Fiche 12  Classified and marked documents

Main issues:

Article 9 of Regulation (EC) No 1049/2001 establishes the applicable procedures in case public access is requested to 'sensitive documents': documents originating from a public authority which carry one of the three highest security classifications ('TRES SECRET UE/EU TOP SECRET', 'SECRET UE/EU SECRET' or 'CONFIDENTIEL UE/EU CONFIDENTIAL') and protect essential security, defence and military interests of the EU or one of its Member States (both conditions being cumulative).  

Similar procedures apply also to other classified documents.

Current administrative practice:

a) Release of classified documents following an access-to-documents request under Regulation (EC) No 1049/2001

- Classified documents may only be handled by persons having a security clearance to that effect, with the exception of documents classified at the lowest security level ('RESTREINT UE/EU RESTRICTED').

- If none of the exceptions to the right of access applies to a classified document or parts thereof, it must be disclosed. However, this requires that the document is declassified, following a request therefor to the Director of the Registry "Greffe") in the Secretariat-General.

- In case the DG or service intends to grant access to a classified document, the originating authority (including from a Member State, a third country, an international organisation, another EU institution or a Union agency) must express its prior written consent.

- Documents classified 'RESTREINT UE/EU RESTRICTED' having originated in the Commission are considered to be automatically declassified after 30 years.

- If a DG or service decides to refuse access to a classified document, it shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4 of Regulation 1049/2001. This means that neither the (classified content of a) document, nor the title if that reveals classified information, may be revealed in the access-to-documents decision.

- Classified documents are not registered in Ares. Nor are their metadata (title, author, addressee, date,...), except for documents classified 'RESTREINT UE/EU RESTRICTED'.

- Classified documents can only be transmitted between Commission services using authorised couriers or electronic methods approved by the Security Directorate. RESTREINT UE/EU RESTRICTED may also be sent by post, using the recorded delivery (tracking) option.

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1 Please note that the Commission decision (EU, Euratom) 2015/443 refers to 'sensitive non-classified' (SNC) information. Sensitive non-classified information is subject to markings according to C(2019) 1903 and C(2019) 1904; every SNC document contains the expression "SENSITIVE" or "SPECIAL HANDLING" (in some very specific cases).

2 Namely, to documents classified 'RESTREINT UE/EU RESTRICTED', or documents bearing a higher security classification but having no link to essential security, defence and military interests of the EU or one of its Member States. See also Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information and Article 6 of the Detailed Rules of Application of Regulation 1049/2001.

3 Please find a standard request to that effect on our 'Standard letters' webpage on Intracom: https://myintracom.ec.europa.eu/sq/docinter/Pages/letters.aspx.

4 For electronic transmission within the Commission and with the EEAS, the RUE system has to be used to transmit RESTREINT UE/EU RESTRICTED documents (R-UE/EU-R). NB: the RUE system is scheduled to be replaced by RUE-X in the coming months. For classifications higher than R-UE/EU-R, only high level encryption machines can be used for electronic transmission (like the NCN), used only by the registries (not email). As regards paper transmission, the internal courier service may be used for the transmission of R-UE/EU-R documents within the Commission, provided the envelope does not have any indication about the classification of its contents. For higher classifications, the transmission can be done only with "authorised couriers" i.e. persons working for the Commission and having a security clearance and authorisation given by the Security Directorate in DG HR.
b) Release of classified documents under sincere cooperation

The transmission of classified documents under sincere cooperation (i.e. to a Member State or another EU institution) takes place outside the framework of Regulation 1049/2001, and specific confidentiality conditions may be attached to the transmission (e.g. consultation in a reading room, no wider dissemination, ...).

c) Marked documents

Documents bearing internal 'markings' are to be distinguished from classified documents, in that they do not need to undergo any specific procedure before they are released. The purpose of marking information is to ensure a sufficient level of confidentiality for the information.

Sensitive non-classified information is information or material the Commission must protect because of legal obligations laid down in the Treaties or in acts adopted in implementation thereof, and/or because of its sensitivity, as mentioned in Commission Decision 443/2015 (Article 9, paragraphs 5b, 6 and 7). As the word says, this information is sensitive, but not classified.

When the deemed information needs effective protection due to its sensitivity, it shall be identified by the originator with a security marking and corresponding handling instructions, approved by the Commission Security Authority.

Markings are based on the fundamental security principle of need-to-know. Unauthorised disclosure of sensitive non-classified information could cause damage to the Commission or other interested parties, for example business, companies or natural persons, undermining their intellectual property or privacy and integrity.

There are two security markings: 'SENSITIVE' and 'SPECIAL HANDLING'.

Both markings contain handling instructions. These markings can be used on their own or together with one or more distribution markings to determine who should receive the documents on a need-to-know basis.

The distribution markings indicate restrictions on the authorised recipients or the expected timeframe of sensitivity.

Markings are not recognised under Regulation 1049/2001, and do not have any external effect.

However, in order to avoid any confusion it is recommended to remove the marking before the document is released to the applicant. For documents formally adopted by or on behalf of the Commission, this is done via Decide Decision, through a message from the DG's legislative coordinator to the gestionnaire de dossier in the Registry (Greffe) in the Secretariat-General or through clear indications in the system indicating until when the documents should remain sensitive non-classified.

Case-law:

- Judgment of the Court of First Instance of 26 April 2005, Jose Maria Sison v Council of the European Union, Joined Cases T-110/03, T-150/03 and T-405/03, (paragraphs 71-78);
- Judgment of the Court of Justice of 1 February 2007, Jose Maria Sison v Council of the European Union, C-266/05 P, (paragraphs 75 and 100-108); and

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5 Cf the table of equivalence of security classifications contained in Annex I of Commission Decision (EU, Euratom) 2015/444. Please note that the Swedish marking system changed on 1 April 2019 (see note Ares (2019)3842784). For more details, please contact your Registry Control Officer or Local Security Officer.

6 Once it is uploaded in Greffe, the new, unmarked version automatically appears in Vista and its sensitivity level is accordingly reduced to 'standard treatment' (meaning that the documents can be made public). It is also recommended to upload a new version in Ares, via the DG or service's DMO, unless an expiry date for the sensitivity level was indicated in Ares upon registration (in which case there is no need for manual intervention).
Reference documents/links:

- Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information
- Intracom webpage on Information Security
- Examples of confirmatory decisions and a summary of relevant case-law are available on the Commission’s access-to-documents webpages on My Intracom
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu.

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