Fiche 16: Requests from (sub)national authorities

Main issues:

Member States have the right to ask for documents either under the principle of sincere cooperation laid down in Article 4(3) TEU, or under Regulation 1049/2001. In the latter case, they are bound by the same conditions and limitations as other applicants.

Requests from subnational territorial entities are normally treated under Regulation 1049/2001, provided that these entities have a distinct legal personality and that they are not to be considered as ‘emanations of the state’.

In case of doubt, clarifications should be sought from the respective Permanent Representation.

General approach stemming from the case-law:

- Whenever a Member State chooses to submit an application under Regulation 1049/2001 rather than under sincere cooperation, the Commission cannot evade the exceptions of Regulation 1049/2001, nor the procedures applicable under that Regulation.

Commission's administrative practice:

Whether a request from a (sub)national authority has to be dealt with under sincere cooperation or under Regulation 1049/2001 depends both on the authority’s manifest intentions in this respect, and on whether the entity that it represents is to be considered as an ‘emanation of the state’.

1. Treatment under loyal cooperation

- When a Member State requests a document without referring to its right to public access or to Regulation 1049/2001, such a request must in principle be dealt with under loyal cooperation.

  o The Commission can in such cases consider granting wider access than the access which would normally have been granted under Regulation 1049/2001, and attach conditions to the access (for instance, in camera consultation or no further/public divulgation).

  o In any event, the access cannot be less than the access that would have been granted under Regulation 1049/2001.

  o In case of a request under sincere cooperation, the relevant Commission service will process it in the framework of sincere cooperation laid down in Article 4(3) TEU and send a reply to the Member State as soon as possible, where appropriate in consultation with the relevant policy unit of the Secretariat-General covering the subject-matter concerned. The Commission service’s reply should normally be addressed to the Member State’s Permanent Representation, where applicable with a copy to the submitting authority.

  o If a Member State intends to make the document public, the assessment of the possible risks of disclosure will be similar to the assessment that would have been performed under
Regulation 1049/2001. In case of doubt about whether the documents will be made public, Commission services should ask the Member State for clarifications.

2. Treatment under Regulation 1049/2001

- When a Member State explicitly refers to the right of public access or to Regulation 1049/2001, the Commission must follow the same procedures and undertake the same assessment as it would do for any other applicant under Regulation 1049/2001.

- If a Member State submits its request via the electronic document request form, or in case of doubt whether it indeed intended to ask for public access under Regulation 1049/2001, it is recommended to seek confirmation from the Permanent Representation.

- Subnational territorial entities having legal personality which, according to the Permanent Representation, are not to be considered as ‘emanations of the state’ can introduce requests only under Regulation 1049/2001 and not under the principle of loyal cooperation.

Case-law:

General Court, 13 September 2013, case T-380/08, Netherlands v Commission