



Access to documents

ARIANE II – BASIC Training

UNIT SG/B4 (Transparency)

Programme

- 1. Legal framework**
- 2. Scope of Regulation 1049/2001**
- 3. Principles and exceptions**
- 4. Procedures**
- 5. Further information**

3. Principles and exceptions

Principles

- **Principle of transparency:** documents are accessible unless an exception applies (the exceptions are listed in Art. 4 of Regulation 1049/2001)
- Exceptions to be **construed strictly**
- **Concrete and individual** examination of documents
- **No exempt categories**, not even classified or sensitive documents (Art. 9 of Regulation 1049/2001)
- Exceptions apply **as long as protection is justified**, up to 30 years

Types of exceptions

- **Absolute exceptions**

Single harm test

- **Relative exceptions**

Double test:

- Harm ?
- Overriding public interest in disclosure ?

Absolute exceptions

Article 4(1) of Regulation 1049/2001

- **Public interest** as regards

- Public security
- Defence and military matters
- International relations
- Financial, monetary or economic policy of the EU or a Member State

- **Privacy and integrity of the individual**

◀▶ **In case of harm, deny access!**

Privacy and integrity of the individual

Art. 4(1)(b) of Regulation 1049/2001

When access request under Reg. 1049/2001 covers personal data, **Reg. 45/2001 becomes applicable in its entirety**

Protection of personal data in practice:

Personal data, including of all Commission staff (with the exception our senior management) is systematically redacted!

* Consult the **Guidance note on Commission Staff Names**

Relative exceptions

Art. 4(2) and 4(3) of Regulation 1049/2001

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

◀▶ **Balance harm against the public interest in disclosure**

Protection of commercial interests

Art. 4(2)(1) of Regulation 1049/2001

Access refused if harm to the competitive position of the company or its reputation or its intellectual property rights

◀▶ **unless overriding public interest in disclosure**

* Consult the **Guidance note on Procurement Documents**

Court proceedings and legal advice

Article 4(2)(2) of Regulation 1049/2001

Court proceedings: exception applies mainly to **documents drafted for the proceedings**, such as application, defence, reply, rejoinder

General presumption of non-disclosure: Case API (C-514/07)

Legal advice: exception applies to **legal opinions**

- Consult **the Commission's Legal Service**

◀➤ **unless overriding public interest in disclosure**

Inspections, investigations, audits

Article 4(2)(3) of Regulation 1049/2001

Access is refused if disclosure would undermine the **purpose** of inspections, investigations or audits

◀➤ **unless overriding public interest in disclosure**

This exception applies to **on-going** investigations!

Inspections, investigations, audits

General presumption of non-disclosure exists for:

(in these cases **no individual assessment of documents** is required!)

- **State aid investigation** (Case TGI C-139/07P);
- **Merger investigations** (Cases Odile Jacob C-404/10 P and Agrofert C-477/10 P)
- **Cartel investigations** (Case Netherlands/Commission T-380/08)
- **Infringement investigations and EU Pilot** (Case LPN C-514/11 P and C-605/11 P)
- **OLAF investigations** (Case Catinis T-447/11)

* Consult the **Guidance note on closed infringements**

Decision-making process

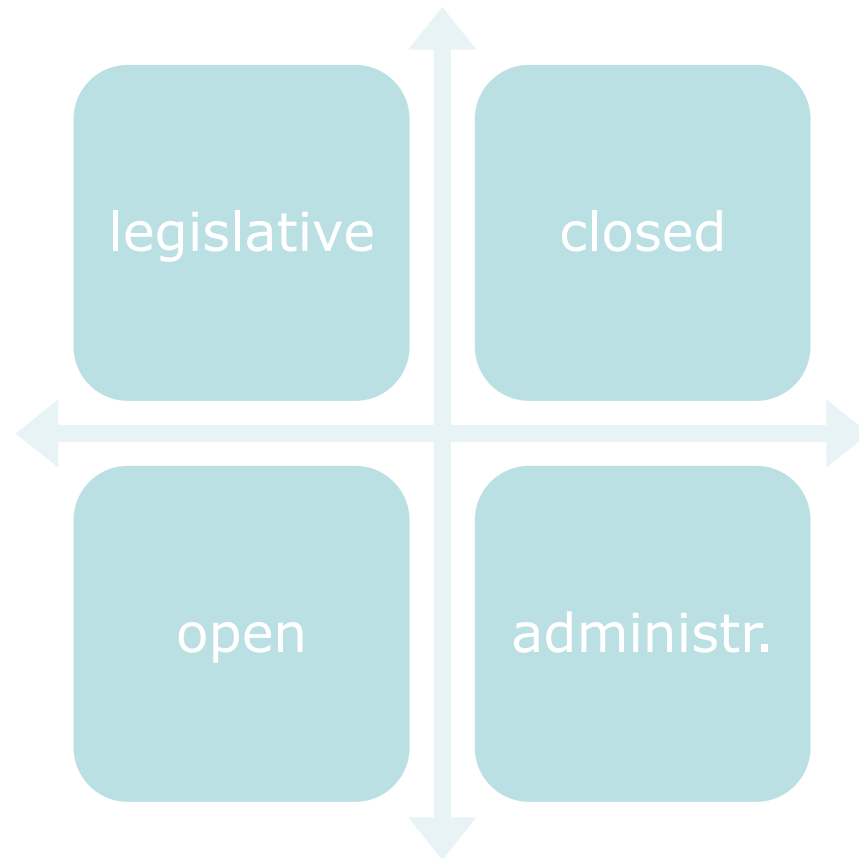
Article 4(3) of Regulation 1049/2001

Access refused if disclosure would **seriously** undermine the decision-making process

◀▶ **unless overriding public interest in disclosure**

1st paragraph: documents drawn up for internal use or received **before the decision has been taken**

2nd paragraph: documents containing **opinions for internal use** even **after the decision has been taken**



4. Procedures

Initial applications: treatment

Step 5: Conduct the necessary consultations (*unless it is clear that the document shall or shall not be disclosed*)

- for the Commission documents consult the relevant services;
- for Member States' documents consult the national authorities concerned (Article 4(5) of Regulation 1049/2001);
- for third-party documents consult the author of the document (Article 4(4) of Regulation 1049/2001);
- for documents of other EU institutions consult them accordingly (Memorandum of Understanding).

Objections cannot be overruled at the initial stage!

Initial applications: treatment

Step 6: Assess all identified documents

How?

Conduct a **concrete and individual examination** of the content of the documents and perform a '**harm test**' by checking if disclosure would undermine one of the interests protected under Art. 4 of Regulation 1049/2001.

Exception: unless a general presumption of non-disclosure applies to the documents requested.

Initial applications: treatment

Step 7: Consider whether granting partial access is possible

- If only **parts** of the document are covered by exceptions, the **remaining parts** must be released.
- Partial access is granted if **meaningful!**

Article 4(6) of Regulation 1049/2001

Initial applications: treatment

Step 8: Draft a reply to the applicant

In cases of negative (or partially negative) replies you should duly **motivate your refusal** on the basis of the exceptions provided for in Art. 4 of Regulation 1049/2001.

The question of a **possible partial access should always be addressed.**

Initial applications: treatment

Step 9: If you use one of the exceptions provided for in Art. 4(2) of Regulation 1049/2001, i.e. the relative exceptions, do not forget to ...

assess whether there is an overriding public interest in disclosure

Include the relevant justifications in your reply!

Initial applications - treatment

Step 10: For partially negative and negative replies, make sure that they are:

- **Signed by Director-General** (Articles 3 and 10 of Implementing Decision). If the reply is positive or when the only parts redacted are personal data, it may be signed at Head of Unit level.
- Applicant is informed **of right to request a review** (Article 7(1) of Regulation 1049/2001)