ACCESS TO DOCUMENTS

Training session
DG Internal Market, Industry, Entrepreneurship and SME's
17 March 2015

ATD team in DG GROW (unit R4)
Overview

• Context: the right of access to documents
• General principles
• Procedural rules
• Figures and references
• Exceptions: detailed analysis and case studies
Context

Short History of the right of access
Transparency and public participation
Legal Framework
The right of access - Short History

- Most Member States have laws on access to documents or information
- Maastricht Treaty (1992): Declaration on access to information
Transparency and Public Participation

Treaty on European Union

Art. 1 + 10(3):
- decisions taken as openly as possible
- as closely as possible to the citizen

Art. 11 (1), (2) and (3)
- dialogue with civil society
- broad consultation
Transparency and Public Participation (2)

Treaty on the Functioning of the EU

Art. 15 (1) and (2):

- work as openly as possible
- Parliament meets in public, Council when considering and voting legislation
The right of access - Legal Basis

**Article 15 (3) of the TFEU**
(Treaty on the Functioning of the EU)

- Right of access to documents of all EU institutions, bodies, offices and agencies
- Court of Justice, European Central Bank and European Investment Bank only covered for administrative tasks
Legal Framework

- **Article 15(3) TFEU**
  - Regulation 1049/2001 (R)
  - Commission Decision 2001/937 (D)

- **Aarhus Convention** (access to information, public participation in decision-making and access to justice in environmental matters)
  - Regulation 1367/2006 (A)
Review of the Regulation

- Additional proposal in March 2011, aligning the Regulation to the Lisbon Treaty – COM(2011)137
- More active publication of legislative documents
- Alignment with Aarhus Convention
- More precise definition of "documents"
- Stricter protection of files related to on-going investigations
- Clarification of right of access to:
  - personal data
  - Member State documents
Scope
Benefits
Limits
Principles
Who can apply?

Everyone!
- An individual, a private person
- A company, association, organization, etc.

Resident or based **inside or outside** the EU.

**No obligation to give reasons**

**No privileged access**
Access Rights of Parliament

- **Members have the same right as members of the public**

- **The institution may have access to confidential information**
  (Annex 2 to the Framework Agreement)
Which documents?

Everything!
But....

Only in the area of competence of the EC

• No private e-mails!

Only existing documents or existing versions in the possession of the EC
Scope

- All documents **drawn up or received** in all areas of activity [Art. 2(3) R]
- Very wide definition of a “document”: **any content** whatever its medium [Art. 3(a) R]
- Access is granted to **existing documents** in an existing version and format (no obligation to create or translate documents) [Art. 10(3) R]
  - Except for list of meetings and document register (listing all the documents identified)
Limits

- **Documents are accessible unless** their disclosure would undermine an interest protected by way of an **exception** (harm test)

- **No exempt categories** (not even classified documents): case by case analysis

- Exceptions apply **as long as protection is justified** (maximum 30 years)

- No confidential information in the motivation of the refusal
The public interest:
- public security
- defence and military matters
- international relations
- financial, monetary or economic policy of the EU or a Member State

Personal data
Commercial interests
Court proceedings and legal advice
The purpose of inspections, investigations and audits
The decision-making process
Procedures

Handling of applications
Means of redress
Initial Applications

- **Handled by DG concerned**
- **Attributed to the competent unit(s) as CF**
  [other units might be involved in ASOC]
- **Time limit:** 15 working days + extension with 15 working days
- **If request not precise:** ask clarifications
- **Voluminous request:** find “fair solution”
Replies

Positive replies (including replies were personal data have been redacted): signed by HoU (in the lead for the file) or Director (if more units involved)

Negative/partially negative replies: signed by Director-General;
Refusals must be motivated
The "Check-list"

Devoid of purpose (no documents identified) signed by HoU in the lead for the file or Director (if more units involved)

In devoid of purpose and negative replies, the applicant must be informed of right to request a review - confirmatory application
Third Party Documents

Art. 4(4) R + Art. 5 D

- **Author consulted** unless it is clear whether document should be released or not (*via email by the unit CF*)

- **Commission decides** on the basis of exceptions

- **Third party objections can not be overruled** at the initial stage
Documents from other Institutions

Art. 2.3 and 4.4 R + MoU

- The Commission must handle the application if it holds the document
- The originating institution is consulted under the "Memorandum of Understanding"
- This also applies to the agencies and to the European External Action Service
Documents from Member States

Art. 4(5) R and Art. 5(4) D

- Member States may **request not to disclose**
- They are **always consulted** unless the document has been made public
- **MS objections can not be overruled** at the initial stage
EU Documents in Member States

Article 5 R

- Member States apply their national rules
- Regulation does not affect national laws
- **Principle of loyal cooperation**: MS Consults Commission if in doubt on disclosure
- Commission indicates whether or not it would itself grant access
- MS may refer request to the Commission
Repeated and Voluminous Requests

Repeated requests

• After refusal, applicant may make a new request for the same documents

Voluminous requests

• Ex.: All correspondence between the European Commission DG Enterprise and external stakeholders concerning the "Circular Economy Package" and the "Clean Air Package" between January 2013 and present, or, should this exceed a time/cost limit, from the earliest permissible date to present.
Sensitive documents

- **Article 9 R**

- Documents from **public authorities**
- Classified as "**EU Confidential**, "**EU Secret**" or "**EU Top secret**" in accordance with security rules

**In the areas of:**
- Public security
- defence and military matters
- international relations
- financial, monetary or economic policy
Sensitive documents (2)

- Handling by *authorised staff*

- Refusal *based on the exceptions* laid down in Article 4

- Disclosed only *with consent of originator*
Confirmatory Applications
Art. 8 R and Art. 4 D

- Submitted to the **Secretary-General** within 15 working days [Art. 7(2) R]
- Within 24 hours the unit CF which handled the initial request must transmit to the SG via the AtD team in R4 the undisclosed documents + comments to the arguments presented by the applicant
- Time limit: **15 working days** + extension with 15 working days [Art. 8(2) R]
In case the applicant is not happy with our reply:

- Confirmatory request to the **SG** *(within 15 working days)*

- **Complaint to the European Ombudsman**

- **Proceedings before the General Court of the EU**
Figures

Number of applications
Profile of applicants
Profile of Applicants
## Number of Access Requests in DG ENTR from 2012 to 2014

<table>
<thead>
<tr>
<th>Type</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial requests</td>
<td>313</td>
<td>370</td>
<td>326</td>
</tr>
<tr>
<td>Confirmatory requests</td>
<td>7</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>Ombudsman inquiry</td>
<td>0</td>
<td>1</td>
<td>1</td>
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</table>
## Disclosure Rate

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial applications</strong></td>
<td>5 055</td>
<td>6 127</td>
<td>6 055</td>
<td>5 274</td>
<td>6 525</td>
</tr>
<tr>
<td><strong>Full access</strong></td>
<td>4 258</td>
<td>5 034</td>
<td>4 856</td>
<td>3 928</td>
<td>4 400</td>
</tr>
<tr>
<td><strong>Partial access</strong></td>
<td>208</td>
<td>329</td>
<td>462</td>
<td>454</td>
<td>640</td>
</tr>
<tr>
<td><strong>No access</strong></td>
<td>589</td>
<td>764</td>
<td>737</td>
<td>892</td>
<td>866</td>
</tr>
</tbody>
</table>
## Breakdown of refusals by exceptions applied (%)

<table>
<thead>
<tr>
<th></th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protection of the purpose of inspections, investigations and audits</td>
<td>21.90</td>
<td>25.32</td>
<td>23.60</td>
</tr>
<tr>
<td>Decision-making process, no decision yet taken</td>
<td>17.15</td>
<td>20.23</td>
<td>20.60</td>
</tr>
<tr>
<td>Protection of commercial interests</td>
<td>16.83</td>
<td>16.94</td>
<td>16.14</td>
</tr>
<tr>
<td>Protection of international relations</td>
<td>12.02</td>
<td>3.58</td>
<td>6.19</td>
</tr>
<tr>
<td>Protection of privacy and the integrity of the individual</td>
<td>8.90</td>
<td>14.65</td>
<td>16.26</td>
</tr>
<tr>
<td>Decision making process, decisions already taken</td>
<td>8.58</td>
<td>4.92</td>
<td>6.51</td>
</tr>
</tbody>
</table>
# Requests, Appeals, Complaints, Court Cases

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>All requests received</td>
<td>6361</td>
<td>6477</td>
<td>6014</td>
<td>6525</td>
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<tr>
<td>Confirmatory applications</td>
<td>181</td>
<td>165</td>
<td>229</td>
<td>236</td>
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<tr>
<td>Complaints to the Ombudsman</td>
<td>22</td>
<td>10</td>
<td>20</td>
<td>22</td>
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<tr>
<td>Court cases</td>
<td>14</td>
<td>15</td>
<td>14</td>
<td>14</td>
</tr>
</tbody>
</table>
Exceptions
Protection of personal data

Art. 4(1) b R

- Privacy and integrity of the individual in particular in accordance with legislation regarding the protection of personal data [Regulation 45/2001]

- Access to documents and personal data protection are equivalent rights

- Requests for access to personal data to be examined under both Regulations 1049/2001 and 45/2001

- Applicant must establish the need for disclosure

- Disclosure should not prejudice the person’s rights
Protection of personal data (2)

- **Practice**
  - Documents to be disclosed are expunged of personal data

- **What about EC staff?**

  - New policy of redacting names applies to all names below senior management level (i.e. below Director-General, Secretary-General or Cabinet staff (ALL members of Cabinets) + Commissioners)

  - We do not disclose names of Directors and HoUs unless the need thereto has been clearly substantiated and there are no reasons to assume that the legitimate rights of the individuals concerned might be prejudiced
Protection of commercial interests

Art. 4(2) first indent R

Access refused:

- if disclosure would affect the competitive position, the reputation or intellectual property rights of a person or a company
- Unless there is an overriding public interest in disclosure
Inspections, Investigations, Audits

Art. 4(2) third indent R

Access is refused:
• if disclosure would undermine the purpose of inspections, investigations or audits
• unless there is an overriding public interest in disclosure
Inspections, Investigations, Audits (2)

Case-law

- Applies *during investigations*
- May cover *follow-up actions*, but limited in time

- Joined cases T-391/03+T-70/04 Franchet & Byk v Commission
- T-437/08 CDC v Commission
Infringements

Case-law

- **Pending cases:** exchanges between Member States and the Commission remain confidential
  - T-191/99 Petrie and others v Commission
  - T-29/08– Liga para Protecção da Natureza (LPN) v Commission

**PUBLIC ACCESS TO DOCUMENTS RELATING TO INFRINGEMENT PROCEEDINGS**

Decision-making process

- **Documents drawn up for internal use or received before the decision has been taken**
  [Art. 4(3) 1st subparagraph R]
  - Preparatory work in comitology: to be disclosed unless serious harm to decision-making
  - T-144/05 Muñiz v Commission

- **Documents containing opinions for internal use even after the decision has been taken**
  [Art. 4(3) 2nd subparagraph R]
  - External pressure on experts: there must be concrete and specific harm
  - T-121/05 and T-166/05 Borax v Commission
Decision-making process (2)

Access is refused:

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

- *unless* there is an *overriding public interest in disclosure*
Very useful!!

- **Summary of case-law on access to documents**

- **Guidelines on "public access to documents concerning procurement and grant award procedures"**
Partial Access

Art. 4.6 R

- If only parts of the document are covered by exceptions, the remaining parts must be released

- Principle of proportionality:
  - The administrative work of creating an expunged version may be balanced against the information value of the parts to be disclosed
Overriding public interest

See Art. 4(2): overriding public interest in disclosure

Ex.: If disclosure of a document or parts of it is vital for the public to be aware of risks (food scares, environmental hazards, threats to public health)
Useful links

- Public access to Commission documents: https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx (guidance and standard letters)

Thank you

For further information:
- Access to documents coordinators (DG GROW unit R4)
- SG Transparency unit (SG unit B5)