Unusual but important procedures (part one) - Access to documents requests

Unit R.1 – Transparency and Legal access-to-documents Coordinator

DG ECFIN
last update: 06/02/2017
Transparency Instruments

- Access-to-documents
- ATMOS (Register of meetings)
- Legislation: EUR-LEX, OJ
- Lobby-Register
- Register of Documents
I. The right of access to documents
II. Legal Basis
III. General Principles
IV. Procedures
V. Exceptions
VI. Further Information
Programme

1. Legal framework
2. Scope of Regulation 1049/2001
3. Principles and exceptions
4. Procedures
5. Further information
I. The right of access – a short history

- Most Member States have laws on access to documents or information
- Maastricht Treaty (1992): Declaration on access to information
II. Legal Basis ®

- Article 15(3) TFEU
- EP and Council Regulation 1049/2001 (R)
- Commission Decision 2001/937 (D)
- Jurisprudence of the European Courts
- Instructions from the Secretariat-General (notes from Secretary-General, Newsletters from unit SG.B.4)

Environmental matters
- Aarhus Convention (access to information, public participation in decision-making and access to justice in environmental matters)
- Regulation 1367/2006 (A)
III. General Principles of Access

Beneficiaries

Scope

Limits
Beneficiaries

- **Any natural or legal person**  
  [Art. 2(1) and 2(2) R and Art. 1 D]

- **No obligation to give reasons** *for the request*  
  [Art. 6(1) R]

- **No privileged access** *
  confirmed by the General Court*
Scope

- All documents drawn up or received in all areas of activity [Art. 2(3) R]

- Very wide definition of a “document”: any content whatever its medium (even database content!) [Art. 3(a) R]

- Access is granted to existing documents in an existing version and format (no obligation to create or translate documents [Art. 10(3) R])

- Also documents in the archives, if not older than 30 years
Limits – Principle of harm:

Documents are accessible unless their disclosure would undermine an interest protected by way of an exception (harm test)

No exempt categories (not even classified documents) : case by case analysis!

Exceptions apply as long as protection is justified (maximum 30 years)
IV. Procedures

Handling of initial applications
Internal Procedures DG ECFIN
Documents from third parties and other EU-Institutions
Documents from Member States
EU Documents in Member States
Partial Access
Sensitive documents
Confirmatory Applications
Means of redress (Remedies)
Handling of Initial Applications

Handled by DG/Service concerned [Art. 6 D]

Within ECFIN: decentralised treatment!

Time limit: 15 working days + extension with 15 working days [Art. 7(3) R]
Internal Procedure DG ECFIN (1)

Request arrives per electronic form on EUROPA-website

ECFIN-Access-to-documents-team checks ECFIN competence and identifies responsible unit

ECFIN-Access-to-documents-team sends Email with attribution to responsible unit (deadline for response)
Internal Procedure DG ECFIN (2)

Responsible unit prepares the reply (positive or negative).

If positive, an email on behalf of the Head of Unit can be sent (including release of documents where only names of individuals are redacted – see Note of the Secretary-General Ares(2014)3950212 of 26/11/2014 in Newsletter nº 11 of 2 December 2014)

- If request not precise: ask for clarifications
  [Art. 6(2) R]

- Voluminous request: find “fair solution”
  [Art. 6(3) R]
Internal Procedure DG ECFIN (3)

Negative reply to be signed by the Director General (also partially negative) – responsible unit launches the e-signatory (A-t-D-team may advise drafting the reply)

- Refusals must be motivated [Art. 7(1) R]
- Applicant must be informed of right to request a review - confirmatory application (same Art.)
- Copy to ECFIN AtD-team (functional mailbox)
Dear Sir or Madam,

Your request for access to documents has been registered. This message is an acknowledgement of receipt.
In accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, you will receive a reply within 15 working days (02/05/2016).

Commission reference: C(2015)8148/F1

Document request: GESTDEM/2016/1786

Yours faithfully,

European Commission
Secretariat-General
Transparency (SG.B.4)
Dear colleagues,

DG ECFIN has received 3 (three) requests, attached herewith (together with the acknowledgement of receipt), made under the Regulation 1049/2001, for access to the following document:

Codes:

C(2013) 2544 final
C(2013) 8141 final
C(2013) 8148 final

Titles:

COMMISSION DECISION of 14.4.2013 on the borrowing of the EU for the macro-financial assistance loan to Tunisia

COMMISSION DECISION of 16.11.2015 on the borrowing of the EU for the macro-financial assistance loan to Tunisia

COMMISSION DECISION of 16.11.2015 on the release by the European Union of macro-financial assistance to Tunisia

You can renew the deadline once in case of voluminous or complicated requests.)

1. You will find templates for the reply on the DG Commission website:

https://register.ec.europa.eu/edoc/user/edoc presentaion/toBelieve

A guidance can be found on the GovPro (Guide to procedures) website:


(Attached also in pdf format)

2. According to Article 3 of the Detailed Rules of Application of Regulation 1049/2001 and the Secretary General’s Instructions

A positive reply (including those where only personal data is included in the documents to be released) shall be signed by the Head of Unit (even if the e-mail of the case handler is in agreement with and on behalf of the Head of Unit).

A negative reply (refusing full or partial access to the documents requested) shall be signed by the Administrator.

Please put us in copy of your reply, in order to register it in the GovDoc database.

The ECFIN ACCESS TO DOCUMENTS TEAM (Legal and/or Administrative coordinator) is at your disposal to give you any assistance needed for the reply.

Many thanks for your cooperation.


02/05/2016
Dear Mr

Following your request for documents, please find attached on behalf of the following documents:

- COMMISSION DECISION of 14.4.2015 on the borrowing of the EU for the macro - financial assistance loan to Tunisia

- COMMISSION DECISION of 16.11.2015 on the release by the European Union of macro - financial assistance to Tunisia

- COMMISSION DECISION of 16.11.2015 on the borrowing of the EU for the macro - financial assistance loan to Tunisia.

Best regards,

Legal Officer

European Commission
DG ECFIN
Unit D2, Neighbourhood Countries – Macro - Financial Assistance (MFA)
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Office CHAR [redacted]
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Special situations

- Documents from third parties and other EU-Institutions

- Documents from Member States

- EU Documents in possession of Member States

- Partial Access (to some of the documents identified/ to only a part of a documents)

(use ADOBE ACROBAT PROFESSIONAL for redacting documents)
"Sensitive documents" = Documents from public authorities

Classified as “EU Confidential” “EU Secret” or “EU Top secret UE” in accordance with security rules in the areas of: (...) financial, monetary or economic policy

Handling by authorised staff
Refusal based on the exceptions laid down in Article 4
Disclosed only with consent of originator
In ECFIN marking very rare

[Article 9 R]
Appeal ('Confirmatory Applications')

To be submitted to the Secretary-General within 15 working days [Art. 7(2) R]

Time limit: 15 working days + extension with 15 working days [Art. 8(2) R]

Secretary-General decides by delegation
Legal Service approval required
Remedies

- **Complaint to the European Ombudsman**  
  (leading to inquiries; correspondence to be replied by the President)

- **Proceedings before the General Court of the EU**  
  (with possibility of review by the Court of Justice)
V. Exceptions

Absolute exceptions

*In case of harm, access is denied*

Relative exceptions

Double test:

*Harm?*

*Overriding public interest in disclosure?*
Absolute exceptions

**Protection of the public interest [Art. 4(1) a R]**
- Public security
- Defence and military matters
- International relations
- Financial, monetary or economic policy of the EU or a Member State

**Protection of personal data [Art. 4(1) b R]**
- Privacy and integrity of the individual in particular in accordance with legislation regarding the protection of personal data [Regulation 45/2001]

Access to documents and personal data protection are equivalent rights
Protection of personal data ®

Access to documents and personal data protection are equivalent rights

Requests for access to personal data to be examined under both Regulations 1049/2001 and 45/2001

Applicant must establish the need for disclosure

Disclosure should not prejudice the person’s rights

Documents to be disclosed are expunged of personal data

Access can be granted to the names and functions of Commissioners, their Cabinet members and staff in Senior management positions. For other staff members only if a clear need is established and there are no reasons to assume that the legitimate rights of the colleagues concerned might be prejudiced (Guidance note, SG-Newsletter n° 19 of 27 March 2015)
Relative exceptions (1)®

Protection of commercial interests, Art. 4(2) first indent R
Access refused, if disclosure would affect the competitive position, the reputation or intellectual property rights of a person or a company

Court Proceedings and legal advice Art. 4(2) second indent R
Documents drafted for the proceedings/legislative + non-legislative opinions

Inspections, Investigations, Audits, Art. 4(2) third indent R
(Infringement-, State aid-, audit- and competition procedures)
Access refused, if disclosure would undermine the purpose of ... (Jurisprudence: General presumption of inaccessibility for certain types of investigations)

Unless there is an overriding public interest in disclosure!
Relative exceptions (2) ®

**Decision-making process, Art. 4(3) R**
(legislative work, administrative and budgetary decisions, Proceedings of Selection Board and evaluation committees)

Documents drawn up for internal use or received **before the decision has been taken** [Art. 4(3) 1st subparagraph R]

Documents containing opinions for internal use even **after the decision has been taken** [Art. 4(3) 2nd subparagraph R]

*Access is refused, if disclosure would seriously undermine the decision-making process*

**Unless there is an overriding public interest in disclosure!**
VI. Further Information

**Active information**
(Public registers of documents (Art. 11 R))
Register of COM, SEC, C, OJ, PV documents
REGEXP - Register of Expert Groups
Transparency Register EP/COM (lobbyists)
ATMOS = Application for Transparent Meetings with Organisations and Self-employed individuals

**Websites**
ECFIN.net:

SG on Europa: