is laid out in the Act concerning the Storting’s Ombudsman for Public Administration 22 June 1962 no. 8 § 4. The act is included in the enclosed summary of the annual report for 2007.

5. Please explain complaint procedure according to FOIA
   - following the decision of the body of first instance (where can the applicant primarily seek legal protection):
     Subsequent to a negative decision regarding access to information, the applicant may in most cases appeal against the refusal to the administrative body that is immediately superior to the administrative body that has made the decision. If the refusal is made by a municipal or county body, the County Governor is the appellate instance.

   - following the decision by the Information Commissioner or Ombudsperson (which court):
     Only after the superior body has reached a conclusion, can the applicant complain to the Ombudsman. If the applicant so chooses, the case can also be brought before a District Court. This will normally bar the Ombudsman from investigating the case further, as the functions of the courts of law are exempt from the Ombudsman’s scope of authority.
6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?
To what extent the individuals to whom the data in question relate are included in the proceedings before the Ombudsman, varies from case to case. As a general rule, however, these individuals are not included directly in the proceedings.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
NA

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA

7. What are your competences during the procedure of investigation?
The Ombudsman can demand from public officials and from all others who serve in the public administration such information as he requires to discharge his duties. There are very few and specific exemptions from this rule. Consequently, the public administration is to a great extent obliged to provide any and all information the Ombudsman requires, including classified information and information regarded as business secrets etc. Although this is not common practice, there is nothing in the legal basis of the Norwegian Ombudsman arrangement to prevent the Ombudsman from questioning a public servant. In cases concerning access to information, the Ombudsman habitually conducts in camera investigations.

The Ombudsman cannot enter the premises of a public body without its consent. He can, however, require that the courts of law obtain evidence on his behalf. The courts, in turn, have certain coercive measures at their disposal.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
See the answer above.

7.2 Are you authorised to examine computer or information system of the body?
7.3 Are you authorised to enter the premises of the body without its consent?
See the answer above.

7.4 Do you have the possibility to conduct so called in camera inspection?
See the answer above.

7.5 Are you authorised to question civil servants?
See the answer above.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
See the answer above.

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
See the answer above.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

The principal rule of the newly adopted Norwegian Freedom of Information Act, which is expected to enter into force this autumn, is that all documents in the possession of a public body shall be accessible to the public. Thus a document is public unless there is an express exemption in the Act. The Norwegian FOIA distinguishes between absolute and qualified exemptions. Absolute exemptions mainly comprise information covered by the rules regarding professional secrecy. According to Section 11 of the act a public interest test applies to the qualified exemptions.

Section 11 of the act translates:
«Notwithstanding that a document may be exempted from public disclosure pursuant to the provisions of this Act, the administrative body shall consider whether the document should nevertheless wholly or partly be made public. The document should be made public if there is a greater public interest in providing the information to the applicant than in maintaining the exemption.»
Be advised that the above is an office translation of the relevant article. Unfortunately, the new Act does not yet exist in an official translation to English. Some of the qualified exemptions also have harm tests. The wording of the test varies from article to article, and the basis is generally closely linked to the subject matter of the exemption in question.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer above.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
See the answer above.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

1. Access to information in a provisional guardian’s accounts for a diseased individual
A legal heir (son of the deceased) requested to see the accounts drawn up by his mother’s provisional guardian the last years of her life. The mother had retained undivided possession of the estate with her late husband. The heir claimed that his mother’s assets had been substantially reduced in her last years. The authorities denied access to the accounts, with reference to a previous statement from the Norwegian Ombudsman. The Ombudsman found that the authorities could not, on a general basis, deny access to information in the accounts in question. The authorities had to perform an interest test, in which they i.a. should consider if the mother’s assets had in fact been substantially reduced and that the diseased had retained undivided possession of an estate. The authorities were asked to consider the case again. After the Ombudsman’s recommendation, the heir was given access to the accounts.

2. Access to documents related to a case before the EFTA Court
The authorities denied access to declarations from other states and international organisations related to a case involving Norway before the EFTA Court. The authorities maintained that the applicant should contact the relevant states and organisations with
his request to access the documents. During the proceedings before the Ombudsman, the authorities also claimed that publication of said documents could harm its strategic interests in the pending court case.
The Ombudsman found that the authorities could not refer the applicant to the senders of the declarations. He further found that it was doubtful whether a possible harm to Norway’s strategic interests in the pending court case, could meet the requirements in the relevant harm test, as set out in the Norwegian FOIA.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
The annual reports for 2006 and 2007 are not available in English. I have, however, attached pdf-versions of a summary of the reports.
1. How many cases (complaints or notifications) have you received?
595 cases, incl. 370 complaints and 162 opinions.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
  C. 30% of the complaints.
- due to decision by which access to information has been rejected?
  C. 70% of the complaints.

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
C. 10% of the complaints.

3. For Ombudspersons:

3.1 In how many cases has your recommendation proved as correct in the court proceeding?
C. 90% of our opinions or reports, object of court proceedings.

3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
C. 90% of the cases.

3.3 In how many cases have your recommendations not been successful?
C. 10% of the cases.

3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
C. 5% of the cases (as we know)
3.5. If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she miss the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure? After the revision of the Law 65/93 in August 2007, the procedure before the CADA stops the deadline... (vd. The text of the Law next nr.)

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law – please attach relevant article)?

Law no. 46/2007 of 24 August 2007, which regulates access to and the re-use of administrative documents:

**Article 15 - Right of complaint**

1. Applicants may complain to CADA about a lack of response, denial of an application, or any other decision which restricts access to administrative documents.
2. A complaint shall interrupt the time period for judicial submission of a request for a court order to provide information, consult files, or issue certificates, and shall be made within the said time period, to which the provisions governing the submission to a court of procedural items shall apply mutatis mutandis.

5. Please explain complaint procedure according to FOIA

- following the decision of the body of first instance (where can the applicant primarily seek legal protection):

NA

- following the decision by the Information Commissioner or Ombudsperson (which court):

Once it has received the report of CADA, the body to which the application was made shall communicate its duly justified final decision to the applicant within ten days, failing which there shall be deemed to be an absence of decision.

An interested party may impugn either the decision or the absence of decision before the administrative courts. (Art. 15 of Law 46/2007)

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate? If yes, in what way are these persons
involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?

See the answer below.

6.1 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?

Applicants may complain to CADA about a lack of response, denial of an application, or any other decision which restricts access to administrative documents, including personal ou “nominative” data.

According to the Portuguese Law, third parties shall only possess the right of access to nominative or personal data if they are in possession of written authorized from the person to whom the data refer, or if they demonstrate a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality.

Health-related data shall be communicated via a doctor if the applicant so requests. Nominative documents which are communicated to third parties shall not be used for purposes other than those which led to their access, failing which there shall be liability for losses and damages as laid down by law.

7. What are your competences during the procedure of investigation?

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?

Every director, member of staff and agent of the bodies and entities submitted to CADA shall be under a duty to cooperate with it, failing which they may be held responsible in disciplinary or other terms, as laid down by law. For these purposes, all information that is relevant to knowledge of the complaints shall be communicated to CADA (art. 28.o of Law 46/2007).

7.2 Are you authorized to examine computer or information system of the body?

All information, including in electronic form, that is relevant to knowledge of the complaints shall be communicated to CADA (art. 28.o of Law 46/2007).

7.3 Are you authorised to enter the premises of the body without its consent?

No.
7.4 Do you have the possibility to conduct so called in camera inspection?
Yes (vd. Art. 28.o, cit.).

7.5 Are you authorised to question civil servants?
Yes (vd. Art. 28.o, cit.).

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes (vd. Art. 28.o, cit.).

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
Yes (vd. Art. 28.o, cit.)
The body shall send CADA a copy of the application and of all such information and documents as are appropriate to providing it with the facts in the case (art. 14.o2).

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
See the answer below.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer below.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
Third parties shall only possess the right of access to administrative documents which contain commercial or industrial secrets or the internal life of a company, if they are in possession of written authorisation from the company in question, or if they demonstrate a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality.
In any case, documents which are subject to restricted access shall be the object of partial communication whenever it is possible to expunge the information concerning the reserved matter (art. 6.o6 of Law 46/2007).
The use of information in breach of copyright or industrial property rights shall not be permitted.
Nominative documents which are communicated to third parties shall not be used for purposes other than those which led to their access, failing which there shall be liability for losses and damages as laid down by law. (art. 8.0 of Law 46/2007).

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
Yes (vd. Arts. 6.0-6 and 8.0 of Law 46/2007).

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
In general, the cases in which CADA needs to weigh different rights, specially the protection of privacy or business secret against the right of the public to get information.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
1. How many cases (complaints or notifications) have you received?

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>New applications received:</td>
<td>512</td>
<td>482</td>
</tr>
</tbody>
</table>

N.B. The above figures include applications made under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, which separately govern access to the environmental information held by Scottish public authorities.

1.1 How many of these have been:

- due to absence of reply (silence) or inactivity of the body of first instance?

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due to absence of reply or inactivity (mute/deemed refusal):</td>
<td>120</td>
<td>109</td>
</tr>
</tbody>
</table>

- due to decision by which access to information has been rejected?

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information withheld</td>
<td>296</td>
<td>306</td>
</tr>
</tbody>
</table>

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of cases where we have found wholly in favour of the public authority:</td>
<td>104</td>
<td>105</td>
</tr>
</tbody>
</table>

3. For Information Commissioners:

3.1 How many decisions of the body of first instance have you changed?
3.2 Are your decisions legally binding?
Yes. Should an authority fail to comply with a decision, the Commissioner may notify the courts, who may then deal with that authority as if it had committed a contempt of court.

3.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
27 appeals have been made to Scotland’s Court of Session. Of these, 2 have been withdrawn by the applicant, and 5 withdrawn by public authorities (bodies of the first instance.)

- By applicants?
4 appeals have been brought to the court by applicants.

- By the bodies of first instance, holders of the document?
The remaining 23 have been brought by public authorities (bodies of the first instance).

3.4 In how many cases has the court:
- upheld your decision?
The court has upheld 3 of the Commissioner’s decisions. (A fourth was originally upheld by the Court of Session, but was then remitted to the Commissioner following a further appeal to the House of Lords).

- repealed your decision?

- amended your decision?
The Commissioner has lost two appeals following a hearing at the Court of Session, while a further 8 have been conceded by the Commissioner prior to the hearing. Of those conceded prior to the hearing, five related to a single issue on which the Court had previously decided. There are seven appeals which have still to be heard by the Court.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?
The Freedom of Information (Scotland) Act 2002. The full text of legislation is available from:

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):

Following a refusal to release information by a public authority (the body of first instance), the applicant is required first to request that an authority review its decision to refuse the request. In doing so, the applicant must write to the authority within 40 working days of their receipt of the refusal, setting out why they are unhappy with the way in which the request was handled. The authority then has a further 20 working days in which to review its handling of the original request and respond to the applicant.

Should an applicant continue to be unhappy following receipt of the public authority’s response to their review request, he or she is entitled to bring an appeal to the Commissioner.

- following the decision by the Information Commissioner or Ombudsperson (which court):

Appeals against the Commissioner’s decisions are made to Scotland’s Court of Session (see http://www.scotcourts.gov.uk/session/index.asp). Appeals can be made on a point of law only, and must be made within 42 days of the date of receipt of the Commissioner’s decision. On lodging an appeal with the Court, the party bringing the appeal is required to pay a fee of £106. Parties should also seek legal representation.

Cases will normally be heard by the Inner House of the Court of Session, which is, in essence, Scotland’s appeal court. Where the Commissioner wishes to defend the appeal, a date will be set for when the Inner House is available for the required number of days, also with reference to both parties’ preferred Counsel. Co-ordinating dates can often take some time, with hearings often scheduled approximately 18 months after an appeal is lodged.

Further appeal against a Court of Session ruling can be made to the House of Lords.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

Whether it is necessary to contact an individual regarding this matter will be assessed on a case by case basis, but such contact is not, normally, required. In the consideration of
such cases it will normally be apparent, from an analysis of the requested information within the context of both the FOI and data protection legislation, whether release would or would not be appropriate. That is not to say that such contact would never occur, however and, where appropriate, contact may be made. If contact is made it would done on an informal basis (as opposed to formally involving them as a party to the proceeding), informing the data subject of the nature of the request and inviting them to make any appropriate representations.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
See the answer above.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
Any such representations would inform the Commissioner’s consideration of the case, but ultimately his decision will be depend on a consideration of whether release is appropriate in terms of the law (e.g. if release can be considered to be ‘fair and lawful’ in terms of the data protection legislation).

7. What are your competences during the procedure of investigation?
Most investigations are undertaken through the informal solicitation of information and evidence from public authorities. Where an authority refuses to provide such information, however, or where the information provided is either inadequate, potentially misleading or unsatisfactory, then the Commissioner will revert to his legislative powers to require authorities to provide information.

In this capacity, the Commissioner would serve the authority with an ‘Information Notice’ under section 50 of the FOI Act. This would require the authority to provide the Commissioner with relevant requested information. Failure to comply with such a notice can be referred to the Court of Session, who may again deal with the authority as if it had committed a contempt of court.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?
Yes – see previous response in relation to Information Notices.
Section 54 of the FOI Act also provides the Commissioner with powers of entry and inspection. Where the Commissioner believes that an authority is in breach of the FOI Act, he may apply to a Sheriff Court (effectively the local court service in Scotland) for a warrant to enter the authority’s premises. Following the grant of a warrant, the Commissioner and his staff are entitled to enter and search premises, inspect and seize any documents that may constitute evidence, and inspect, examine, operate and test any equipment in which information may be recorded. The Commissioner has, to date, not been required to exercise his powers of entry and inspection.

7.2 Are you authorised to examine computer or information system of the body?
Yes. See earlier response.

7.3 Are you authorised to enter the premises of the body without its consent?
Yes. See earlier response.

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes. See earlier response.

7.5 Are you authorised to question civil servants?
There is no legislative provision expressly permitting the Commissioner’s staff to question civil servants in person, although relevant questioning will normally take place throughout the lifespan of a case through, e.g., written communications, telephone conversations and face-to-face meetings.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes. Through the issue of an Information Notice the Commissioner can require that an authority send any information relevant to the consideration of the case. The only exceptions permitted by the legislation are to information which constitutes legal advice relating to the FOI Act. In addition, the Commissioner and certain senior staff have security clearance to view classified documents.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data…)?
Yes. See previous response.
8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

Each appeal to the Commissioner is considered on a case by case basis, assessing the specific content of the requested information within the context of the FOI exemption and (where relevant) the public interest test. Information will only be appropriately exempted where the particular tests in place for the application of that exemption can be adequately met, and - where the exemption is subject to the public interest test - it can be demonstrated that the public interest in non-disclosure outweighs that in release. The Commissioner has prepared guidance for public authorities and the public on the interpretation of the various FOI exemptions and the public interest test. This guidance is available at http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.asp.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.

Yes. Section 2(1) of the FOI Act states:

(1) To information which is exempt information by virtue of any provision of Part 2 (Exemptions), section 1 applies only to the extent that -

(a) the provision does not confer an absolute exemption; and

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

A small number of exemptions are absolute. These are the exemptions relating to information available elsewhere, prohibitions on disclosure, court records or personal data.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.

Yes. The FOI Act’s harm test is attached to certain individual exemptions. It normally states that information is exempt where release would “prejudice substantially” a particular interest, such as national security, international relations or law enforcement. The test is one of “substantial inhibition” where it is considered that the information in question would harm the free and frank provision of advice or exchange of views for the purpose of deliberation.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?

NA

8.4 Can you use Constitution or any other law which allows weighing tests?
The relevant tests are contained within the FOI Act.

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

**Decision 003/2007 - Mr Allan McLeod and the Northern Joint Police Board**

This case concerned a request for a report which examined a police force’s handling of the complaints made by a bereaved family into the police force’s investigation of the death. It involved the consideration of a substantial amount of material within the context of various FOI exemptions, including those relating to law enforcement, investigations and personal information.

Reports of this type and sensitivity had rarely been released into the public domain in the past, and consideration of the case involved careful consideration of the interaction between FOI and data protection, and the issue of whether material contained within the investigation report would harm any further investigation of the death in question.

After careful consideration, the Commissioner ordered that approximately two-thirds of the report should be released into the public domain. The full text of the Commissioner’s decision is available from http://www.itspublicknowledge.info/UploadedFiles/Decision003-2007.pdf.

**Decision 178/2006 - Mr John Rowbotham of the Hamilton Advertiser and the Chief Constable of Strathclyde Police**

This case concerned a request for statistical information about registered sex offenders in the area of Scotland served by Mr Rowbotham’s newspaper.

The police cited the exemptions covering law enforcement, confidentiality and health and safety in support of non-disclosure, arguing that the release of this statistical information would result in attempts being made to identify individuals, and that this would in turn lead to vigilante attacks on individuals. The police provided examples of cases where disclosure of the identity of sex offenders had led to individuals being attacked or murdered, or driven to take their own lives through fear of identification. The police also argued that fear of attack would lead to offenders being driven into hiding (away from areas where they were being monitored by authorities) and that this would subsequently lead to a greater risk of reoffending.

Following consideration of the police’s arguments however, the Commissioner did not accept that the outcomes predicted by the police were likely to occur. The Commissioner considered that the area across which the information was being requested was large enough to ensure that the risk of individuals being identified was minimal, and ordered the release of the information in September 2006. Following release, the Commissioner has received no notification that the consequences predicted by police have occurred.
The full text of this decision is available from

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
Annual Report for 2006:
www.itstpublicknowledge.info/nmsruntime/saveasdialog.asp?lID=1799&sID=234

Annual Report for 2007:
www.itstpublicknowledge.info/nmsruntime/saveasdialog.asp?lID=2566&sID=234
1. How many cases (complaints or notifications) have you received?
2006: 504
2007: 342

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?

3. For Information Commissioners:

3.1 How many decisions of the body of first instance have you changed?

3.2 Are your decisions legally binding?
Yes.

3.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
An appeal against the decision of the Information Commissioner is not possible; however, the initiation of an administrative dispute is envisaged under law. 15 such lawsuits were filed at the Administrative Court during 2006 and 12 in 2007.

- By applicants?
By the bodies of first instance, holders of the document?

3.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?
  2006: 0, 2007: 0.

Other cases have not been concluded yet.

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law – please attach relevant article)?
The appellate instances are defined by Art. 27 of Act on access to public information which was amended in 2005 and 2006 (Official gazette of the Republic of Slovenia, No. 24/2003, 61/2005 and 28/2006; ZDlJZ) and Art. 2 of Information Commissioner Act which was amended in 2007 (Official gazette of the Republic of Slovenia, No. 113/2005 and 51/07 – ZUstS-A; ZInf). The full text of both laws is available at: http://www.ip-rs.si/index.php?id=306.

The Information Commissioner has also jurisdiction of an appellate body under the Public Media Act. According to the Public Media Act the refusal of a liable authority to answer a question posed by a representative of the media shall be considered as a rejection decision. The silence of an authority in such an instance is an offence, as well as grounds for a complaint. A complaint against a rejection is permitted if the negative reply to the question pertains to a document, case, file, register, record or other such archive. The Information Commissioner makes a decision as to a complaint against a rejection decision under the provisions of the Act on the Access to Public Information.

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):
Applicant can appeal (file a complaint) against the decision of the first instance body with the first instance body within 15 days after the decision of the first instance body. The first instance body sends the complaint for ruling to Information Commissioner. Applicant can also file a complaint with the Information Commissioner for inactivity of the first instance body after the deadline to receive either information or decision (20 working days) has passed.

- following the decision by the Information Commissioner or Ombudsperson (which court):

An appeal against the decision of the Information Commissioner is not possible; however, the initiation of an administrative dispute is envisaged under law. The administrative dispute can be filed against the decision of the Commissioner (unless the Commissioner has rejected the complaint in which case the administrative dispute is filed against the decision of first instance body) with the Administrative court which is deciding in administrative dispute on lawfulness of final administrative acts by which the public body has intervened with the legal situation of the plaintiff. Procedures in an administrative dispute against the decision or procedural conclusion issued by the Information Commissioner are urgent and privileged.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?
No.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
NA

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA
7. What are your competences during the procedure of investigation?
If necessary to deal with a complaint, the official of the body must immediately send to the Information Commissioner on his demand the documents, dossiers, registers, records or other documentary material, requested by the applicant. Within the frame of his competency, the Information Commissioner can also view a tax secret. If, when dealing with a complaint in a case of access to public information the Information Commissioner suspects that the first level body holds the requested information, but does not entirely or partially reveal it to the Information Commissioner, the Commissioner can use powers in accordance with the Act governing inspections.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
Yes.

7.2 Are you authorised to examine computer or information system of the body?
Yes within legally and constitutionally allowed privacy protection requirements.

7.3 Are you authorised to enter the premises of the body without its consent?
Yes.

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes.

7.5 Are you authorised to question civil servants?
Yes.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes.

7.7 Is the body required to send you the documents, which are subject to applicant's request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
Yes.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?
8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
Yes, Art. 6 of Slovene Act on access to public information defines public interest test. This article provides for exemption to exemption i.e. disclosure of information even in case of existence of exemptions if public interest prevails.

In certain cases the disclosure is nevertheless not allowed even after public interest test if:
- information which, pursuant to the Act governing classified data, is denoted with one of the two highest levels of secrecy;
- information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistics activities etc.;
- information which contain or are prepared based on classified information of other country or international organization, with which the Republic of Slovenia concluded an international agreement on the exchange or transmitting of classified information; for information which contain or are prepared based on tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country;
- information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of tax secret in accordance with the Act governing tax procedure.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
Yes. According to Art. 6 of Slovene Act on access to public information the harm test needs to be implemented in different contexts in most cases in the process of assessment if certain information is subject to exemption from free access to information. This is the case for the following exemptions:
- Information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanours procedure, and the disclosure of which would prejudice the implementation of such procedure;
- Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;
- Information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
- Information from the document that is in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents;
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- Information on natural or cultural value which, in accordance with the Act governing the conservation of nature or cultural heritage, is not accessible to public for the purpose of protection of (that) natural or cultural value;
- Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

Furthermore also in deciding on the exemption to free access to information for information which is defined as a business secret in accordance with the Act governing companies the harm test needs to be used to assess whether certain information which has not been classified as business secret by a company internal act nevertheless constitutes a business secret.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

2006
Decision No. 021-16/2006/4 dealt with an appeal made by the applicant Amnesty International against the Government of Slovenia. The applicant approached the body with a request to provide either a digital version or a photocopy of the draft legislation (proposed law) and any existing annexes which was intended to regulate the so-called "izbrisani" problem (i.e. the predicament of erased residents who have no recognition as to nationality). The Information Commissioner granted the appeal and the body was ordered to provide the 8th December 2005 document entitled »Constitutional law proposal for amendment of the Constitution to implement the basic constitutional charter on independence and autonomy of the Republic of Slovenia.«

Decision No. 021-18/2006/8 dealt with an appeal made by the applicant (a Liberal Democrat MP), against a decision by the Ministry of the Economy. The Information Commissioner granted the appeal and the body was ordered to disclose the document entitled »Republic of Slovenia, Privatisation Group for Telekom Slovenije: Proposal for
selling the state's share in Telekom Slovenije d.d., Ljubljana, December 2005« to the applicant within three days of the decision becoming final, as the document in question did not include any classified data or business secrets.

2007

By way of its Decision No. 021/102/2007 of 29th January 2008, the Information Commissioner granted the appeal of an applicant representing the Združenje Moč association concerning a refusal by the Social Work Centre in Maribor, and accordingly partially granted the request of the applicant. The applicant had requested statistically processed data relating to characteristics and living conditions of foster children and foster careers. In its contested refusal, the Social Work Centre claimed that it did not dispose of statistical data, and that it was not obliged to create such upon the applicant’s request. In the appeal procedure, the Information Commissioner decided that if the authority disposed of data which would enable the applicant to put together or to create the requisite information, the fact that it did not dispose of the exact information which the applicant had requested did not constitute a reason for the complete rejection of the request. The Information Commissioner thus ordered the Social Work Centre to proceed photocopies of documents or electronic records pertaining to all foster children as of 24.09.2007 from its computer application regarding foster care provision, whereby all the personal data pertaining to foster children and foster carers, which could enable the identification of any individual, should be stricken.

Decision No. 021-27/2007/8 of 10th August 2007 concerned an appeal by the limited company Hypo Leasing d.o.o. in relation to a refusal by the Ministry of Health RS. The Information Commissioner was called to decide upon the means by which the Ministry had partially granted the applicant’s request for access to tender documentation - the Ministry had refused access to information regarding a price structure within a bid. The Information Commissioner granted the appeal and decided that the Ministry of Health had to allow access (insight) into the per unit price as well as the total price of the individual positions of various products in the documentation provided by the successful bidder, as well as indeed of all the other bidders who participated in the public procurement procedure. Supply and installation of general and office furnishings and equipment, serial general equipment, as well as general and specialist medical equipment in the completion of construction and installation works for wards D and E of the Institute of Oncology in Ljubljana. The data (price per item), stated in the bid documentation obviously does not in itself provide evidence of the bidders experience, qualification, plant, personnel, cadre, organizational capacities or the implementation procedure. Likewise such data does not disclose results as to the success of any element of the bid in relation to the individual bidder. Furthermore said documentation does not
reflect the innovation, investment in development studies or human resources, merely. In this particular case - the itemized prices of various products and installations, and not the price structure which, per se, should continue to represent a business secret.

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
Annual reports for 2006 and 2007 in English are available at:
http://www.ip-rs.si/fileadmin/user_upload/Pdf/porocila/annualReport.pdf

Introduction
As the Parliamentary Ombudsman in Sweden has a wider scope and does not work in the same way as most specialized Freedom of Information commissioners, some of the questions are very difficult or even impossible for me to answer. What is very essential in the Swedish system is that the role of the Ombudsman is to scrutinize the legality of the way in which a case is handled, i.e. procedural matters. When it comes to cases about access to public documents (roughly 4% of our total number of cases), the Ombudsman does not review a decision to refuse access; that is a task of an administrative court of appeal. The Ombudsman can criticize faults and shortcomings during the handling of the case, such as delays, failures to give necessary information, unpermitted questions to the applicant and so on.

1. How many cases (complaints or notifications) have you received?
About 260 complaints concerning handling of cases on access to public documents over the latest working year (July 1 2007 - June 30 2008).

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?
NA

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
31% of the cases resulted in some sort of criticism from the Ombudsman, he rest (69%) not.

3. For Ombudspersons:
See the introduction.

3.1 In how many cases has your recommendation proved as correct in the court proceeding?
3.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
NA

3.3 In how many cases have your recommendations not been successful?
NA

3.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
NA

3.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she misses the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?
NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?
The competence of the Ombudsman is defined in the Instrument of Government (ch. 12, sec. 6), the constitution of the country, and more in detail in the act (1986:765) with instruction for the Parliamentary Ombudsmen.

5. Please explain complaint procedure according to FOIA
   - following the decision of the body of first instance (where can the applicant primarily seek legal protection):
   If access is denied, the applicant has the right to appeal to an administrative court of appeal.
   If the applicant wants to complain about treatment, procedure or delay, he can go to the Parliamentary Ombudsman.

   - following the decision by the Information Commissioner or Ombudsperson (which court):
   There is no specialized Freedom of Information Ombudsman or Commissioner.
6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate? 
No.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
NA

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA

7. What are your competences during the procedure of investigation? 
The Ombudsman has a very vast competence of investigation. The answer to all the questions is yes.

7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?
Yes.

7.2 Are you authorised to examine computer or information system of the body?
Yes.

7.3 Are you authorised to enter the premises of the body without its consent?
Yes.

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes.

7.5 Are you authorised to question civil servants?
Yes.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data…)?
Yes.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data…) and when no law specifically allows publicity?
There is no general and specific public interest test in the Secrecy act, but the whole FOI legislation is founded on the principle of weighing the interests of secrecy (State security, protection of personal data and so on) against the public interest of greatest possible openness. Furthermore, the vast majority of provisions concerning secrecy are constructed with harm tests.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See the answer above.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
See the answer above.

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
NA

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
NA

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
Summaries in English are attached.
General remark:
The Freedom of Information Act (FOIA) came into force on the 1st July 2006. Therefore, we can only declare the numbers from that moment on up to December 2007. Because of a lack of human resources, 7 of the 45 cases could not be treated in that period of time.

1. How many cases (complaints or notifications) have you received?
45

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
1

- due to decision by which access to information has been rejected?
44

2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
16

3.1 For Information Commissioners:

3.1.1 How many decisions of the body of first instance have you changed?
15
(In addition: in 7 cases successful mediation or access granted during the mediation procedure)

3.1.2 Are your decisions legally binding?
No, they are not legally binding. Our recommendations are no decisions in the legal sense, but they influence further decisions or court rulings. They are important for a continuous practice of the FOIA, they are leading cases and mostly accepted by the parties.
3.1.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?
  1

- By the bodies of first instance, holders of the document?
  According to the FOIA, there is no such possibility. The holder of the document has to decide whether he accepts our recommendation or not. If not, he has to make a decision and the applicant can initiate judicial proceedings.

3.1.4 In how many cases has the court:
- upheld your decision?
  0
- repealed your decision?
  1
- amended your decision?
  0

Remark: In two cases, the applicants wanted the holder of the document to enact a decision, but did not go to court after that.

3.2 For Ombudspersons:

3.2.1 In how many cases has your recommendation proved as correct in the court proceeding?
  0 (there was just 1 case brought to court)

3.2.2 In how many cases have the bodies of first instance after they initially rejected access complied with your recommendation and changed their decision following your recommendation?
  22

3.2.3 In how many cases have your recommendations not been successful?
  1

3.2.4 How many applicants have had to seek judicial protection due to the body of first instance’s non-compliance with your recommendation?
  0
3.2.5 If the applicant decides to ask the Ombudsman for review of the concrete case, can he/she miss the deadline for court appeal or the procedure before Ombudsman stops the deadline provided in instructions as to legal remedy and the applicant still has the possibility to appeal in front of the court after the Ombudsman finishes her/his procedure?

NA

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law - please attach relevant article)?

Art. 13 FOIA (Mediation)
Art. 14 FOIA (Recommendation)
Art. 15 FOIA (Decision)
Art. 16 FOIA (Appeal to the Federal Administrative Court)

5. Please explain complaint procedure according to FOIA - following the decision of the body of first instance (where can the applicant primarily seek legal protection):

The authority, as a general rule, has to answer a request for access within 20 days as of receipt of the latter. If it refuses or restricts access, it has to inform the applicant, giving a brief explanation of its position. The applicant can then challenge the authority’s position. In case of a conflict between the authority and an individual requesting access to an official document, or a third person who is opposed to the authority communicating data relating to him or her, the law establishes a mechanism to resolve this conflict. This mechanism is based on preliminary mediation, a compulsory step before being able to initiate court proceedings. Thus, any person can submit a request for mediation, once his or her request for access to an official document has been limited, deferred or refused; or if the authority has failed to reach a decision on the request within the legal deadline; or if the authority intends to grant access to official documents containing personal data concerning him or her.

The task of conducting mediation has been assigned to the Federal Data Protection Commissioner who thus became the Federal Data Protection and Information Commissioner. The law allows him 30 days to carry out the procedure which consists of bringing the opposed parties together to find a compromise. As a mediator, the commissioner has access to all official documents; no authority is allowed to withhold documents citing any obligation to maintain secrecy. In case of a failure of the mediation, the federal commissioner issues a recommendation to the authority. The applicant or third person may then request the authority to take a decision in order to
appeal against it. Furthermore, the authority has to enact a decision if it does not intend to follow the recommendation of the Commissioner. An appeal can be lodged against this decision at the Federal Administrative Court. If the applicant again does not agree with the court ruling, he can appeal, as a last step, to the Federal Supreme Court.

- following the decision by the Information Commissioner or Ombudsperson (which court):
  See the answer above.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

Art. 11 FOIA

Yes, the person concerned, also named “third person”, is involved as a party to the proceeding.

Initially, the document holder (the authority) has to inform the third person, if:
  - the relevant document contains personal data of him or her and
  - the document holder wants to give access to the document.

- The document holder must also inform the third person of the position it has taken regarding the request for access.

The third person has the possibility to comment within 10 days.

The third person can submit a request for mediation, if he or she does not agree with the decision of the authority to give access to the relevant document. In this case, the person becomes a participant.

If the authority refused to give access to the document and for that reason did not inform the third person, the Information Commissioner has to inform him or her about the mediation procedure.

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?

See the answer above.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or
is the purpose of involvement more about informing the person that actual proceeding is taking place)?
See the answer above.

7. What are your competences during the procedure of investigation?
7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant’s request?
NA

7.2 Are you authorised to examine computer or information system of the body?
According to Art. 19 FOIA: yes

7.3 Are you authorised to enter the premises of the body without its consent?
According to Art. 19 FOIA: yes

7.4 Do you have the possibility to conduct so called in camera inspection?
NA

7.5 Are you authorised to question civil servants?
According to Art. 19 FOIA: yes

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
According to Art. 19 FOIA: yes

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data…)?
NA

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data…) and when no law specifically allows publicity?
See the answer above.

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
Yes; Art. 7 Abs. 2 BGÖ; Art. 6 VBGÖ
As far as personal data is concerned, there is an appreciation of private and public interest. In case of preponderant public interests, access can be granted.

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
Yes; Art. 7 Abs. 1 FOIA

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
Not relevant

8.4 Can you use Constitution or any other law which allows weighing tests?
Not relevant

9. Please describe briefly two of the most difficult cases from 2006 and 2007.

2006:
The applicant wanted access to a report drawn up by the Federal Criminal Court as the competent supervisory authority for the Office of the Attorney General of Switzerland OAG.
Documents with regard to the jurisdictional tasks of the courts are not covered by the FOIA. Documents solely concerning their administrative duties, however, are by all means subject to the act. In the case at hand, signs were clearly indicating that the report in question was part of the administrative tasks of the Federal Criminal Court. In order to conduct the mediation process provided for in the FOIA, the FDPIC asked the court to hand over the report. However, the court not only refused to do that, but also refused to even consider the applicability of the FOIA. Subsequently, the Commissioner issued a recommendation in which he pointed out that the FOIA was applicable and underlined his discomfort about the manner in which the Federal Court had been treating the Freedom of Information principle.


2007:
The applicant wanted to know everything about each single project of the Swiss Agency for Development and Cooperation (SDC). The request was too comprehensive for the SDC to identify the relevant documents. Moreover, the applicant already had some of the relevant documents. He wanted to use the FOIA to get into a position to publish the
document and to take action against the SDC. In addition, the applicant made several more requests for access to different documents in 2007.

In these extremely difficult circumstances, the Commissioner initiated the mediation process. However, despite extensive debates and several meetings, the parties were not able to find a satisfying solution. Even though all substantial questions regarding the FOIA were resolved and both parties fundamentally agreed with all the interpretations and propositions of the Commissioner, the positions were so entrenched that the mediation was not successful. The Commissioner’s recommendation was accepted by the authority, but not by the applicant. He requested an official decision to appeal against. As of now, it remains open if he is going to appeal to the Federal Administrative Court.


10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.

Data below is for 2007/2008

1. How many cases (complaints or notifications) have you received?
See the answer below.

1.1 How many of these have been:
- due to absence of reply (silence) or inactivity of the body of first instance?
- due to decision by which access to information has been rejected?

We don’t record the information in a way that makes it easy to quickly respond to the above, but we can supply a breakdown below of the reasons for case closure 2007-2008. A substantial % of the 1270 cases listed as withdrawn will relate to complaints about the absence of reply. The complaint is normally withdrawn once the public authority has responded, after some form of intervention by the Commissioner.

<table>
<thead>
<tr>
<th>Reason</th>
<th>Cases</th>
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</thead>
<tbody>
<tr>
<td>Closed - abandoned</td>
<td>27</td>
</tr>
<tr>
<td>Closed - Complaint Withdrawn</td>
<td>6</td>
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<tr>
<td>Closed - decision notice served - not upheld</td>
<td>135</td>
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<tr>
<td>Closed - decision notice served - partly upheld</td>
<td>178</td>
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<tr>
<td>Closed - decision notice served - upheld</td>
<td>61</td>
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<td>Closed - Decision Notice served - Varied</td>
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<td>Closed - enforcement not recommended</td>
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<td>Closed - frivolous</td>
<td>7</td>
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<td>Closed - insufficient evidence</td>
<td>439</td>
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<td>Closed - no internal review</td>
<td>241</td>
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<tr>
<td>Closed - not EIR complaint</td>
<td>4</td>
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<tr>
<td>Closed - not PA</td>
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<tr>
<td>Closed - not pros'd: withdrawn</td>
<td>2</td>
</tr>
<tr>
<td>Closed - not Section 50</td>
<td>78</td>
</tr>
<tr>
<td>Closed - undue delay (complainant)</td>
<td>27</td>
</tr>
<tr>
<td>Closed - vexatious</td>
<td>1</td>
</tr>
</tbody>
</table>
2. How many complaints or notifications have been unjustified in whole (the body of first instance has procedurally proceeded correctly and has rejected access on lawful and regular grounds)?
2007/2008 – 2646 complaints received

3.1 For Information Commissioners:

3.1 How many decisions of the body of first instance have you changed?
Outcome of decision notices 2007/2008 – 30% complaint upheld, 45% partly upheld, 25% complaint not upheld.

3.2 Are your decisions legally binding?
Yes.

3.3 In how many cases have judicial proceedings been initiated against your decisions (or in the case of UK before tribunal and then before the court)?
- By applicants?
167 (since January 2005)

- By the bodies of first instance, holders of the document?
68 (since January 2005)

3.4 In how many cases has the court:
- upheld your decision?
- repealed your decision?
- amended your decision?
Since January 2005: 85 cases ICO decision upheld, 46 cases varied or overturned, 31 cases withdrawn

4. Which law defines the appellate instance competences of Information Commissioner or Ombudsperson (FOIA or some other law – please attach relevant article)?

5. Please explain complaint procedure according to FOIA
- following the decision of the body of first instance (where can the applicant primarily seek legal protection):
  Application to the Information Commissioner for a decision under section 50 of the Freedom of Information Act.

- following the decision by the Information Commissioner or Ombudsperson (which court):
  Appeal to the Information Tribunal, under section 57 of the Freedom of Information Act.

6. When examining cases where a question of existence of exemption of protected personal data or protection of privacy arises, do you involve in the proceeding the persons to whom the data in question relate?

6.1 If yes, in what way are these persons involved in the proceeding (formally involved as a party to the proceeding or only informally informed of the proceeding)?
Informally - they will be consulted via the public authority that is holding their personal data. Any objections or representations will then be taken into account when considering whether disclosure would be a breach of the data protection principles.

6.2 If yes, how does involvement of these persons in the proceeding affect the result of the proceeding or assessment of free availability of requested information (if the person concerned does not allow disclosure, is such request complied with in the proceeding or is the purpose of involvement more about informing the person that actual proceeding is taking place)?
NA

7. What are your competences during the procedure of investigation?
7.1 Do you have inspection competences to conduct investigation without consent of the body which possesses the document which is subject to the applicant's request?
The Information Commissioner has the power to issue a legally binding information notice requesting information (either recorded or unrecorded) if he requires it in connection with an investigation that a public authority has not complied with the Freedom of Information Act. These powers are set out in section 51 of the Freedom of Information Act.
7.2 Are you authorised to examine computer or information system of the body?
See above.

7.3 Are you authorised to enter the premises of the body without its consent?
The Information Commissioner has search warrant powers under section 55 of the Data Protection Act (as amended by the Freedom of Information Act).

7.4 Do you have the possibility to conduct so called in camera inspection?
Yes.

7.5 Are you authorised to question civil servants?
See above – the Information Commissioner has information notice powers, this can include requests for unrecorded information, this will often include requests for further arguments justifying no disclosure from civil servants.

7.6 Does the head of Information Commissioner or Ombudsperson have access to classified information/data?
Yes.

7.7 Is the body required to send you the documents, which are subject to applicant’s request regardless of potential existence of exemptions as defined in FOI (business secret, personal data, classified information/data...)?
Yes.

8. How do you implement weighing between different rights (when there is a collision between the right of public to get information and business secret, personal data...) and when no law specifically allows publicity?

8.1 Is there a public interest test in FOIA? Please attach text of relevant article.
See section 2 of the Freedom of Information Act.
http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_2#pt1-pb1-l1g2

8.2 Is there a harm test in FOIA? Please attach text of relevant article.
The exemptions in sections 26, 27, 28, 29, 31, 33, 36, 43 are subject to the test of “would, or would be likely to prejudice”
Section 24 contains the test: “required for the purpose of safeguarding national security”
Section 34 contains the test: “required for the purpose of avoiding an infringement of the privileges of either House of Parliament”
Section 38 contains the test: “would, or would be likely to endanger the physical or mental health of any individual”

http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000036_en_1

8.3 If neither of the two tests exist does that mean that there is no weighing and that a document which fits in definition of any of the exemptions is a priori unavailable (absolute exemption)?
NA

8.4 Can you use Constitution or any other law which allows weighing tests?
The Freedom of Information Act must be read in line with the Human Rights Act, which contains a test of proportionality.

9. Please describe briefly two of the most difficult cases from 2006 and 2007.
Case Ref: FS50071069
Date: 25/10/2006
Public Authority: Epsom and St. Helier University Hospitals NHS Trust
Summary: The decision concerns a request made for records held by an NHS Trust relating to an individual, now deceased. The request was refused on the grounds that a duty of confidence was owed to the deceased and that as this would still be actionable the information was therefore exempt under section 41 of the Act. After requesting a copy of the withheld information and a further explanation of the refusal the Commissioner concluded that the section 41 exemption was valid. In addition, some of the requested information was subject to legal professional privilege and was therefore exempt under section 42. However, the Commissioner also concluded that the Trust had not fully complied with section 17 of the Act when refusing the original request. The Information Tribunal has ruled on this decision and has dismissed the appeal.
Section of Act/EIR & Finding: FOI 41 - Complaint Not upheld , FOI 42 - Complaint Not upheld , FOI 17 - Complaint Upheld
View PDF of Decision Notice FS50071069

Case Ref: FS50070469
Date: 13/06/2007
Public Authority: House of Commons
Summary: The complainant asked for a list of items claimed by Tony Blair in 2001/2, 2002/3 and 2003/4 under the Additional Costs Allowance. The House of Commons refused the request on the grounds that it was personal data and that disclosure would be unfair. The Commissioner decided that the requested information is personal data and that its fully
itemised disclosure would be unfair. However he has decided that it would not contravene the data protection principles to disclose information showing the totals paid under specified headings within the Additional Costs Allowance. He has therefore ordered disclosure of the total amounts claimed by reference to each of these headings. An appeal was made to the Information Tribunal, but the appeal was dismissed.

Section of Act/EIR & Finding: FOI 40 - Complaint Partly Upheld
View PDF of Decision Notice FS50070469

10. If annual reports for 2006 and 2007 are available in English (which will be official language of the conference) in electronic format, please attach them.
http://www.ico.gov.uk/Home/about_us/what_we_do/corporate_information/annual_reports.aspx
Available here, not attached due to size.