



RTD Access to documents

Basic training

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In this presentation...

- Legal framework
- Personal/material scope
- Principles and exceptions
- Procedures
- AtD @ DG RTD

Legal basis

- Primary law
- Secondary legislation
- Requests for access to documents vs requests for information

Primary law

- **Art 15(3) TFEU:** right of access to documents of all EU institutions, bodies, offices and agencies
- The CoJ of the EU, the ECB and the EIB - only when exercising their administrative tasks
- **Art 42 Charter of Fundamental Rights of the EU:** right of access to documents

Secondary legislation

- Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents
- Decision 2001/937 laying down detailed rules for the application of Regulation 1049/2001 (the implementing decision)
- Archives Regulation 1700/2003
- Aarhus Regulation 1367/2006 (access to information, public participation in decision-making and access to justice in environmental matters)
- EU Data Protection Regulation 2018/1725 (on the protection of individuals with regard to the processing of their personal data)

Access-to-docs v. access-to-info

Access to documents requests

- Are dealt with under Regulation 1049/2001

Requests for information not contained in documents

- Are dealt with under the (European) Code of Good Administrative Behaviour (for staff of the European Commission in their relations with the public)

Personal and material scope

- Who has the right to access EU documents
- What is a document
- Types of requests for access to documents

Personal scope (beneficiaries)

- **Any natural or legal person** residing or having their registered office in a MS **or not**, has a right of access to the documents of the EU institutions, bodies, offices and agencies
- **No obligation to give reasons for the request**
- **No privileged access** (e.g.: the MEPs have the same right as any other member of the public at large)

Material scope (documents)

- **All documents drawn up or received and in the possession of the institutions in all areas of activity**
- **Document:** any content whatever its medium related to policies within the sphere of responsibility of the Institution (no document = request for information)
- **Existing documents in an existing version and format**
= no obligation to create/translate/keep

Document registration (Ares(2018)5874624)

- Identification and retrieval of documents - essential for the efficient and timely handling of requests for access to documents under Regulation 1049/2001
- Any document drawn up or received by the Commission must be registered in a corporate document management system (Ares/Decide/ABAC/Basis etc.)
- Provided the registration criteria are applied correctly, only registered documents fall under the scope of Regulation 1049/2001
- If services identify unregistered documents in their files, they must be registered ex-post as soon as identified in the framework of an AtD request

Existing documents

- Emails?
 - Are documents
 - Must be registered if significant content
 - Unless of private nature or
 - Short-lived
- Databases?
 - Are within the scope of the AtD Regulation
 - If requested data can be extracted using routine tools
- Significant content?
 - Cannot be excluded from scope
 - Possible lack of interest not relevant

Problematic requests

- Vaguely formulated requests
 - Request for clarifications (the time-limit is suspended)
 - Duty to assist the applicant
- Wide-scope requests
 - Fair solution
 - Interest of the applicant may be useful in this case to limit the scope of the request
- Repeated requests
 - Applicant may request again the same documents
 - The Institution may confirm the earlier decision if circumstances unchanged

Principles of the right to access

- Transparency
- Applicant's interest
- *Erga omnes*
- Concrete and individual assessment
- Motivated (partial) refusal
- General presumption of non-disclosure

Principles (1)

- Transparency = access is the rule (all documents are accessible **unless** an exception applies)
- Not dependent on applicant's interest ➡ the applicant's interest is not relevant for deciding on disclosure ➡ no obligation to give reasons for a request ➡ no privileged right of access
- *Erga omnes* = once a document has been released, it becomes accessible to anyone
- Partial release = if document not fully covered by exceptions, remaining parts must be disclosed ➡ redactions must be based on exceptions

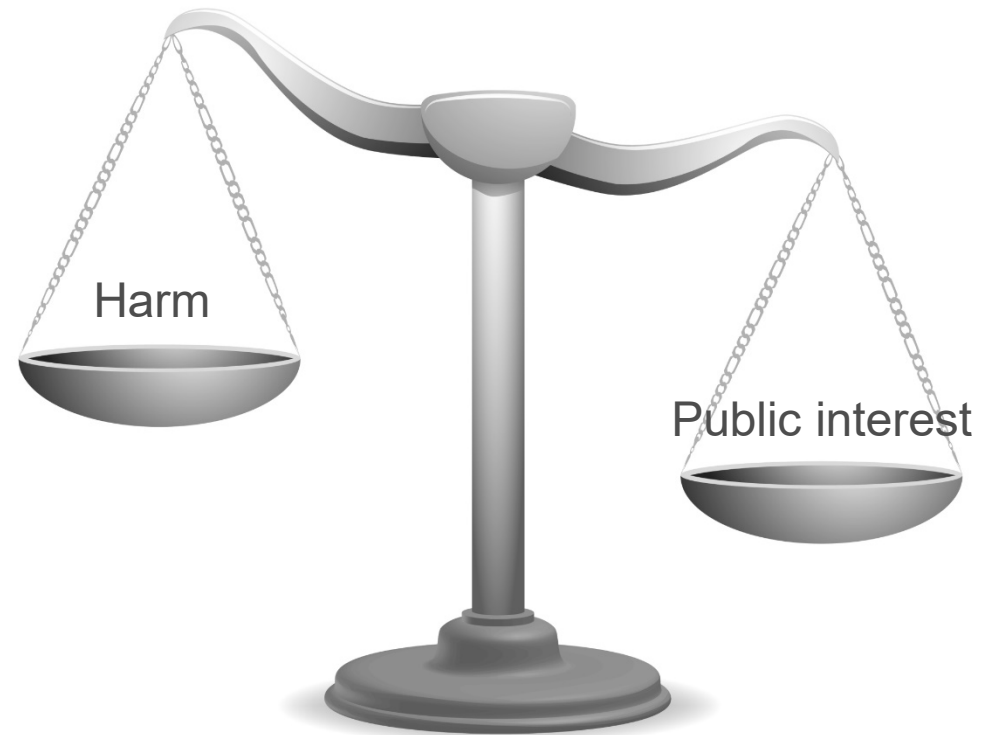
Principles (2)

- Concrete and individual examination of each document = in principle, no class exemptions allowed (however, the Courts construed general presumptions of non-disclosure in 9 specific areas)
- Exceptions to be construed strictly = the risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical
- Motivation of a refusal = negative decisions must be motivated (the applicant must understand the reasons & the EU Courts must exercise judicial review). But the motivation should not reveal any confidential content

Principles (3)

- Period during which exceptions may apply = as long as protection is justified, up to 30 years (but three exceptions may continue to apply: commercial interests; personal data; sensitive documents)
- No exempt categories, not even classified or sensitive documents

Limits of the right to access EU documents



Limits to the right of access (exceptions)

Absolute

- Single (harm) test = in case of harm, no access

Relative

- Double (balance) test:
 - Harm
 - Overriding public interest in disclosure

Exceptions

Absolute

- Protection of the public interest as regards
 - Public security
 - Defence and military matters
 - International relations
 - Financial, monetary or economic policy
- Privacy and integrity of the individual (personal data)

Relative

- Commercial interests
- Legal advice and court proceedings
- The purpose of inspections, investigations and audits
- Decision-making process

Protection of the public interest

- Institutions have wide margin of appreciation
- Court review limited to procedures and motivation
- Environmental information: public interest to be taken into account (Aarhus Regulation 1367/2006)

Absolute exceptions

- Public security (0)
- Defence and military matters (0)
- International relations (1+1)
- Financial, monetary or economic policy (0)
- Privacy and integrity of the individual (personal data) (33+1)

Public security

- Risk for internal or external security of the EU/MS
 - Fight against terrorism or organized crime
 - Security measures for protecting individuals or buildings
 - Risk to supply of essential commodities

Defence and military matters

- Exchanges with military authorities
- Documents of the European Defence Agency or related to it
- Contacts with the defence industry

International relations (with third countries)

- Diplomatic relations
- Multilateral negotiations (CETA/TTIP/FTA)
- Exchanges between Commission services regarding positions concerning a third country
- Agreements with state-owned enterprises in third countries
- H2020/HE Association Agreements

Financial, monetary or economic policy

- Financial or economic interests of EU/MS
- Monetary stability
 - Financial crisis
 - Support measures for MS

Sensitive documents

- Documents classified as EU Confidential Information (EUCI) with the purpose to protect public interest
- Refusal must be motivated
- Classification is neither a condition, nor an exception: if exceptions no longer apply, the document is first declassified and then released

Personal data protection

May be disclosed

- Names and functions of:
 - Commissioners (past & present)
 - Cabinet members (AD officials)
 - Staff in senior management positions (SG, DGs, Directors, Spokes)
 - Heads of EC's Reps in the MS
 - Public figures acting in public capacity

Normally withheld

- Personal data (names, functions, addresses, pictures, etc.) of
 - Commission staff not occupying any senior management position
 - Outside individuals, who are not public figures acting in public capacity

Successive tests under the EU DPR

- **Necessity** (specific purpose in the public interest, demonstrated by express and legitimate justifications or convincing arguments and no less invasive measures available)
- **Prejudice** (no reasons to assume that the legitimate interests of the concerned individuals might be prejudiced)
- **Proportionality** (transmission is proportionate for the specific purpose, after weighting the various competing interests – public/general interest & data subjects' interests)

Break & video (5' + 5')

AresTV: the 3 types of the Ares documents search (tips & tricks):

Search and find Ares documents using the 3 search methods Ares offers: the QUICK, the SIMPLE and the FULL TEXT searches.

Relative exceptions

- Commercial interests (14)
- Legal advice and court proceedings (0)
- The purpose of inspections, investigations and audits (1)
- Decision-making process (1)

Commercial interests

- Competition procedures (cartels, mergers, state aids) – general presumption of non-disclosure, jointly with protection of ongoing investigations
- Grants & public procurement (specific rules on information to applicants/participants) – general presumption of non-disclosure
- IPR (copyrights, trademarks, geographical indications, industrial designs, patents, etc.) – protection does not automatically prevail

Court proceedings & legal advice

- **General presumption of non-disclosure for pending cases:**
 - Documents drafted for the purpose of the proceedings (application, defence, reply, rejoinder)
 - Internal documents concerning the case
 - Contacts with external lawyers
- Protection of an institution's ability to receive frank, objective and comprehensive legal advice
- Legal opinions not *per se* confidential
- Strong public interest in disclosure if legal advice given during the legislative procedure

Inspections, investigations, audits

- General presumption of non-disclosure for ongoing...
 - State aid investigations (if no final position has been taken & during Court proceedings)
 - Merger investigations
 - Cartel investigations (but also for closed cases)
 - Infringement investigations & EU Pilot (but even when procedure is suspended)
 - OLAF investigations (same reasoning as for the state aids & merger investigations)

Decision-making process

- Access refused if disclosure would seriously and concretely undermine the decision-making process (*space to think*):
 - **before** the decision has been taken: documents drawn up for internal use or received
 - **after** decision has been taken: only the documents containing opinions for internal use
- If related to legislative activity, the principle of openness prevails (enhanced transparency)

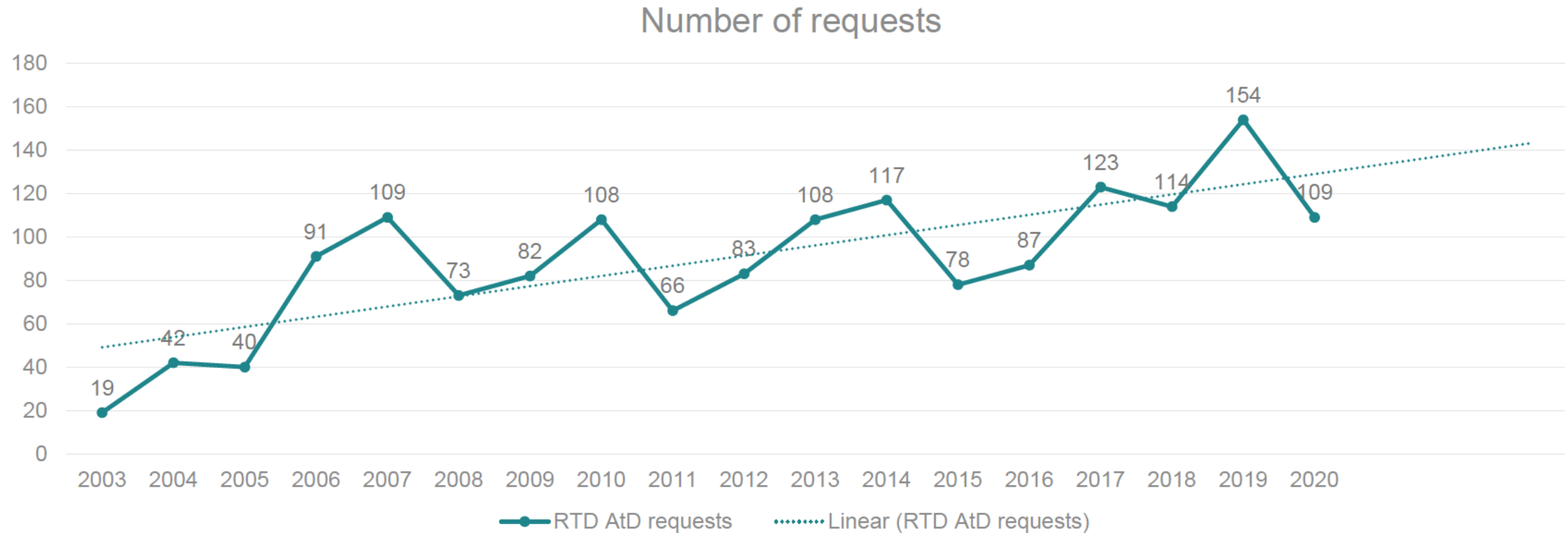
Procedures @ DG RTD & SecGen

- Initial applications
- Our role & tasks
- Unhappy path (risks & risk mitigation)
- Contributions

Initial applications

- Handled by DG RTD (as opposed to the confirmatory applications)
- No specific form for submitting a request, but should be in writing and the applicant must provide a postal address
- Time limit: 15 working days (+ 15 working days extension if properly justified)
- AtD @ RTD in 2020: out of 109 initial applications, approximately 70% were answered within 15 working days, 20% within the extended deadline and 10% were answered after the maximum deadline of 30 working days. More than 220 documents assessed and more than 2700 messages exchanged

RTD AtD requests (GestDem)



What we do when receiving an AtD request

- Identify the material and temporal scope of the request. If request not precise enough: ask the applicant for clarifications
- Conduct the necessary consultations (relevant units, third-party authors/originators, other institutions, etc.)
- Assess the contributions received and, if necessary (wide-scope requests) try to find a fair solution with the applicant
- Apply the necessary redactions (exceptions & out-of-scope) and assess if partial access is meaningful
- Draft and launch internally the duly motivated reply and send the answer to the applicant
- Contribute to the fresh review by the Secretariat-General of the reply to the initial request

Risks when handling AtD requests

- Confirmatory applications to the Secretariat-General (within 15 working days from the initial replies)
- Complaints to the General Court (within 2 months from the confirmatory replies)
- Complaints to the Ombudsman (within 2 years from the confirmatory replies)
- Reputational damage in case of late or unsubstantiated replies

Risk mitigation

- Efficient & effective cooperation between the responsible unit(s) and the coordinating Access to documents legal team in CLSS
- Quality of reasoning for denying access to (parts of) documents and of the answers in general (positive replies & no documents held)
- Compliance with the legal deadlines – if no reply provided within the 15 + 15 working days statutory deadline, the applicant has the right to file a confirmatory application to the Secretariat-General


What we need from you in max 5 work days

- A list of existing documents relevant for the request
- The identified documents (not redacted)
- Justified detailed opinion on the (partial) public disclosure of the identified documents (Annex I to note Ares(2019)7120265 of 18/11/2019 on handling requests for public access to documents under Regulation 1049/2001)

AtD team in CLSS


- DG RTD access to documents legal and administrative coordinators
- First line of contact between DG RTD and the EAs to which we are parent-DG with the Transparency, Document management & Access to documents Unit in the Secretariat-General
- Handling all files related to AtD: confirmatory applications, contributions to requests handled by other institutions/services, requests for information
- Ensure a common, harmonised AtD approach across the R&I family (guidelines & legal advice to the Research DGs, EAs & JUs; GoFund page; information letters & coordination meetings)

Any (other) questions?



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Functional mailbox

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Contact Person

Persons in charge



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