

CURRENT PRACTICE ON ACCESS TO DOCUMENTS AT THE GSC

1. Principles

The implementation of the general principles on public access to documents, enshrined in Regulation 1019/2001, is contained in Article 10 and Annex II of the Council's Rules of Procedure.¹

These principles include the establishment of a public register of documents which currently includes approximately 380.000 documents (excluding linguistic versions of the same document) of which 70% are public.

Article 11 of this Annex lists the type of documents which are to be directly accessible to the public upon circulation (e.g. provisional agendas for meetings of the Council) and those which should be directly accessible if clearly not covered by any of the exceptions laid down in Art.4 of Regulation 1049/2001 - see annex I (e.g. provisional agenda of committees and working parties; notes, reports, progress reports and reports on the state of discussions in the Council or one of its preparatory bodies).

Documents which are not directly public (those which are classified or LIMITE, basically to protect one or more interests referred to in Art.4 of Reg.1049/2001) can become public:

- a) if no longer covered by one of these exception and if related to a legislative act: automatically after adoption of that act (Art.11.6 of Annex II CRoP) or,
- b) upon request of the public, providing none of the exceptions still apply.

Classification of a document or the marking LIMITE are decided on a case-by-case approach based on series of instructions (see e.g. 11336/11, 5109/1/17 REV1 and 14352/16) leaving a wide margin of appreciation to policy DGs.

¹ [OJ L 325, 11.12.2009, p. 36](#)

Currently there are no provisions for a structural review of the LIMITE status of documents (except after adoption of a legislative act) which means that release of a document is mostly reactive and not proactive.

2. Current practice

The different procedural steps in the handling of requests for access to document and confirmatory applications are set out in annex II.

Issuing of legislative documents

Last year, the Council issued 6 104 legislative documents of which 1 933 were issued as 'public' upon circulation. Of the remaining 4 171 legislative documents issued as LIMITE (with a reference in the register but not directly accessible), 2 406 documents were made public upon request.

Requests for access to documents

In 2017, the Council received 2 597 initial requests for access to documents requiring the analysis of 8 000 documents. At the initial stage, full access was granted to 5 466 documents (68.3%) and partial access to 678 documents (8.5%).

A breakdown by policy areas to which these requests relate, can be found in annex III. The area with the greatest number of requests was Justice and Home Affairs (15,9%), followed by Environment (13,7%).

So far in 2018, the GSC has received 1 680 requests for access to documents, including (after the De Capitani judgement) 64 requests for 4-column trilogue tables of which a vast majority relates to COREPER I competence.

These **initial requests** are handled by the GSC's Transparency Service in DG COMM which makes a final assessment after consultation of the policy DG, author of the document.

At the initial stage, documents in 2017 were refused mainly in order to protect the Council's decision-making process (545 times, or 32%), to protect the public interest as regards international relations (269 times, or 15,8%) or for reasons of public security (51 times, or 3%). In nearly 46% of cases (780 times), documents were refused based on the combination of a number of exceptions.

If access is refused on the basis of one of these exceptions, applicants can enter a so-called **confirmatory application** (appeal).

In 2017, the GSC received 31 confirmatory applications relating to 135 documents. Full access was granted to 25 documents (representing 18.5% of all documents requested) and partial access to 26 documents (19.3%). For the others, the refusal of access was confirmed. If no full access is granted, the applicant may make a complaint to the Ombudsman or institute court proceedings with the ECJ. In 2017, the GSC received three complaints from the Ombudsman. In such cases, the Council is requested to re-examine the case and to inform the Ombudsman of the results of this re-examination.

So far in 2018, the GSC has 22 confirmatory applications and no complaints from the Ombudsman.

These confirmatory applications are handled by the Transparency Service together with the Council Legal Service. The Working Party on Information is consulted on the draft reply to the applicant which afterwards requires adoption by CRP and Council (I/A item).

The full Council Annual Report on Access to documents for 2017 can be found [here](#).

Article 4 of Regulation (EC) N° 1049/2001

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
 - (a) the public interest as regards:
 - public security,
 - defence and military matters,
 - international relations,
 - the financial, monetary or economic policy of the Community or a Member State;
 - (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
 - commercial interests of a natural or legal person, including intellectual property,
 - court proceedings and legal advice,
 - the purpose of inspections, investigations and audits,unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. 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.
4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Main stages of the processing of requests for public access to documents²

Initial application

- **Registration** of the application for access, including deadline for reply³, and identification of the requested documents.
- **Examination** of the requested document(s) on the basis of Article 4 of Regulation 1049/2001 by DG COMM (Transparency Service).
- **Consultation** of the responsible GSC service by a member of the Transparency Service, making clear that access should in principle be granted unless the exceptional circumstances envisaged by the Court are met.
- **Decision** on access, partial access or refusal. Any (partial) refusal must be motivated, based on the exceptions provided for in Article 4 of Regulation 1049/2001 and in line with the Court judgment.
- **Letter of reply** is sent to the applicant within 15 working days of the reception of the request, possibly extended, containing the motivation in case of (partial) refusal.

The decision is taken by the General Secretariat (DG COMM on the basis of the consultation with the DG)

Confirmatory application

In the event of partial access or a refusal of access, the applicant may, within 15 working days of receiving the reply, submit a confirmatory application asking the institution to reconsider its position.

- **Registration** of the confirmatory application for access to one or several documents and establishment of the 15 working-day deadline for reply.
- **Re-examination** of the requested document(s) on the basis of Article 4 of Regulation 1049/2001 by DG COMM (Transparency Service) in cooperation with the Council Legal Service.
- **Re-consultation** of the originating service by a member of the Transparency Service.

² See also Summary of procedures in [ST 6896/1/17 REV1](#)

³ Time-limit of 15 working days, which in exceptional cases, for example, in the event of a very large number of documents, may be extended by 15 working days.

- **Draft reply** is drawn up by the Transparency Service and submitted to the Council Legal Service.
- **Approval by the Legal Service** of the draft reply
- **Examination** by the Information Working Party of the proposed draft reply.
- **Approval by COREPER** (generally as an 'I' item).
- **Adoption by Council** acting by simple majority (generally as an 'A' item).

The decision is taken by the Council.

Statutory remedies

In the event of a partial access or a refusal of access, the applicant may institute court proceedings (within 2 months) against the Council or make a complaint to the Ombudsman (within 2 years). This is also the case, if the Council fails to reply within the prescribed time limit.

ANNEX III

Policy area of requested documents	2013	2014	2015	2016	2017
Agriculture, Fisheries	3%	4,9%	3,6%	5,2%	4,9%
Internal Market	11,7%	6,7%	8,3%	5,3%	6,4%
Research	2,1%	1,1%	0,1%	0,3%	0,2%
Culture	0,5%	0,4%	0,4%	0,9%	0,9%
Education/Youth	0,6%	0,5%	0,5%	0,5%	0,8%
Competitiveness	1,1%	1,1%	0,4%	0,5%	1,7%
Energy	2%	1,3%	0,9%	0,7%	3,8%
Transport	2,6%	3,9%	3,3%	6,5%	4,2%
Environment	12,6%	13,1%	8%	11%	13,7%
Health and Consumer	4,5%	6,1%	5,2%	4,7%	2,8%
Economic and Monetary Policy	8,7%	4%	8,5%	8,3%	9,4%
Tax Questions – Fiscal Issues	3,7%	4,2%	4,3%	6,5%	5,7%
External Relations – CFSP	8,1%	10,6%	12,7%	10,2%	10,2%
Civilian Protection	0,8%	0,6%	0,3%	0,5%	0,5%
Enlargement	0,4%	0,4%	0,6%	0,7%	0,5%
Defence and Military matters	2,5%	0,8%	1,4%	1%	1,1%
Assistance for Development	0,4%	0,1%	0%	0%	0,2%
Regional Policy and Economical/Social Cohesion	0,1%	0,3%	0%	0,1%	0%
Social Policy	5,2%	5,1%	4,1%	3,5%	4,1%
Justice and Home Affairs	16,8%	23,4%	27,4%	19,1%	15,9%
Legal questions	5,1%	3,6%	2,2%	3,5%	3,4%
Functioning of the institutions	2,8%	2,8%	3,3%	6,2%	2,8%
Financing of the Union (Budget, Statute)	0,4%	0,2%	0,1%	0,1%	0%
Transparency	0,5%	0,5%	0,5%	0,5%	0,7%
General policy questions	1,1%	1,8%	1,6%	1,3%	1,2%
Parliamentary Questions	0,7%	0,5%	1,1%	0,9%	0,7%
Various	0,1%	0,2%	0%	0%	1,77%
BREXIT					2,42%