GUIDANCE NOTE

WIDE-SCOPE INITIAL REQUESTS FOR ACCESS TO DOCUMENTS UNDER REGULATION 1049/2001

The Commission often receives requests for access to documents, lodged under Regulation 1049/2001, which have such a wide temporal and/or material scope that their detailed treatment could substantially impair the normal functioning of the relevant Commission services.

The sections below provide guidance on the Commission services’ possible responses, at the level of initial applications, to such cases, taking into account the recent case-law.

1. REQUEST A CLARIFICATION UNDER ARTICLE 6(2)

Article 6(1) of Regulation 1049/2001 provides that applications for access to a document shall be made in a sufficiently precise manner to enable the institution to identify the document.

If an initial application is worded so imprecisely that it is not possible to understand its scope and therefore to identify the documents falling under it, the Commission services are encouraged, as a first step and as soon as possible after registration, to:

- ask the applicant to clarify his/her request pursuant to Article 6(2), by referring where relevant to the public register of documents;
- specify that the fifteen-day time-limit for replying to the application will start to run only from the receipt of such clarification;
- only where it is not clear whether the request is made under Regulation 1049/2001, or if the treatment as a request for information appears to be more adequate, ask the applicant they would agree that the request be dealt with as a request for information under the Code of Good Administrative Conduct, outside of Regulation 1049/2001 and answered with information.

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1 Adopted in application of Article 10 of the Detailed Rules of Application of Regulation 1049/2001, which provides that ‘[t]he Secretariat-General shall ensure coordination and uniform implementation of these rules by Commission Directorates-General and departments. To this end, it shall provide all necessary advice and guidelines’ (Commission Decision 2001/937 of 5 December 2001, OJ L 345, of 29 December 2001).

2 In particular, the judgment of 15 March 2023, T-597/21, Basaglia v European Commission, EU:T:2023:133.

3 In accordance with Article 2 of the Implementing Rules of Regulation 1049/2001 (OJ L 345 of 29.12.2001, p. 94), which provides that 'the deadline for reply shall run only from the time when the Commission has this information.'
and not documents (for example, providing a simple reply by letter or e-mail). However, the request should be dealt with under Regulation 1049/2001 if the applicant does not accept that it be treated as a request for information.

This possibility should only be used for genuinely imprecise requests and not for all wide-scope requests. Furthermore, the lack of precision should be identified and the clarification request sent within a reasonable number of working days, as soon as possible from the registration date of the request.

2. ADDITIONAL OPTIONS

2.1. Extension of the time-limit

In some cases, the initial request has a clear but too wide scope, involving one or several very long documents or a very large number of documents, the treatment of which cannot be completed within the 15 + 15-day deadline.

In those cases, services shall, as soon as possible, extend the time-limit by 15 working days (Article 7(3) of Regulation 1049/2001), notifying the applicant in advance and providing detailed reasons for that extension.

In addition, they can consider one of the following options, taking into account the scope of the request and the content and nature of the documents covered by it:

2.2. Application of a general presumption

Account should also be taken of the possibility of applying a general presumption acknowledged by the case-law.

If a general presumption based on the applicable legislative framework is not applicable, services may also group the requested documents into different categories according to the common characteristics of those documents, and give common grounds for the (full or partial) refusal to disclose each category of documents.

2.3. Meaningful access

In case of some wide-scope requests, where the only parts to be released are already public, and the obligation to ensure partial access would result in an excessive administrative burden, the institution may refuse to grant partial access in order to safeguard the interests of good administration, and decide to instead refuse access to the documents altogether.

A similar approach is recommended where, following a large number of redactions, releasing the remaining parts of the document(s) would be pointless as those parts would be deprived of any substantive content.

4 Certain wide-scope requests might be formulated in such a way because the applicant is not aware where and how to find the needed information. In certain cases, it might therefore be possible to confer with the applicant and provide him or her with the specific information that he or she seeks (but has not specifically requested).

2.4. Fair solution

Alternatively, the Commission DG/Service dealing with the initial application may confer with the applicant informally pursuant to Article 6(3) of Regulation 1049/2001, as soon as possible after the application has been registered, to try to find a fair solution.

The solution under Article 6(3) may concern the number and content of the documents applied for, but NOT, in principle, the timeframe for dealing with the initial request, as per settled case-law. In any case, the institution is not empowered to unilaterally extend the time limits laid down in Regulation 1049/2001. Moreover, the Commission cannot reply to a wide-scope request by providing the documents requested in batches that go beyond the 15+15 working days from the day of registering the original request. The provision of the documents requested in instalments, outside the statutory deadlines, is unlawful even if this is done at the request or with the agreement of the applicant.

The fair solution can thus consist of inviting the applicant to reduce the temporal and/or material scope of his/her initial request, so as to enable the request to be dealt with within the double fifteen-day time limit. The applicant’s agreement to the fair solution must be unequivocal and recorded in writing.

The institution must ask the applicant to specify his/her interest in obtaining the documents requested and provide the applicant with concrete elements enabling the latter to take an informed decision, in particular:

- a list of documents or of categories of documents;
- an estimation of their total number and if possible the total of number of pages covered, provided that identifying the relevant (categories of) documents and estimating their number does not, in itself, represent a disproportionate administrative burden;
- the estimated time needed to deal with the application in its entirety, if possible, in the light of the nature of the documents or the diversity of their authors (including third-party consultations and time for internal validation of the decision, but excluding the time required for their search/retrieval);
- the estimated number and/or categories of documents that could be dealt with within 30 working days.

If the applicant's proposal is deemed unreasonable, the Commission service concerned can put forward its own counter-proposal without already committing to treat a certain number of documents, with a clear deadline for the applicant's feedback.

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7 The Case T-727/19, Basaglia v European Commission addressed specifically the issue of providing a reply in successive instalments and paragraph 38 of the Judgement of 23 September 2020 provides that: ‘(…) the time-limits laid down by Regulation No 1049/2001 for replies to requests for access are not laid down in the exclusive interest of the applicant. The argument [brought forward by the applicant] that the Commission could have set aside those time-limits in order to respond favourably to the applicant's availability to receive replies in instalments over time must therefore be rejected’.
8 Through a written declaration, letter or e-mail.
9 Provided that such a listing would not in itself engender a disproportionate administrative burden.
2.5. **In exceptional cases, where failure to reach a fair solution: balance the interests of the applicant with those of good administration (unilateral restriction)**

In practice however, applicants do not always seem ready to confer with the Commission to find a fair solution. In other cases, a solution satisfying both the applicant and the Commission cannot be found.

In cases where the applicant has demonstrated a genuine willingness to cooperate but has failed to agree on a fair solution with the Commission; or where the applicant has provided details as to the documents which were of interest to him/her as a priority, the institution may decide to deal with a limited number of documents which, having regard to their number and content, can be treated with within what remains of the time-limits laid down in Regulation 1049/2001.

A decision which unilaterally restricts the scope of a request must evidence the **fulfillment of the following three cumulative conditions**¹⁰:

1. **(1) Unreasonable workload involved by the concrete individual review of the documents requested**

   The proof of the unreasonable workload may be objectively demonstrated, inter alia, by:
   
   – the computation of the **number of documents and pages** falling under the scope of the request (or their approximate minimal number if not easily identifiable);
   
   – **substantiated explanations** as to the **different levels of complexity** of heterogeneous documents, and the required depth of the examination;
   
   – **an objective calculation as to the time required for reading/assessing the documents requested based on an average speed for human reading** (for instance, the General Court quoted a scientific article establishing an average reading speed of 238 words per minute¹¹, which corresponds to **four minutes per page**);
   
   – taking into account (in addition to the above) **the time required for third-party consultation, translation** (if applicable) and **internal validation of the decision** (for instance, the General Court accepted 5.5 working days for a third-party consultation and 4 working days for the finalisation and internal validation of the decision¹²)

   Moreover, as the unreasonableness of the workload must be objectively demonstrated, **it cannot take into account the applicant’s personal situation** (such as their specific private interest in having access to the documents for litigation purposes etc.).

2. **(2) The institution’s attempt to consult with the applicant**

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¹¹ Although, due to a clerical error, both in its Italian and French versions, the Judgment mentions four pages per minute. See Judgment of 15 March 2023, T-597/21, *Basaglia v European Commission*, op.cit., paragraphs 59; and 70 to 72.

This obligation may be evidenced by referring to the institution’s written request to clarify and reduce the scope of the request, by limiting for instance the number of documents or categories of documents concerned by the request\textsuperscript{13}.

\textit{(3) The consideration of alternative solutions (all less favourable)}

The fulfilment of the obligation to consider alternative solutions can be demonstrated by referring to the institution’s efforts to limit the request according to different criteria, and select, for the purposes of a specific, individual examination, documents falling under different categories; while explaining why these alternatives are less favourable to the applicant\textsuperscript{14}.

In the absence of any indication of preference from the applicant, the institution may use a random method of selection\textsuperscript{15}.

\textit{Annex 1 contains an excerpt of the Commission decision covering this scenario, as an example.}

This option should only be used in exceptional cases, where it can be ascertained with reasonable certainty, based on the exchanges with the applicant, that the latter would be genuinely interested in receiving \textit{only part of} the documents.\textsuperscript{16}

\textsuperscript{13} Judgment of 15 March 2023, T-597/21, \textit{Basaglia v European Commission, op.cit.;} paragraph 90.

\textsuperscript{14} Judgment of 15 March 2023, T-597/21, \textit{Basaglia v European Commission, op.cit.;} paragraphs 92-93.

\textsuperscript{15} Judgment of 15 March 2023, T-597/21, \textit{Basaglia v European Commission, op.cit.;} paragraph 94-97.

\textsuperscript{16} In many cases, receiving only part of the documents will not serve any purpose for the applicant. This would for instance be the case where the research topic chosen by an applicant would imply examining \textit{all} Commission documents covered by a specific topic (and not only part thereof). In such a case, the applicant might prefer switching research topics instead of receiving only part of the documents relating to his/her initial research topic.
Annex 1

Excerpt of a ‘unilateral restriction of the scope’ decision\textsuperscript{17}

[...] 2.1 Unilateral restriction of the scope of the initial application

\textit{Number of documents/pages}

As explained by the Directorate-General for Communications Networks, Content and Technology in its message of 29 March 2019, the original scope of your initial application covers a significant number of documents. [...] 

As illustrated in the enclosed Annex 29, for all 12 projects and documents identified as corresponding thereto, your initial application covers 300 documents, encompassing in total 9053 pages. This is, consequently, the total number of identified documents falling under the original scope of your initial application.

\textit{Workload assessment}

In the view of the European Commission, it is not possible to handle a request for access to documents under Regulation (EC) No 1049/2001 covering 9053 pages contained in 300 documents. Indeed, the assessment of the said documentation requires processing a significant amount of information for the sole benefit of one applicant.

According to the available studies\textsuperscript{18}, the average reading speed of documents would amount to four minutes per page (average 238 words per minute). In the situation at hand, reading all documents falling under the original scope of the application (at the rate mentioned above) would take one staff member working full time on this particular case 75 working days\textsuperscript{19}.

It needs to be emphasised that the assessment carried out under Regulation (EC) No 1049/2001 is not limited to reading of the documents but also to the analysis of their content. The relevant information that require protection under various exceptions provided for in Article 4 of that regulation has to be filtered out and identified. The length of that process depends on the level of complexity of the documents content-wise.

First, in the case at hand, the documents have different level of complexity. With regard to the documents identified as falling under category 4 of your request (contracts signed), only the general conditions of the contract can be considered as a simple document, requiring only superficial assessment, as this type of documents normally do not contain any information (even personal data) that might require protection under the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.

\textsuperscript{17} Decision C(2021)5741 (also registered under Gestdem 2019/1270).
\textsuperscript{18} See critical overview and study by Marc Brysbaert ‘How many words do we read per minute? A review and meta-analysis of reading rate’; Journal of memory and language, 2019-12, Vol.109, p.104047.
\textsuperscript{19} \(9053 \times 4 = 36.212\) minutes. \((36.212 / 60) / 8 = 75\) (rounded down).
The remaining documents, such as the description of work included in the annexes to the contracts (category 4), or the audit (category 7) and periodic review reports (category 6) are documents of much higher complexity. They are written using the technical language (description of the tasks to be carried out under the project), or require at least certain level of knowledge in the area of finances (information regarding eligible costs and budgetary information). In the same vein, the reports requested under categories 1 to 3 also contain information regarding the respective projects and are therefore not standardised.

Second, a significant number of documents originate from third parties. Consequently, the consultations under Article 4(4) of Regulation (EC) No 1049/2001 is required. The time needed to carry out the necessary consultations needs to be added to the above-mentioned handling time. This includes preparation of the consultation letters, their internal validation workflow and delivery (the documents are delivered in hand, the electronic version is sent only for information). Subsequently, the consulted third parties are given five working days to reply. That deadline starts running from the date of delivery of the letter by hand. The European Commission considers that this part of the process adds at least five and half additional working days to handling of the application.

Finally, following the assessment of the documents, which takes into account the positions of the consulted third parties, the case handler must prepare the final version of the documents, including internal consultation (for example with a policy officer competent in the subject matter), marking the text to be redacted by means of the dedicated informatics tools and preparation of the final, redacted version of the document. Then, the final reply and the whole file is put into the validation process in view of its approval. This part of the process adds four working days to the over time of the handling.

Against this background, the handling of your request would take, as a minimum, 84 and half days of active full time employment. This estimate corresponds to a wide scope request. In this context, it needs to be underlined that in its judgment in case T-727/19, the General Court acknowledged that the European Commission was right in seeking a solution that would, in principle, restrict the scope of the application in order to provide a reply and to refuse to release the documents requested in batches (as you initially suggested)20.

The European Commission notes that […] you maintained your position and refused to reduce the scope of your request. Indeed, in the letters of 4 November 2020 and 6 January 2021 you underlined that you still wish to be granted access to all documents falling under the original scope of the application.

In this context, the European Commission has no other choice but to unilaterally restrict the scope of the request. I can confirm that the choice made by the Directorate-General

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for Communications Networks, Content and Technology represents the most favourable option for the applicant.

First, the documents identified as falling under the restricted scope of your initial application encompass 1266 pages from several categories of documents of a higher complexity (categories 4, 6 and 7). Only one document (fully disclosed document 3) may be considered as not complex insofar as it includes the general conditions of the contract.

Consequently, it takes one staff member working full time on this particular case during ten working days, just to read them\(^{21}\). Second, as a significant number of documents (documents 2, 5, 7, 9, 10, 14, 16 and 23 - 28) originate from third parties, the European Commission undertook the required consultations under Article 4(4) of Regulation (EC) No 1049/2001. As mentioned above, four additional days are needed for internal validation of the request.

As a consequence, the processing of your request following the unilateral restriction of scope may be estimated at 19 and half days of active full time employment as a minimum, which already exceeds the time-limit set in Regulation (EC) No 1049/2001 to handle a request for access to documents.

I can also confirm that the other possible options were not as favourable to you as the one chosen by the Directorate-General for Communications Networks, Content and Technology.

Firstly, the Directorate-General for Communications Networks, Content and Technology selected documents from categories 4, 6 and 7, which, as illustrated in the annex, are among the most voluminous documentation.

Secondly, given that the documents falling into category 5 (appointment letters of external reviewer) would have to be expunged from personal data as recognised by the judgment in case T-727/19, the processing of documents falling into this category would have led to a meaningless access.

Thirdly, as mentioned above, not all the documents falling into categories 1, 2 and 3 could have been retrieved. They were also less voluminous.

Against this background, by selecting the documents relating to two projects (‘Mosaica’ and ‘Secure-Justice’) and the categories of documents (4, 6 and 7), the applicant has been given the opportunity to have access to the documentation of two projects rather than one single (more voluminous) project\(^{22}\) and to the highest number of pages that could be processed.

In that respect, among the projects of medium-size, the selected categories of documents pertaining to the Mosaica project and the Secure-Justice project correspond respectively

\(^{21}\) \[\frac{1266 \times 4}{60} / 8 = 10\] (rounded down).

\(^{22}\) As recalled above, in case of projects ‘Cocoon’, ‘Dicoems’, ‘I-way’, ‘J-Web’ or ‘Noesis’, it would have been possible to assess documents of only one project as the number of documents identified for these projects were more voluminous.
to the highest number of pages (625) and the third highest number of pages (482) falling under categories 4, 6 and 7\(^2\) and, jointly, their documentation amounts to the upper limit in terms of workload. The selection of other projects would have either limited the volume of documentation disclosed to you or exceeded the maximum limit of workload that the European Commission may devote to the handling of one request for access to documents.

Consequently, taking the above-mentioned considerations into account, the European Commission considers that in its choice of the projects to which the original scope of the application was limited, it assumed the most favourable solution for the applicant. Indeed, through that choice it ensured that the documents eventually disclosed, covered more meaningful amount of information covering two projects, rather than just one.

Consequently, the European Commission considers that the 28 documents assessed by the European Commission at the initial and confirmatory stages, constitutes the maximum that can be processed with full respect to the deadlines provided for in Regulation (EC) No 1049/2001\(^2\) and that the documents selected by the European Commission correspond to the most favourable option for the applicant. In the light of the above-mentioned additional consideration concerning the workload assessment, I consider that the decision of the Directorate-General for Communications Networks, Content and Technology to unilaterally restrict the scope of your initial application to 28 documents in question and the decision of 4 September 2019 confirming this position, was in line with the principle of proportionality.

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\(^2\) By comparison, save for the contract J-Web, the same selected categories of documents pertaining to the other projects which were as voluminous as Mosaica and Secure-Justice would have resulted in the processing of a smaller number of pages (Match: 394; Liric: 388; Pharmacog: 294; Clinica: 238 pages; E2SP: 162 pages).