Access to Documents Toolkit

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This document is a working tool intended to give practical guidance on how to handle access to documents (ATD) requests.

It is an internal document and should not be shared as such or circulated outside the Commission.

This Toolkit is prepared and updated by the DG TRADE Access to Documents Team in DG TRADE unit R.3.

For further guidance on access to documents replies please contact us via email to our functional mailbox TRADE-ACCES-DOCUMENTS@ec.europa.eu, and/or consult our Intranet page at:

https://myintracomm.ec.europa.eu/dg/trade/procedures/Pages/access-to-documents.aspx
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out of scope
FOREWORD

Despite changes in the overall political context, trade policy remains a subject of high public interest. This has led to an increasing demand for transparency and openness of the decision-making. Transparency remains a top political priority of the Commission and unprecedented steps have been taken to ensure that trade policy is conducted in a transparent and inclusive manner.

In particular over the past 6 years, major steps have been undertaken to make our trade policy much more transparent. Since the Communication ‘Trade for All’ (October 2015), we publish more information about ongoing negotiations, such as initial legal negotiating texts, detailed reports of the negotiating rounds, explanatory material, the texts of the political agreements before legal scrubbing as well as the Commission’s proposals to the Council for negotiating Directives. In 2018, DG TRADE decided to increase further its transparency efforts regarding the implementation phase of EU’s trade agreements. We now publish agendas and reports of Committee meetings, in particular for agreements that came new into force, but to the extent possible also for agreements that were already in place.

In addition, all DG TRADE impact assessments, sustainability impact assessments and evaluations include an in-depth consultation of stakeholders (through online questionnaires, surveys, meetings with civil society and stakeholders and workshops organised in the partner country) and DG TRADE also organises regular meetings with civil society groups during trade negotiations.

Our proactive transparency efforts have also been extended to expert groups chaired or co-chaired by DG TRADE and, following a commitment undertaken by the then Commissioner Hogan in February 2020, DG TRADE now also publishes Commission decisions authorising Member States to negotiate Bilateral Investment Agreements with third countries.

Public access to documents represents an important element in this transparency debate. Increased public interest in trade policy has generated a large number of requests in all areas of activities of DG TRADE, while the legal requirements for assessing the documents have remained strict. For example, in 2020 we handled in total 353 requests for access to documents, involving the review of ca. 20,000 pages. Among these documents, about 77% were released (either fully or partially), whereas only 9% were entirely withheld.

This continuing demand comes with a variety of different legal and practical challenges and shows the value of this practical guidance on how to handle access to documents requests in an efficient manner. This Toolkit provides a guide to DG Trade colleagues and helps them in the preparation of the replies. It is based on our day-to-day experience.
We trust this Toolkit will be useful. If you have any questions that are not addressed here, do not hesitate to contact us in the ATD team (of unit R.3). Our job is to help and support you so that together we can meet the practical challenges of the access to documents work and ensure the best degree of transparency to the public, while ensuring that legitimate interests of the EU and other entitled third-parties are preserved.
INTRODUCTION

WHY?

We have a legal obligation to grant public access to documents of the EU institutions. The right of access to documents is a fundamental right enshrined in Article 42 of the Charter of Fundamental Rights of the EU and Article 15(3) of the Treaty on the Functioning of the EU. Its purpose is to enable citizens to participate more closely in the decision-making process and to ensure that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system.


⇒ Access is the rule! Documents can only be fully or partially withheld if there is a reasonably foreseeable (and not just hypothetical) risk of harm to certain public or private interests as contained in Article 4(1), (2) and (3) of Regulation 1049/2001, namely:

- to international relations;
- the financial, monetary or economic policy of the EU or a Member State;
- the privacy and integrity of the individual;
- the commercial interests of third parties;
- the purpose of court proceedings and legal advice;
- the purpose of investigations;
- the Commission's decision-making process.

According to long-standing well-established case-law these exceptions to the right of access must be interpreted restrictively.

When a request for access to documents contains personal data, Regulation (EU) 2018/1725 applies.

⇒ Names, and any other information revealing the identity of members of institutions below the level of Director (or equivalent) or the identity of any member of third party staff, are
redacted from the documents to be disclosed, unless specific conditions established in the Article 9(1)(b) of Regulation 2018/1725 are fulfilled.

When a request concerns information relating to emissions into the environment, the Aarhus Regulation (Regulation 1367/2006) applies together with Regulation 1049/2001.

WHAT DOCUMENTS?

All documents held by an EU institution can be subject to an access request, i.e.:

- documents drawn up by the institution,
- documents in its possession,
- documents received from third parties.

⇒ No category of documents is excluded a priori from the right of access. This includes classified documents. Even a database can be considered as a document if the requested data can be easily extracted as part of a routine search. This also includes e-mail correspondence, if it is supposed to be registered in ARES in the first place (simple e-mail exchanges are excluded; cf. STEP 3 below).

⇒ In practice all documents (reports, notes, emails including attachments) identified in reply to an ATD request must be registered in ARES or in an equivalent document-management system (e.g. Basis, EMT), before being sent to the applicant.

⇒ The right of access applies only to existing documents. These are released in their existing version and format (except when they have a marking or classification). This means, for instance, that documents do not need to be translated, nor do new documents need to be created for the purpose of replying to a request. However, a list of documents identified (including the ARES numbers of the originals) is drawn up for each request under the Commission Code of Good Administrative Behaviour.1

1 ‘Unless it leads to the imposition of administrative or budgetary burdens out of proportion to the benefit expected’ (see point 1, page 4 of the Commission Code of Good Administrative Behaviour).
When the request concerns third party documents (e.g. Member State, company) the originator of the document must be consulted in case of doubt. If it is clear, however, that the document should or should not be disclosed, we can take the decision without consulting the third party. If you decide to deviate from the opinion of the third party, you will in principle need a justification approved by the SG and the Legal Service (though in practice it is of course very much preferable to come to an agreement with the third party).

A document released under Regulation 1049/2001 becomes a public document and can no longer be withheld in future replies.

(A) WHO CAN REQUEST ACCESS?

Any individual or organisation, including those from outside the EU, can ask for access to documents. The majority of the requests to DG Trade come from NGOs, journalists, lawyers and academics; more rarely, citizens. The applicant does not need to give any reason or a purpose of her/his request.

MEPs can either introduce a request for public access to documents under Regulation 1049/2001 or ask for access to confidential information via the relevant EP bodies defined in Annex II to the EP-
Commission **Framework Agreement**. In the latter case the request is not to be treated as an access to document request under Regulation 1049/2001. However, access provided under the Framework Agreement may not be more restrictive than public access provided previously or simultaneously under Regulation 1049/2001.

Requests from **Member State national or sub-national authorities** should not be handled under Regulation 1049/2001, but rather as a corollary of the principle of loyal cooperation (Article 4(3) of the Treaty on European Union). The ATD team of unit R.3 can advise on the correct procedure to handle these types of requests. In general, the replies should be sent as soon as possible, where appropriate in consultation with the relevant policy unit of the Secretariat-General covering the subject-matter concerned, and addressed to the Member State’s Permanent Representation.

(B) **INCOMING INITIAL REQUEST – INITIAL LEVEL REPLY**

When the request arrives in DG TRADE, the ATD team in **R.3 registers** and analyses it and **distributes** it to the unit in charge of the matter (Chef de File unit – ‘CdF’). In parallel to distribution by email, R.3 will distribute the request to the CdF unit in Ares (CF: HoU; INFO task: DHoU/ATD coordinator; ASOC: associated units). **The CdF unit coordinates the collection of the documents** (including from the associated units if applicable – except for Cabinet documents, which is done by R.3) and **prepares the reply**. In case it is not clear which unit should take the lead, R.3, in consultation with all units concerned, will designate the CdF unit. If a unit has erroneously been designated as CdF, it will need to click ‘BACK TO THE SENDER’ in Ares and add an explanation of why it should not deal with the request.

The first thing that the CdF unit needs to do once it receives a request, is to send to the ATD team of unit R.3 an **immediate assessment of the workload** required to prepare the reply. In case of a request concerning a large number of documents, it may be possible to agree with the applicant to reduce the scope of the request. If a ‘fair solution’ cannot be found, a part of the request may exceptionally be refused on the ground that the workload relating to the disclosure of the requested documents would be disproportionate in comparison with the interest of the applicant. However detailed explanations would need to be given to the applicant in this case.

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2 However, if the applicant acts in his/her personal capacity, the request will be treated under Regulation 1049/2001. It is important to establish in case of any doubts, whether a request is made in personal capacity, despite the use of their professional email and/or postal address by the applicants.
R.3 supports units in charge of the replies by managing the deadlines and the correspondence with the applicants, advising on procedural and legal questions, and by making a final check of the replies before signature. The ATD team of unit R.3 also coordinates with other DGs and other institutions when needed. To enable R.3 to handle the required contacts with the applicant, the unit in charge of the reply should keep R.3 regularly informed about the status of the preparation of a reply. It should also inform R.3 as soon as it realises that an extension of the deadline is needed to finalise the reply.

What you need to do if you are in charge of a request:

1) Identify the document(s) that fall(s) under the scope of the request.

2) Assess the identified document(s) individually with regard to the need to protect all or parts of them with regard to the exceptions contained in Article 4(1), (2) and (3) of Regulation 1049/2001.

   2.a) If the documents are classified, they must be declassified before release.

3) In case of any partial release, redact the document(s) whenever necessary, in pdf-format by using – exclusively – the specific Adobe Acrobat Pro software (not installed by default on the labtops, but easily available via the EC (software) store); this redaction should happen by way of a two-step approach, using the ‘Redact’ tool provided for in Adobe Acrobat Pro: (1) establishing (and saving separately) a ‘Marked for redaction’ (‘MFR’) version, starting from the original document (whereas the original [Ares] document should be free of electronic signatures, which could prevent the performance of redactions; in case of doubt, simply do a reprint [‘print to pdf’] of the original document); (2) performing the very (irreversible) redactions via ‘apply redactions’ (whereas the ‘MFR’ version serves as fall-back version, still allowing quick modifications and generation of an newly adapted final redacted version.)

4) Draft the reply letter, using past examples (available from R.3 and/or R.3 Intranet page).

5) Prepare the signataire (in ARES and, where applicable, also in paper file).

6) Send out the reply by email or via ARES, once it is signed.

7) For all replies, except positive ones, your unit should normally provide unit R.3 with the original signed letter (whereas then unit R.3 would send the letter to the applicant via registered surface mail). However, since the beginning of the exceptional working arrangements due to COVID-19, we currently do not send out a printed reply letter. Instead of this, we have adapted the template language for the ‘cover’ email accordingly, not only making use of the ‘Request a Delivery Receipt’ and ‘Request a Read Receipt’ MS Outlook ‘Options’, but also (explicit requirement by the SG colleagues) requiring an explicit email receipt confirmation reply email from the email addressee/applicant.

You can find in this Toolkit a detailed 10 steps guide on how to prepare an ATD reply. For any further questions do not hesitate to contact us at TRADE-ACCESS-DOCUMENTS@ec.europa.eu.
(C) DEADLINES

As specified in Regulation 1049/2001, requests for access to documents must be handled within 15 working days. This deadline may be extended by additional 15 working days provided that the applicant is informed in advance and detailed reasons are given. Please note that the extension of a deadline cannot be asked immediately after the attribution of a request, but only shortly before the expiration of the 1st deadline. If we fail to reply within the prescribed time limits, the applicant is entitled to submit a request directly to the Secretariat-General (confirmatory application – see below) as in principle a lack of reply is equivalent to a refusal to grant access. In general, when this happens the Secretariat-General will give us the opportunity to finalise our initial reply first, if this can be done in a reasonable timeframe.
(D) IF THE APPLICANT IS NOT SATISFIED – CONFIRMATORY DECISION

In case of a total or partial refusal, or where the institution fails to reply within the time limit, the applicant can make a confirmatory application (within 15 working days upon receipt of the initial reply) to the Secretariat-General asking the Commission to reconsider its position. In this case the SG will ask us to react quickly (24 h) providing our views and the unredacted originals of the documents. The Secretariat-General, in consultation with the Legal Service, will prepare a definitive decision either confirming or fully/partially reversing the initial reply, but after consulting us on their position. The Confirmatory Decision is a Commission Decision, which is adopted and signed by the Secretary-General by way of a delegated decision (i.e. the adoption power is delegated from the College to the Secretary-General of the Commission).

Please keep in mind that any document we produce (supposed to be registered in ARES or in other e-DOMEC compliant registration system) might potentially need to be disclosed under the access to documents

(E) LEGAL REMEDIES AVAILABLE TO THE APPLICANT

In case of a negative decision by the Secretary-General (i.e. partial or full refusal to give access to identified documents) or failure to reply within the prescribed time limit at the confirmatory level, the applicant can make an application for annulment before the General Court and/or a complaint to the European Ombudsman. As regards the latter: only EU citizens or natural or legal persons residing or having their registered office in a Member State are entitled to make a complaint to the European Ombudsman.
10 STEPS TO PREPARE A REPLY
STEP 1: READ THE REQUEST CAREFULLY

When you receive a request for access to documents, it is important that you first read it carefully. This will allow you to understand whether the applicant is asking for documents or for information. In general, R.3 will also provide guidance on whether a request is for documents or information at the stage of distributing the request to the units.

⇒ If you are dealing with a request for information, you must handle it under the Commission Code of Good Administrative Behaviour and not under Regulation 1049/2001. For example, if the applicant asks for a list of meetings with named companies on e.g. the Japan Agreement in 2016 and this list is not as such contained in any existing document or database, this would be a request for information. If, on the other hand, the request is for the reports of those meetings this would be a request under the access to document rules. (See also in more detail Step 3)

⇒ If you are dealing with an access to documents request, you need to determine its material scope, i.e. the documents that are covered by the request. Generally the request should specify a time period for the requested documents. If the end date is not specified, we can normally consider this to correspond to the date of the request.

⇒ If a document covers issues which are not mentioned in the applicant’s request, any parts that are not relevant to the request are usually not disclosed. This is not a refusal to grant access; rather it allows us to reflect better the scope of the applicant’s request.

For example, if the applicant asks for a report related to negotiations with country X (e.g. Turkey) which is contained in a report covering also another country (e.g. China), only those parts referring to country X (e.g. Turkey) are relevant to the request. The other parts of the document will be replaced by the indication "out of scope", as in the example below. Titles of the "out of scope" parts may be left visible, where possible, to ensure transparency to the applicant.

<table>
<thead>
<tr>
<th>China</th>
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<tr>
<td>[Out of scope]</td>
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</table>

Turkey

EFFIA called upon the COM to be ambitious when modernizing the Customs Union (CU) with Turkey. They suggested the EEA model, as under this model regulations are harmonized with the EU acquis.
STEP 2: IF THE REQUEST IS IMPRECISE, OR IS TOO WIDE

A) If the request is not sufficiently precise to allow identifying specific documents:

⇒ The ATD team in R.3 asks the applicant for clarification (i.e. to which type of documents exactly the applicant seeks access), often after consulting the CdF unit.

⇒ A request for clarification stops the clock and the deadlines start running only when the applicant has provided the required clarifications.

B) If the request is very broad and concerns a large number of documents which cannot be dealt with in 15+15 working days, we can try to find a fair solution with the applicant.

⇒ The CdF unit should make the workload assessment as soon as possible so that R.3 can take care of negotiating with the applicant.

The case law has clarified that a fair solution may concern the number and content of the documents (i.e. with a view to reducing the number of documents concerned), but not the deadlines for dealing with the initial request (C-127/13 P, Strock, §§ 25-28). This means that we need to release to the applicant all documents covered by the scope of the request within 30 working days.

⇒ To facilitate reaching a fair solution, we need to provide the applicant with concrete elements to enable him/her to make an informed decision, e.g. on the basis of the exhaustive list of identified documents we will provide number/category(ies) of documents that could be dealt with within 30 working days.

⇒ The applicant may agree to withdraw some parts of the request, e.g. by reducing the scope. The applicant’s agreement must be unequivocal and recorded in writing (e.g. by e-mail).

If a fair solution cannot be found, we may exceptionally refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate in comparison with the interest of the applicant. We must however explain in detail why the full treatment of the request would entail an unreasonable amount of work. Unit R.3 can provide you guidance on how to handle large scope requests.
STEP 3: PREPARE A COMPLETE LIST OF DOCUMENTS

Once the scope of the request is defined, you need to identify one by one the documents that fall within the scope of the request. These documents are either registered or should have been registered in ARES. This, of course, can also include emails. If the documents date back to a few years ago and have not been registered in ARES, although they should have been, they can be registered now as 'Note to File'. The CdF unit would need to coordinate, ask and receive documents from other units. As regards documents from the Cabinet, R.3 will request them directly from the Cabinet and transfer them to the CdF unit for redaction and inclusion in the reply.

⇒ For guidance as to which documents should be saved in Ares, we advise you to consult the DG TRADE guidelines on the registration of documents in annex 5 to this toolkit Ares(2014)20526183.

⇒ For documents related to meetings with external stakeholders in particular, also use EMT (the Events Management Tool) to register the meeting and the corresponding meeting report.

⇒ A list of all documents identified under the scope of the request needs to be attached in the reply to the applicant. The list must be clear, relevant and exhaustive and include titles, dates and ARES reference numbers of each document (see example below). We also recommend to number the documents consecutively in the file names, according to their number in the list (e.g. Doc 1_Meeting request, Doc 2 Minutes, and so on). The title or description of the documents should not contain any personal data. The list of documents must be drawn up in Word (not in Excel) format (see template below, available also on R.3 Intranet page). The final version sent to the applicant should be in pdf format.

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If the documents identified contain annexes (e.g., an email with attachments), the latter are normally considered to be part of the documents identified.

Sometimes, applicants request lists of meetings with specific organisations or concerning a specific topic. If this list does not exist and cannot be retrieved from EMT, we are not obliged to create it under Regulation 1049/2001. However, in line with the Commission Code of Good Administrative Behaviour, we should generate the list unless it really represents a disproportionate administrative burden. In this case, we treat it as a request for information (see above under Step 1: Read the request carefully). With the more systematic use of EMT the effort involved should be more and more reduced.

Double-check EMT to identify the documents that fall within the scope of the request (i.e., in particular lists of meetings/meeting reports). Pour mémoire: lists of meetings of the Commissioner, his/her Cabinet and the Director-General with organisations and self-employed individuals are already publicly available.

If the requested documents are old, the unit in charge will need to contact the Historical Archives of the Commission (OIB-ARCHIS-BASE@ec.europa.eu) There is no formal procedure other than sending an email with a clear indication of what type of documents are requested to the above email address.
STEP 4: CONDUCT THE NECESSARY CONSULTATIONS

If documents of third parties (e.g. position papers of a company/industry association/NGO handed or sent to the Commission) are in the scope of the request, check if they are published online. Often documents that are marked confidential or presented to the Commission as such are in fact public.

If they are not public, it is then for us to decide whether they can be disclosed or not. We do not have an obligation to consult a third party, except when there is a doubt regarding the release of the documents. However, SG advises to consult the third party on release in case the document originates from a third party or it reflects or quotes a third party’s position.

⇒ For Member States’ documents, we can consult the national authorities via the Permanent Representations in Brussels. This would normally be done by the CdF unit, with R.3 in copy; R.3 can advise who exactly to contact in the Permanent Representations.

⇒ For other third party documents, we can consult the author of the document, though it is good practice to check on the status of the document immediately at the time it is handed over and keep a trace of the response given. If the third party is consulted subsequently, this would normally be done by the CdF unit, with R.3 in copy. In the case of third countries, contacts can be facilitated by the EU Delegation.

⇒ For documents originating from another EU institution or from other DGs, the Legal Coordinators of the ATD team in unit R.3 will normally consult on these documents with their counterparts in the FP SG and/or Council SG and/or with their colleagues of the Commission ATD network.

R.3 can provide the templates for the consultation of third parties or Member States. Consulted parties should be given at least 5 working days to reply.

If the parties consulted object to the release of the document, it is advised to respect their objections, but these must be based on the (‘Article 4’) exceptions of Regulation 1049/2001 for not disclosing the documents.

If the third party consulted asks for the identity of the applicant, this should normally not be revealed, unless the party can demonstrate that there is no prejudice to the interests of the data subject and that the information is necessary. (This is in practice very difficult to prove since the
access is given to the public and not to specific individuals, which means that the identity of the applicant is irrelevant. We may however provide an indication of the category to which the applicant belongs (e.g. NGO, journalist, academic).
STEP 5: ASSESS ALL IDENTIFIED DOCUMENTS

Once the documents are identified, you need to carry out a **concrete and individual examination of their content** to verify whether any of the exceptions set out in Art. 4 of Regulation 1049/2001 applies.

⇒ Any refusal to grant access must be based on one, or more, of the exceptions in Regulation 1049/2001 and explained in sufficient detail why the release of the information would "specifically and effectively" undermine the interest foreseen in the relevant exception. A refusal, which fails to give the reasons on which it is based, could give rise to a complaint on the ground that the Commission is not meeting its commitments with regard to transparency.

The exceptions set out in Article 4 of Regulation 1049/2001 are the following:

<table>
<thead>
<tr>
<th>‘ABSOLUTE’ EXCEPTIONS</th>
<th>‘RELATIVE’ EXCEPTIONS</th>
<th>Special exception category: personal data</th>
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<tbody>
<tr>
<td>(‘single harm’ test)</td>
<td>(‘double harm’ test)</td>
<td></td>
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<tr>
<td>• <strong>Article 4(1)(a),</strong> protection of the public interest(s) as regards:</td>
<td>• <strong>Article 4(2),</strong> protection of:</td>
<td>• <strong>Article 4(1)(b),</strong> protection of the privacy and integrity of the individual, <strong>unless</strong> there is a specific purpose in the public interest (see Art. 9(1)(b) of Regulation 2016/1725)</td>
</tr>
<tr>
<td>− public security</td>
<td>− <strong>commercial interests</strong> of a natural or legal person, including intellectual property,</td>
<td></td>
</tr>
<tr>
<td>− defence and military matters</td>
<td>− <strong>court proceedings</strong> and <strong>legal advice</strong>,</td>
<td></td>
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<tr>
<td>− international relations</td>
<td>− the purpose of inspections, <strong>investigations</strong> and audits, ...</td>
<td></td>
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<tr>
<td>− the financial, monetary or economic policy of the EU or a Member State</td>
<td>• <strong>Article 4(3),</strong> protection of a decision-making process (including negotiations), in relation to:</td>
<td></td>
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<tr>
<td></td>
<td>− documents drawn up by an institution for internal use or received by an institution, which relate to a matter where the decision has not been taken by the institution, if the disclosure would seriously undermine the decision-making process.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>− Opinions for internal use as part of deliberations and preliminary consultations within the institution, even if the decision has been taken, if the disclosure would seriously undermine the decision-making process,</td>
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<tr>
<td></td>
<td><strong>unless</strong> there is an <strong>overriding public interest</strong>.</td>
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In exceptional and very specific cases (recognised by the case-law),\(^4\) a **general presumption of non-disclosure may apply** (mainly/only in cases regarding the Article 4(2) exceptions), which means that the documents would not need to be individually assessed. However, in most cases such general assumption does not apply.

⇒ For example, documents of an **ongoing negotiation are not as such covered by a general presumption of non-disclosure**. This means that they need to be examined one by one and disclosed fully or partially if their content does not fall under any of the exceptions of Regulation 1049/2001.

The fact that a document has been **leaked is not per se a reason to release the document** if the disclosure undermines one of the interests protected by Regulation 1049/2001. In practice however, the fact that the document is already (unofficially) in the public domain, may weaken the argument that its disclosure undermines one of the interests protected by Regulation 1049/2001.

For additional guidance on how to assess **briefings, draft Impact Assessment reports** and associated exchanges between DGs, and documents which are part of **Interservice Consultations**, please refer to the fiches prepared by SG contained in **Annexes 1, 2 and 3 to this Toolkit**.

### A. ‘ABSOLUTE’ EXCEPTIONS

Absolute exceptions require a **single harm test**:

![Diagram showing the single harm test]

#### Protection of international relations

This exception is generally used to protect information which reveals EU strategic objectives in the negotiations and confidential negotiating positions. It is also used to protect the negotiating position of our trading partners in order not to undermine the mutual trust in the negotiations.

\(^4\) By analogy with the case-law related to competition proceedings, we consider that a general presumption of non-disclosure applies to certain documents of TDI proceedings.
Protection of the financial, monetary or economic policy of the Community or a Member State

This exception has been used to protect ongoing WTO negotiations which were taking place in a "sensitive context" and were "characterised by resistance on the part of both the developing and the developed countries and the difficulty in reaching an agreement". In case T-264/04, WWF European Policy Programme v Council, the Court found that the use of this exception was justified in such context as disclosure of the documents "could have undermined relations with the third countries [...] and the room for negotiation needed by the Community and its Member States to bring those negotiations to a conclusion".

B. ‘RELATIVE’ EXCEPTIONS

‘Relative exceptions’ require a double harm test.

Protection of commercial interests

This exception is generally applied to protect information that could harm the competitive position of a company, by undermining its reputation, or disclosing commercially sensitive information (e.g. Intellectual Property, know-how, prices, costs, or simply the fact that a company made a request under specific EU regulations) that could give an unfair advantage to competitors, or which could lead to a risk of retaliation from competitors or regulators and other authorities in third countries. This exception can also be applied to the company name if its disclosure could harm any interest protected by it unless the company name constitutes the name of the natural person (e.g. John Smith Ltd). In this case we would rather apply the personal data protection exception.

Protection of court proceedings and legal advice

This exception usually applies to documents prepared for Court proceedings (e.g. application, defence, reply and rejoinder), and legal opinions which cover particularly sensitive issues or have a wide scope. Recently, the EU Courts (T-18/15, T-800/14, T-796/14, T-755/14, T-710/14, Tobacco
judgments) have recognised that this exception can also apply to documents that were not drawn up solely for the purposes of court proceedings, if at the time of the decision refusing access, the requested documents had a **relevant link with a pending or imminent dispute before EU or national courts** (e.g. documents of an inter-service consultation or opinions of individual staff which concern a piece of legislation challenged before EU Courts). Disputes under WTO auspices or under our bilateral trade agreements evidently fall under the scope of this exception. Documents related to such disputes may be prevented from disclosure before the case is officially launched. After that period, the identified documents should be assessed on a case by case basis and their partial or non-disclosure may fall under articles 4.1(a) third indent (international relations), 4.2 (court proceedings) or 4.3 (decision-making process) depending on the type of document and the step of the particular procedure in question.

**Protection of the purpose of inspections, investigations and audits**

This exception is used to protect internal documents of trade defence investigations. A general presumption of non-disclosure was recognised by the Ombudsman to cover antidumping proceedings. This however has not been confirmed by the EU Courts yet.

**Protection of the institution's ongoing decision-making process**

This exception applies to internal documents drawn up or received in the context of an **ongoing decision-making process**, provided that disclosure would **seriously undermine such process** and unless there is an **overriding public interest**.

The requirements to rely on this exception are **particularly strict**. In a ruling concerning a request to DG Trade for access to documents related to endocrine disruptors (T-51/15, Pan Europe), the General Court annulled the Commission decision refusing access, on the ground that we failed to provide **detailed, precise and concrete justifications** to prove that the release of the documents (internal notes and emails) would have seriously undermined the ongoing decision-making process on the definition of criteria for endocrine disruptors.

In practice, when we rely on the exception protecting an ongoing decision-making process, we should therefore:
• Adopt a selective approach and invoke the exception only for the parts that really merit protection.

• Justify why and how this exception applies, alongside any other possible applicable exceptions.

• Consider the use of the exception in situations where the inter-institutional decision-making process is not yet finalised.

• If you are dealing with documents related to a decision-making process which is concluded you may still rely on the first subparagraph of Article 4(3) provided that the disclosure of the documents would seriously undermine another ongoing decision-making process.

Protection of the institution’s finalised decision-making process

This exception applies to internal opinions exchanged within the institution (including within an advisory committee) after the decision-making process is concluded if disclosure would seriously undermine such process and unless there is an overriding public interest.

- The EU Courts have recognized in their case-law that the capacity of the EU staff to express their opinions freely must be preserved to avoid the risk that the disclosure would lead to future self-censorship, which would ultimately affect the quality of the internal decision-making.

For guidance on the use of the exceptions, you can consult the 5G Intranet page which contains an updated summary of the relevant case law. Examples of replies to ATD requests are also available on the R3 Intranet page. In case of doubt, do not hesitate to consult our team.

C. SPECIAL EXCEPTION CATEGORY: personal data ('privacy and integrity of the individual')

Personal data (e.g. names, e-mail addresses, phone numbers, job titles, names of companies containing the name of a natural person) are protected under Article 4(1)(b), unless specific conditions established in Regulation 2018/1725 are fulfilled (see Annex 6). Absent these conditions, the administrative practice of the Commission is to remove systematically the names and job titles of:
- **all Commission staff except for senior management** (Director level and above, Heads of Delegation, Members of Cabinet/cabinet AD staff, Special Advisors or equivalent, and the Commissioners); as it seems, the removal of this data is not facultative, i.e. individual staff member cannot agree on their own that their personal data are published in relation to their professional activities.

- **employees of an external entity who are not public figures acting in their public capacity.**

Names of public figures (such as President, Head of State, Minister, State-Secretary, Secretary-General, Director General, Ambassador Permanent Representative, head of regional administration, mayor, Ombudsman, MEP, etc) are generally disclosed.

In addition to names and job titles, **other personal data** such as contact details (e.g. e-mail addresses, telephone numbers) and **hand-written signatures** must be systematically withheld regardless of the seniority of the subject person.
STEP 6: CONSIDER THE ‘OVERRIDING PUBLIC INTEREST’

If you rely on one of the exceptions set out in Articles 4(2) and 4(3) of Regulation 1049/2001, i.e. the ‘relative’ exceptions, you must also assess whether there is an overriding public interest in disclosure and include the relevant reasoning in a separate section of the reply.

⇒ There is little guidance as to what would constitute an overriding public interest. The EU Courts seem to recognise that the overriding public interest relates to increased openness and public participation in the institutions’ decision-making process (Joined cases C-39/05 and C-52/05 P, Sweden and Turco v Council).

⇒ What is clear, however, is that there is a distinction to be made between cases where the institution acts in a legislative capacity and cases where it acts in an administrative or non-legislative capacity.

- The public interest is of particular relevance when the institution is acting in its legislative capacity. In this case, there is a presumption that an overriding public interest exists and it is for the institution to rebut that presumption. Therefore, if we refuse access to a document relating to a legislative procedure, we need to provide reasons as to why a public interest is not deemed to exist.

- In case of administrative or non-legislative documents the situation is the reverse: an overriding public interest is presumed not to exist, unless the applicant proves otherwise. Therefore in these cases, the overriding public interest can be dispelled with a less extensive reasoning.

  - A private interest of the applicant (e.g. the interest to defend oneself against a criminal charge) in obtaining the document is not relevant for the assessment of whether a public interest exists.

- In the negotiation of international agreements, the participation of the public is necessarily restricted – in view of not revealing strategic interest in the negotiations (T-301/10, Sophie in't Veld v Commission).
STEP 7: CONSIDER WHETHER PARTIAL ACCESS IS POSSIBLE

If only parts of the document are covered by exceptions set out in Article 4 of Regulation 1049/2001, the remaining parts must be released. In case of partial access, it is important that the parts released to the applicant are meaningful. If not, then it is advisable to withhold the entire document (T-204/99, Mattila v Council and Commission, § 69: "[...] the Council and the Commission are in any event entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant").
STEP 8: REDACT THE DOCUMENTS

The redactions in the documents to be partially released must all be done electronically through Adobe Acrobat Pro[essional] (for Windows 10). You can request it through the EC Store. In case of doubt, please ask the IT Helpdesk calling (77777).

Please note: Acrobat Reader may not be used for redaction exercises, as redactions performed with Acrobat Reader electronically in the documents, are not unreversible and can easily be removed again afterwards!

For further instructions on how to use this programme, please check the SG guide in Annex 4 to this Toolkit. The steps to follow are:

1. **Select the right redaction colour: the lightest grey grade.**

   Only in case you redact whole pages, change the redaction colour into white and take out the pages entirely redacted. Always indicate on the first page which pages have been taken away and for which reason.

2. **Redact properly** following the instructions in Annex 4 to this Toolkit.

3. **Insert the right justification for each information redacted**

   Go to ‘Edit PDF’ and add on each redacted part the justification article from Regulation 1049/2001 (e.g. ‘Article 4(1)(a) third indent’) using font size 10 or 12.

   However, **best practice** in this context is making use of the ‘Properties’ tab and the ‘Use Overlay Text’ function of the Adobe Acrobat Pro ‘Redact’ Tool:
4. **Save the ‘Marked for redaction’ (‘MFR’) version as intermediary step**

It is best practice to save the ‘Marked for redaction’ (MFR) version as intermediary step. This version may serve for two important purposes: (1) it can easily be reconsulted in case of later changes (e.g. required by the hierarchy); (2) as a ‘supporting document’ in Ares it allows easier technical access to the documents intended for redaction and easier handling of the Ares reply file, since the ‘marked for redaction’ version allows easy verification of the original text and of the intended redactions at the same time.
5. **Save the redacted document**

It is then indispensable that you save the document (the application will automatically add a 'Redacted' extension to the document name). Only once the redactions have been applied (permanent grey bars instead of red boxes) and the document has been saved, the redactions have become irreversible.

The ‘best practice' two-step approach described above for performing the redactions leads ideally to a situation, where the case-handler has at hand three folders with the respective documents (see example below): the **first folder** with the original documents (prior to any redaction activity), the **second folder** with the ‘marked for redaction' versions of the documents, which should internally serve for briefing and consultation of the hierarchy (inter alia as ‘supporting documents' in the Ares reply file; allowing at the same time to easily return to the redacting exercise for any changes in the redactions to be implemented), and the **third folder** containing the finalised and irreversibly redacted documents to be sent to the ATD applicant.
Please note that the **redactions are done by the Unit(s) responsible for the reply before launching the e-signatory.** If the documents to be fully disclosed have a marking (such as ‘LIMITED’) or a classification (such as ‘EU RESTRICTED / UE RESTREINT’), this must be taken away before release. It is the responsibility of the operational units to request DMO or SG to remove the marking or classification.

⇒ For documents which have been passed through the internal decision-making process of the Commission for official transmission to the other institutions (e.g. Commission proposals for negotiating directives), R.3 will help you by preparing a note from Director of DG TRADE Directorate R to inform the Director of the Commission Registry (Greffe SG.A) of the request for declassification. You would, however, need to provide a full or partial version of the document **in all existing languages**.

⇒ Once the declassification is done, the declassified version of the document will be uploaded on SG-Vista by the SG.

⇒ For other documents, for example, market access offers in a negotiation where the classification is done by DG Trade, you should consult the Director-General or Director responsible (where this has been delegated) and if he/she agrees, produce a file note confirming the decision to declassify the document(s) in question. All the original addressees of the documents (e.g. European Parliament) should be informed of the declassification.


For further advice, do not hesitate to consult the ATD team of unit R.3.
From: Art. 4.1(b) (TRADE)
Sent: Thursday, March 05, 2015 7:13 PM
To: GARCIA BERCERO Ignacio (TRADE); Art. 4.1(b) (TRADE-WASHINGTON); Art. 4.1(b) (TRADE); Art. 4.1(b) (TRADE); Art. 4.1(b) (TRADE); Art. 4.1(b) (EEAS-WASHINGTON)
Cc: Art. 4.1(b) (TRADE)
Subject: 04/03/2015 Chevron - TTIP - report

Chevron: Mr Art. 4.1(b) (law department), Ms Art. 4.1(b) (Brussels office), Mr Art. 4.1(b) (Well, law firm)
TRADE: Mr Art. 4.1(b) , Ms Art. 4.1(b) (report)

Short meeting organised at the request of the company interested in the overall progress of the negotiations, the dynamics and the main elements of the discussion. The subject was set according to the usual line. On energy Art. 4.1(b) we identified our interest to solve in TTIP our bilateral issues, set rules on energy trade and investment beyond WTO (e.g. transit through pipelines, trading monopolies, non-discriminatory access to monopolised infrastructure) as a stepping stone for global standard, as well as our wish to work on consolidation of existing common environmental principles (e.g. offshore safety) and disciplines for renewable energy and energy efficiency. Several example of a geopolitical value of such a chapter were discussed (UA, Central Asia, Russia). Chevron asked principally questions on ISDS and was interested in the dynamic and arguments used in the current debate in the EU.

European Commission
DG TRADE
Unit G3 Market Access, Industry, Energy and Raw Materials

B-1049 Brussels/Belgium
@ec.europa.eu
STEP 9: DRAFT A REPLY TO THE APPLICANT MAKING SURE THAT THE RIGHT PERSON SIGNS THE LETTER

The reply needs to contain the following essential elements:

- A list of documents which is clear, relevant and exhaustive;
- Correct and exhaustive choice of the exceptions and a clear reference to them;
- Detailed and solid reasoning for withholding documents (or parts of documents) on the basis of the exceptions;
- (If required) input from third party/MS consultations;
- In case the relative exceptions are used, explanation of why there is no overriding public interest in the disclosure;
- In case a document is proposed to be fully withheld, assessment of whether partial access is possible;
- Reference to the means of review (confirmatory request);
- In case documents are fully disclosed, include the proper "dissemination clause" from the positive letter template;
- If the deadline for replying to the applicant has been exceeded, it is good practice to include in the reply an apology and, if possible, an explanation for the delay.

Examples of our replies prepared in the past are uploaded on R.3 Intranet page. R.3 can provide further and more specific guidance.

SIGNATURE

Positive replies or replies in which the only parts redacted concern personal data are signed at CdF unit Head of Unit level;

Partially negative and negative replies, as well as complex files are signed by the Director-General, including:

- positive reply with only personal data redacted but the applicant asked for personal data,
- positive replies with 'Out of scope' redactions);
- negative replies to repetitive requests.
If no document exists that corresponds to the request, the reply letter is signed by the Director-General.

Some organisations systematically publish, via a publicly accessible website, Commission services replies to applications for access to documents. In order to avoid that handwritten signatures (which are sensitive biometric data) appear in the public space, it is recommended that initial replies are signed by means of an electronic, rather than handwritten signature.
STEP 10: SIGNATAIRE

The lead unit will prepare the e-signatory. In case of replies including more than 5 documents or a very long and complex document, it is necessary to prepare a parallel paper signatory as well. A paper signatory is also needed in case of classified documents, as these cannot be uploaded in Ares for as long as the document is not yet declassified. The lead unit will also send the reply to the applicant.

A. E-signatory

⇒ In ARES, click on REPLY next to the document that contains the initial request (as shown below). Then, import the reply letter, the list of documents and the documents to be sent out to the applicant (in the redacted version if partially released).

* IMPORTANT: when you fully release a document (i.e. all content is released and no personal data are redacted), you do not need to import it but to link the document released to the reply by using the button in ARES ATD-Public ARES doc. You can do so by: (1) clicking ATD-Public doc ARES; (2) inserting the Ares number of the document; (3) clicking LINK.
When uploading a document in ARES please:

- Double-check that the name of the attachment is accurate and does not include any personal data. The applicant will receive the document with this name;
- In the external reference field, please write down the number of the document, i.e. ‘DOC 2’. This will help the colleagues to easily identify the documents:

The ARES document containing the reply and the released documents will be automatically filed in the Ares file that relates to the specific request. This file will contain also the request, and all other relevant correspondence with the applicant.

Create the e-signatory as follows, and please grant the ve_trade.accessdoc ‘management rights’ in Ares for the Ares reply file:

<table>
<thead>
<tr>
<th>Positive reply + Partial reply with personal data redactions only</th>
<th>Partially negative reply, Negative reply No-documents identified reply Positive reply with out of scope redactions. Only personal data redacted but applicant asked for these Repetitive requests</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>RED:</strong> Lead unit</td>
<td><strong>RED:</strong> Lead unit</td>
</tr>
<tr>
<td><strong>VISA:</strong></td>
<td><strong>VISA:</strong></td>
</tr>
<tr>
<td>- Associated unit(s)</td>
<td></td>
</tr>
<tr>
<td>- <strong>ve_trade.accessdoc</strong></td>
<td></td>
</tr>
<tr>
<td><strong>SIGN:</strong> Lead unit HoU*</td>
<td><strong>SIGN:</strong> DG</td>
</tr>
<tr>
<td><strong>EXP:</strong> Lead unit</td>
<td><strong>EXP:</strong> Lead unit</td>
</tr>
</tbody>
</table>

[*HoU R.3 for replies concerning Cabinet documents only]
⇒ Once the e-signatory is created, please also upload the original unredacted documents [switch to 'marked for redaction' versions to be considered!] (not to be sent to the applicant!) and all other important documents (such as consultations of other units or third parties) as supporting documents to the e-signatory (please see below). These documents will not be kept once the e-signatory is finished.

<table>
<thead>
<tr>
<th>VISA</th>
<th>Supporting documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>SANDLER Peter (TRADE)</td>
<td>ve_trade.accessdoc (TRADE.R.3)</td>
</tr>
<tr>
<td>SIGN</td>
<td>Weyand Sabine (TRADE)</td>
</tr>
<tr>
<td>EXP</td>
<td>ve_trade.d.2 (TRADE.D.2)</td>
</tr>
</tbody>
</table>

**Supporting documents**

- Original Document: 01 - 2017/09/10 Final Draft CM ACIA Bening _doc
- Original Document: 01 - Case ACIA speech 1 June 2017 Avea(2017)3017955.pdf
- Original Document: 02 - Report of a meeting, covering FTA and other.pdf

⇒ Please keep all the originals in a place where they are easily accessible and retrievable on short notice. In case there is a confirmatory request, the SG will ask us to provide the originals in usually 24 hours.

**B. Parallel paper signatory**

In case a parallel paper signatory is necessary:

⇒ the original request goes on the left side first page, together with email consultations of other units or third parties;

⇒ the cover letter is printed one sided and placed in the signataire;

⇒ the list of documents is the first annex;

⇒ the documents follow so that the original is placed on the left side and the redacted version on the right side of the page (remember to number each document according to the list of documents) – if a document is fully released it goes only on the right side, and if it is fully withheld it goes only on the left side.
C. Modifications to the reply letter

⇒ Modifications to the reply letter can be done by using either the function of 'Check-in/Check-out' or 'Manage versions'. Do not delete previous versions of a document! In case of a paper signatory and handwritten signature, it is advised to check if modifications in the electronic version of the reply letter have been included in the paper version.

D. External transmission

⇒ Once the reply is signed, the lead unit sends it out by Outlook or by the ARES External Transmission function. Please make sure the ATD Team receives a copy of the reply, either by putting TRADE ACCEs DOCUMENTS@ec.europa.eu in copy, or by forwarding the notification that you receive from Ares after the external transmission.

⇒ By sending out the reply to the applicant in ARES, it is recommended to use the virtual entity as sender (email) and give the name of the person who signed in the standard text. By sending the reply via Outlook it is recommended to sign the cover e-mail with a functional rather than personal name (e.g. Head of Unit for ...XXX Unit...)

⇒ In case of a partial or negative reply the lead unit would have to bring the signed letter to R.3 so that in addition it is also sent out by registered mail (this is needed for proof of calculation of the 15 days that the applicant has to make a confirmatory request to the SG if he/she is not satisfied). – During COVID-19 and the resulting working arrangements we do not send the reply by registered mail, but have adapted the email template for transmission accordingly, which consequently now also includes a request for acknowledgment of receipt by the recipient. Please consult R.3 in case of doubt.