# JRC GUIDELINES ON APPLICATION OF REGULATION 1049/2001

## (ACCESS TO DOCUMENTS)

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## I. Introduction

The principle of openness and transparency regarding works and activities of the European Union (EU) and the public right of access to documents of its Institutions are based on Article 15 of the Treaty on the Functioning of the European Union. According to this Article, *"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium (...)"*. Access to the European Institutions' documents is also recognised as a citizens' right in the Charter of Fundamental Rights of the European Union[1].

In 2001, by initiative of the European Commission, the Council and the European Parliament adopted Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[2]. This Regulation plays a prominent role in the access to documents field, together with the "Aarhus Regulation"[3], which governs, among other things, access to environmental information held by EU institutions and bodies[4].

The presence of the above instruments in the EU legal framework, and the public's higher awareness of the rights these instruments offer them, result in constant increase in the number of requests for access to the European Institutions' documents that has been observed since a few years. The NGOs also become more and more active in the area of transparency and openness and try to facilitate the access of the general public to the documents of the EU Institutions. The example that can be given here is the website AsktheEU.org which was set up by civil society organizations to help members of the public get information about the European Union.

The increase in the number of requests for access to documents has also been noted with regard to requests addressed to the Joint Research Centre (JRC). It is therefore necessary to provide the JRC Institutes/Directorates with a set of clear and easily applicable guidelines on issues concerning access to documents with particular focus on the aspects relative to the JRC. Given that the requests often relate to documents with sensitive scientific/technical content and therefore require thorough analysis before the access is granted or refused, clear guidelines are especially relevant.

The present guidelines provide a description of obligations arising from Regulation 1049/2001. The purpose of this document is to explain in detail what is the public right of access to the Commission documents and to ensure coherent and uniform application of the provisions of Regulation 1049/2001 across the JRC. The JRC

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[1] Article 42 of the Charter of Fundamental Rights of the EU

[2] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[3] Regulation No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[4] Regarding the distinction between a "document" and "information" see the section II below.

Institutes/Directorates are encouraged to follow the interpretation included in these guidelines in their initial assessment of the received requests for access to documents.

The document, however, is not meant to be exhaustive and its contents are not "carved in stone". The ultimate interpretation of the provisions of Regulation 1049/2001 and their application are subject to the rulings of the EU General Court. For this reason the references to the Court cases relating to the area of access to documents are included very often in the guidelines. The document will be updated whenever necessary, to take account of the changes of interpretation included in the constantly growing number of new rulings of the Court concerning the application of Regulation 1049/2001.

The guidelines are composed of two parts. The first part (chapter II) explains the administrative aspects of handling the requests for access to documents, i.e.: what workflow applies within the JRC when the request for access to documents is submitted. The second part (chapter III and the following) describes the legal framework, i.e.: in which situation the access to the requested document can be granted and in which it has to be refused.

The notion of the "Institution" used in the text of these guidelines encompasses the EU Institutions (such as the European Parliament, the EU Council and the European Commission, etc). As far as the European Commission is concerned, it applies as well to the Directorates General and more concretely to the JRC, except for the cases where the explicit reference is made to the JRC to underline the particular aspects of application of access to documents in that DG.

## II. Regulation 1049/2001 on access to documents: Administrative aspects

### *1. Handling of the request for access to documents – multi-stage process*

The process of handling requests for access to documents may involve many actors within and outside the JRC. It is possible that the input of the Commission's Secretariat General or the Legal Service, as well as colleagues from policy Directorates General, is required before the decision to grant/refuse the access to the requested document is taken. This is the case of documents with politically sensitive contents or where it is problematic to assess the implications that the release of the document may cause.

It has to be emphasised that the decision to refuse access to a document taken at Directorate General level, does not necessarily put the process to an end. Regulation 1049/2001 allows the public to question the decision refusing access to the requested document, by introducing a possibility to submit a, so called, confirmatory *application* to the Commission's Secretary General. The Secretary General re-assesses the justification provided by the Directorate General at the initial stage and weights it against the applicant's argumentation provided in the confirmatory application. On that basis the Secretary General takes a decision that either confirms the stance of the Directorate General or changes it. In cases where the applicant is not satisfied with the outcome of the confirmatory stage, the case can be brought before the EU General Court with a view to annulling the decision

of the Secretary General, or a complaint can be lodged with the European Ombudsman.

*2. Practical aspects of handling of the request for access to documents*

The political sensitivity of the contents of the documents that are subject of the request for access, the multitude of actors and layers involved in their handing, requires that proper coordination allowing for coherent and uniform interpretation of the provisions of Regulation 1049/2001 is ensured. At the Commission's level, this coordination is provided by the Secretariat General. As far as the JRC is concerned, the function of the coordinator responsible for access to documents is established within the unit B.6 *Legal Advice*, who can be contacted by all JRC staff members by means of the dedicated functional mailbox: JRC ACCESS DOCUMENTS. Staff should be aware that the internal JRC quality management procedure is in place for timely and efficient handling of requests for access to documents (link). The Code of Good Administrative behaviour adopted by the Commission is also applicable within this context (link).

From a practical point of view, in line with the above mentioned procedure, in cases of request for access to documents submitted to the functional mailbox (majority of the requests) the coordinator contacts the relevant unit and asks for its contribution, including the following information: 1) is the document requested indeed in the possession of the JRC, 2) can it be tracked down and extracted and 3) what is the initial opinion as regards its potential release. On the basis of that feedback, and following the detailed assessment of the contents of the document from the point of view of the requirements provided for in Regulation 1049/2001, the proposal of the line to take (release/refuse) is submitted to the hierarchy.

The coordinator provides all the guidance and advice that may prove necessary in the course of the procedure. It needs to be underlined that, in order to ensure coherence of the assessment leading to a decision to grant/refuse access to a document, the coordinator always has to be informed of all applications submitted to the JRC staff directly by the general public (i.e. submitted not to the functional mailbox JRC ACCESS DOCUMENTS, but addressed directly to the staff members' email addresses).

## III. Regulation 1049/2001 on access to documents: Definitions

*1. Widest possible access to the EU Institutions documents*

In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions (…) (Regulation 1049/2001, whereas n. 11).

The framework established by Regulation 1049/2001 introduces the principle according to which access to all documents covered by its scope should, as a general rule, be provided to the public through the direct means (e.g. internet website or an on-line register) or indirectly, i.e. upon request. The legislator introduced, however, a set of exceptions, limiting the application of that principle where the Institutions have to refuse the access to a document (Article 4 of

Regulation 1049/2001). Therefore, the assessment of each request will require verifying whether the contents of the requested document require invoking one of the exceptions in order to protect certain interests. It follows from the principle of the widest possible access that the above mentioned assessment of the document should not serve as a tool allowing the Institution to find means to not disclose the document. It should be rather considered as a safeguard allowing for protection of certain interests in the set-up where all documents are, by default, publicly available.

The principle of the widest possible access to the Institutions' documents goes in pair with the principle of equal treatment. In accordance with that principle, access to a document released to one applicant on the basis of Regulation 1049/2001 may not be refused to other applicants. It means, therefore, that granting access to a document *de facto* makes this document public and a reply to each subsequent request for access to that document will have to be positive.

2. *Who can request access to a document?*

In principle, everybody can request access to a document that is in possession of the Institution.

Regulation 1049/2001 provides that *any citizen of the EU, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the European Institutions*. As far as the documents of the European Commission are concerned, the above-mentioned scope has been extended (by the amendment of the Commission's Rules of procedure) to any natural or legal person not residing or not having its registered office in the Member States.

Such a universal notion of "applicant" under Regulation 1049/2001 makes it evident that the requests for access to documents cannot be refused solely on the grounds of the identity of the applicant requesting the access.

Requests for access to documents submitted by the staff of the JRC (or other DGs) acting in their capacity of staff members, will not, as a general rule, be considered as falling into the scope of Regulation 1049/2001. Such requests will be dealt with in accordance with general administrative practice. However, requests submitted by staff members acting in their capacity as e.g. a chairperson of an EU staff association or a union will have to be assessed according to the criteria of Regulation 1049/2001, as they are considered as third parties.

It needs to be emphasised that Regulation 1049/2001 does <u>not</u> require the applicants to provide <u>any justification</u> of their requests for access to documents. This does not preclude the possibility to communicate with the applicant, e.g. in cases where the request is very general or wide in scope and the applicant's additional input/explanation is required to allow the JRC to determine with precision what type of document is requested and provide the applicant the material that fits best his/her needs.

*3. What is a "document"?*

The notion of a "document" included in Regulation 1049/2001 goes much beyond what is normally considered as a "document". According to Regulation 1049/2001, a "document" means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the Institution's sphere of responsibility.

Such defined "document" must be drawn up or received by the Institution and be in its possession, i.e. it must *exist*. The Institution is therefore not required to create a new document in order to reply to a request for access. E.g. in case of a request for minutes of a meeting that was not recorded (on paper or by any other means), there is no obligation for subsequent drafting of the minutes. Such request for access thus may be refused, because there is no document. This principle, however, may not be misused. As confirmed by the EU General Court, the Institution may not deliberately choose not to draft a document for the single purpose of avoiding its subsequent publication[5].

The notion of document as defined above encompasses ALL documents held by the Institution including work-in-progress documents (drafts), documents received from third parties, as well as the sensitive documents with EU security markings[6]. No categories of documents are excluded from the scope of Regulation 1049/2001.

- *Work-in-progress documents*

  Regulation 1049/2001 does not make any distinction between the documents in their *final version* and the *drafts of the documents* (i.e. the work-in-progress documents). As far as the JRC is concerned, this applies to all types of scientific reports and studies that are prepared by the JRC following the request form e.g. a customer DGs. It is likely (and it actually happens) that information about such reports/studies being prepared are disseminated to the outside world (e.g. through the participation of the JRC in working groups or simply through 'advertising' the facts on the Institutes' internet websites). In consequence, the attention of the public can be attracted and may result in the requests, e.g. from the press or NGOs, for access to document that are not yet finalised. Such requests for access to documents that are not yet in their final version, in principle, have to be treated in the same way as any other request, because the principle of the widest possible access applies to them as to all other (final) documents. It will be therefore against that principle to refuse the access solely on the basis that the work on the document is not yet finalised.

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[5] See judgment CFI of 25.4.2007 (T-264/04), par.61: "*It would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities*".

[6] I.e. classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

In practical terms, however, it is likely that the applicant is not aware of the fact that the requested document has not been yet finalised. In such situations, it is possible and admissible to propose the applicant that the document will be provided once finalised. Such solution has to be presented as a proposal and the applicant must explicitly accept it. If the applicant insists on the release of the draft version of the document, such request will have to be handled as any other.

- *Third party documents*

  The concept of the document being in possession of the Institution implies that documents that do not originate from that Institution but from a third party (such as national authorities, industry, enterprises or the other EU Institutions) fall into the scope of Regulation 1049/2001 and the principle of the widest possible access to the Institution documents applies to them too. Therefore, the requests for the access to such documents may not be refused solely on the grounds of the document's 'ownership'. Nevertheless, given their specific character, Regulation 1049/2001 foresees additional requirements relating to handling of requests for access to such documents. In particular, the Regulation requires that before the access to such documents is granted, the third party must be consulted (see chapter V.3).

  The concept of "being in possession" of a document has to be also interpreted as a right of disposal of it, so that it is up to the Institution to assess the request and to take a decision whether the document would be released or not. In case of documents commissioned to the JRC by other DGs (such as e.g. the scientific reports), despite that it is the JRC who is the author of the document (and a copy of the document will be in its possession), the decision to release the document would be taken by the customer DG. Therefore such requests should be dealt with by the relevant customer DG.

  With regard to the documents that are a result of negotiations of two (or more) parties, such as Memoranda of Understanding and Collaboration Agreements, they are considered as both the Institutions' and third party's document. In this situation, granting access to such document, in general, should be subject to receiving a prior opinion of the third party. Although the third party's opinion is not binding, it should be respected if it is properly motivated[7].

- *Sensitive documents*

  The sensitive documents with the EU security markings are not excluded from the scope of Regulation 1049/2001 and its provisions, in principle, apply to them as to any other document. The access to them may not be automatically rejected solely on the basis of the status such documents were given and the examination whether one or more of the exceptions apply has

[7] If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.

to be carried out. Nonetheless, the documents in question were given their special status for a reason. Their contents include sensitive information and it is very likely that the exception allowing for refusing the access can be easily invoked. The examination against the exceptions provided for in Regulation 1049/2001 in case of such documents, has to be carried out only by the staff members that were given access to them. If the outcome of the examination does not allow for establishing that the access to the document can be refused on the basis of one or more of the exceptions provided for in the Regulation 1049/2001, the Institution will be required to release it. Before the release, however, the document has to be officially "declassified" by the Commission's Secretariat-General.

4. *The specific concept of "environmental information" under the Aarhus Regulation.*

The "Aarhus Regulation" introduces a concept of "environmental information" and defines it as "any information in written, visual, aural, electronic or any other material form". This information must relate to the matters listed in the Regulation, such as, e.g.: the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, factors, such as substances, energy, noise, radiation or waste[8]. Although the case-law of the Court of Justice of the European Union recognizes the difference between a "document" and "information" , the required element of 'materiality' makes the concept of the "environmental information" very similar to the notion of "document" under Regulation 1049/2001. In practical terms, in the majority of cases these two notions would be considered as equivalents, as the definition of the document under Regulation 1049/2001 encompasses environmental information as defined in the Aarhus Regulation.

5. *Request for access to documents or request for information?*

It is important that the JRC Institutes/Directorates are able to correctly verify whether messages they receive from the general public should be treated as simple requests for information, to which the provisions of Regulation 1049/2001 do not apply, or as requests for access to documents, which should be treated in line with the specific workflow and with respect of the strict deadlines imposed by that Regulation.

When a request for access explicitly specifies the type and title of a document, it will most certainly fall within the scope of Regulation 1049/2001. However, general enquiries e.g. about JRC budget, staff number or available posts will not be treated as requests for access to documents, despite that the information requested is included in different sets of "documents" within the meaning of Regulation 1049/2001. Requests for access to information in a database (other than those already accessible to the public), are treated in the same way as requests for access to a document, provided, however, that the request does not require that new IT programming be developed in order to retrieve the data and that the application

[8] Full list of the matters considered as relating to the environment within the meaning of the Aarhus Regulation are included in Article 2.1.d) of the Regulation.

can be processed by routine operations[9]. In accordance with this line of reasoning, the request for e.g. a list of persons holding Italian nationality working in the Ispra Site would have to be considered as a request under Regulation 1049/2001, because such list can easily be extracted from the Sysper2 by means of a routine query.

The concept of a "document" (or "information in a material form" under the Aarhus Regulation) helps to address cases where the request is in fact referring to information, which is not necessarily contained in a "document". All enquiries that do not fall within the scope of Regulation 1049/2001 (i.e. where the applicant does not explicitly identify a "document" to which access is sought) will still have to be treated according to the Commission's Code of Good Administrative Behaviour (link) or any other specific provisions such as e.g. the provisions relative to public procurement (see the Chapter VI) or data protection (see the Chapter IV).

## IV. Exceptions to the principle of broad access to documents

As mentioned in the previous chapter, the right of public access to the documents held by the European Institutions is governed by the principle of the widest possible access. This principle is, however, subject to certain limitations provided for in Article 4 of Regulation 1049/2001. The list of the exceptions to the principle of the widest possible access laid down in the Article mentioned above is exhaustive. This means that any refusal to grant access to a document has to be based only on at least one of these exceptions. No other grounds, e.g. a mere promise to participants of a meeting to keep the minutes confidential or a contractual provision on confidentiality, would be sufficient to refuse access to a document. The legislator linked the concept of the exceptions allowing the Institution to refuse the access to documents with the protection of certain interests: personal data, commercial interests or decision-making process, etc.

Regulation 1049/2001 distinguishes three types and two categories of exceptions that may justify a refusal of access to documents.

*1. Mandatory exceptions – protection of public interest and data protection*

Exceptions under Article 4(1) letters (a) and (b) of Regulation 1049/2001

"The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

[9] See judgement T-436/09 – Julien Dufour c/ ECB

The above types of exceptions are absolute and mandatory. This means that the Institution is required to refuse the access to a document concerned, if the substantiated justification can be produced that the release of the document would undermine the interest protected by the exception. In other words, the Institution may not override the application of the exception by its willingness to release the document to the applicant.

The mandatory character of the exceptions belonging to the above category also releases the Institution from the obligation to carry out the 'overriding public interest test'[10].

The specific mission of the JRC, its status as a non-policy DG and the character of its activities, make practical application of the exception (a) to the documents prepared or received by the JRC rather limited.

With regard to the exception (b) relating to personal data, it has been confirmed by case-law that the reference to the legislation on data protection (the Regulation 45/2001[11]) means that the requirements of that legislation (necessity of a processing for a lawful purpose[12] as well as the guarantees it confers to the data subjects) have to be followed.

In practical terms, the way in which the exception relating to protection of the privacy and the integrity of an individual is applied, would depend mainly on the type of requested document, as the impact of the presence of personal data on the 'value' of a document will be different for different categories of documents. For instance, the compliance with the obligation deriving from Regulation 45/2001 will have to be assessed in a certain way in case of a document such as a presence list of a meeting and differently in case of a tender evaluation report containing the names of the evaluation committee members.

In the first case, the personal data included in the document constitute the primary and crucial element of its content. Therefore, providing such document to the applicant with the personal data expunged would entirely deprive the document of its value. In such case, if the access to the document is to be provided, the compliance with the Regulation 45/2001 has to be ensured. Only if the applicant requesting access provides express and legitimate justification[13] demonstrating the necessity for those personal data to be transferred to him/her, will the Institution have to weigh up the various interests of the parties concerned and then decide on the request for access accordingly. The Institution may disclose the personal data also in cases where disclosure is necessary to perform a task carried out in the public interest in the sense of Article 5(a) of Regulation on data protection (e.g. performing an institutional task, i.e. when publishing annual lists of experts or contractors. On Commission staff personal data, see: Administrative notice

[10] Case T-264-04

[11] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[12] See Article 5 of Regulation 45/2001 on data protection.

[13] According to Article 8 of Regulation 45/2001 on data protection.

85/2003). Following the judgment of the Court in the Borax case[14], the names of members of experts groups giving advice to the Commission are accessible, together with their opinion, and their disclosure may not be refused only on general grounds of privacy protection. Therefore, when inviting external experts to be members of a group, a privacy statement should always be distributed, whereby the expert has to agree in advance to his name and membership in the group being possibly made public. If such privacy statement has not been provided, it might be (depending on the circumstances), as a rule, necessary to consult the persons whose personal data are included in the document and ask for their explicit consent to disclosure.

On the other hand, where the impact of the personal data included in the document on the overall 'value' of the document is limited or non-existing, the decision whether the exception (b) applies would depend on verifying if disclosure of the personal data would constitute processing considered as lawful as required by the Regulation 45/2001. Therefore, if the persons whose data are included in the requested document were not informed through the privacy statement that their data may be transferred upon request to the third parties, the exception (b) will have to be invoked and their personal data will have to be expunged.

The above does not apply to the names of the authors of scientific articles quoted or referred to in e.g. a scientific works. Such personal data is by definition publicly available and from the point of view of application of the exception (b) is irrelevant, as their release does not constitute the processing of personal data within the meaning of Regulation 45/2001.

Requests submitted by data subjects for access to their personal data stored in JRC databases are not considered as requests for access to documents under Regulation 1049/2001. For this reason, e.g. a request for a copy of the entry log submitted by an individual will have to be handled according to the provisions of Regulation 45/2001 on data protection.

It is worth underlining that the regulations concerning access to documents and data protection demand an entirely different workflow in processing the requests for access and impose different deadlines for replying. It is therefore necessary to correctly assess which regulation would be of application in a given case. Besides the above-mentioned elements (is it a "document" in the meaning of Regulation 1049/2001?), the existence of DPO notification regarding the requested type of data should give a meaningful indication as to the choice of the workflow.

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[14] Judgment in case T-121/05, point 44: *"[…] The same reasoning unsupported by evidence, were it to be accepted, could be applied to all the meetings organised by the Commission for the purpose of obtaining the opinion of experts prior to the adoption of decisions of any nature having effects on the activities of economic operators in the sector concerned by those decisions, whatever that sector might be. Such an interpretation of the scope of Article 4(1)(b) of Regulation No 1049/2001 would be contrary to the strict interpretation of the exception, which requires it to be established that the interest protected would be specifically and effectively undermined*".

*2. Relative exceptions – protection of business secrets and court proceedings*

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

"The institutions shall refuse access to a document where disclosure would undermine the protection of:

– commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure."

Among the exceptions included in this category, the exception that is likely to be invoked the most frequently as regards the documents held by the JRC is the one referred to under the first indent: protection of commercial interests. The character of the JRC tasks and activities necessitates frequent purchases of goods, equipment and services through the public procurement. The fact that the JRC is very active in this area, implies the frequent request for access to documents submitted by persons and entities being the economic operators taking part in the tenders organised by the JRC. The document to which the access can be requested may potentially include commercially sensitive business secrets (e.g. the details of the offer submitted by the competitors) and in such cases the exception regarding protection of commercial interests might be of frequent application. Another example where exception would be of application are the documents held by the JRC and received in the framework of its involvement in validation of analytical methods in the process of authorisation of the additive feed.

In most of the cases, these documents belong to third parties and their contribution will have to be requested (see the Chapter V.3) in the course of the assessment leading to the decision whether the access can be granted or refused.

With regard to the exception relating to the protection of the purpose of inspections, investigations and audits, the documents concerned are those relating to the investigations carried out by the Commission's Anti-Fraud Office (OLAF), or the Commission Internal Audit Service, as well as the JRC Internal Audit Unit. In practical terms, the access to certain documents that would normally be released can be refused as they are subject to the on-going OLAF/IAS/IAU investigation or audit.

Application of other exceptions belonging to this type of category is limited as regards the documents in possession of the JRC.

The above exceptions have relative character.

This means that even if the evidence at hand, in principle, justifies the refusal of access to the document, the Institution might still be required to release it. The "overriding public interest" serves to balance the otherwise mandatory application

of the exceptions. In practical terms, when invoking the above exceptions, the Institution is obliged by the Regulation 1049/2001 to assess whether the general public interest outweighs the requirement to protect the private interests covered by the exceptions. Following such assessment, it may turn out that the existence of this public interest may overrule the private interests protected by the exceptions and in consequence the access to documents has to be granted, despite actual risk of undermining these interests through the disclosure. The public interest may be e.g. the need to open up the legislative process to democratic scrutiny (or the need to protect the environment, see the exceptions under the Aarhus Regulation described under IV.4 below).

*3. Relative exceptions – protection of the internal decision-making process*

*Exceptions under Article 4(3) of Regulation 1049/2001*

"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

These two exceptions relate to the protection of the EU institutions' internal decision-making process. They can be invoked in case of requests for access to the document containing, e.g. an impact assessment. Such documents contain the description of implications of various policy options and constitute an important input for a decision on which of these options the adopted legislative proposal will be based. Such document, if disclosed before such decision is taken, may put the Commission at risk of the external pressure from press or entities representing different interests and in consequence may affect the impartiality and transparency of the internal decision making process.

Analogically to the exceptions described under IV.2, the exceptions protecting the Institutions' internal decision making process also require carrying out the 'overriding public interest test'.

*4. Peculiarities under Aarhus Regulation*

Article 3 of the Aarhus Regulation foresees the applicability of Regulation 1049/2001 to requests for environmental information, however, introduces certain differences concerning practical application of the exceptions which under the Aarhus Regulation are applied more strictly.

Firstly, the Aarhus Regulation provides for different application of the exceptions from the first indent of Article 4.2 (protecting commercial interests including intellectual property) and the third indent of Article 4.2 (protection of the purpose

of inspections, investigation and audits). In case of request for access to information relating to the emissions to the environment, the overriding public interest is deemed to exist by default (excluding the 'investigations' in particular those concerning possible infringements of Community law – in such case the overriding public interest is NOT deem to exist and the Institution is still required to carry the public interest test). In practical terms it is not possible to refuse access to such information even if the interests protected by these two types of exceptions (with the exception of 'investigations') are present. It needs to be recalled, that this overriding public interest is NOT deemed to be present in case of protection of information (relating to the emissions) in court proceedings and legal advice (i.e. the second indent of Article 4.2). In this case the overriding public interest test has to be carried out. If the information requested is environmental information but does not relate to emissions, the exceptions are applied as laid down in Regulation 1049/2001.

As concerns "investigations", particularly infringements of Community law, the Aarhus Regulation confirms the applicability of the exception laid down by Regulation 1049, but the existence of the overriding public interest is again presumed by law.

Secondly, the Aarhus Regulation calls for an interpretation of the other exceptions set out in Article 4 of Regulation 1049/2001, "in a restrictive way", taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

Finally, the Aarhus Regulation adds one new exception to the list of exceptions in Article 4 of Regulation 1049/2001, namely, the possibility (not obligation as in case of the exceptions included in the Regulation 1049/2001) for the Commission to refuse access to environmental information "where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species". This exception does not require carrying out the 'overriding public interest test'.

All exceptions apply for the period during which protection is justified on the basis of the content of the document. Apart from the special exception in the Aarhus Regulation (regarding protection of environment), the exceptions may apply for a maximum period of 30 years. However, in case of documents covered by the exceptions relating to privacy or commercial interests and in case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

## V. Application of the exceptions

### *1. Obligation to provide the proper justification*

The exceptions foreseen in Regulation 1049/2001 are a way of derogation to the otherwise compulsory principle of widest possible access to the documents held by the Institutions. Every application of derogation must therefore be properly justified. Providing the proper justification allows the Institution to comply with the obligations deriving from the EU legislation such as Article 296 of the Treaty on functioning of the EU and Articles 41 and 42 of the Charter of Fundamental

Rights requiring the EU Institutions to state the reasons for their decisions. The justification also makes it possible for the applicant to use the right to question the decision of the Institution regarding the access to the requested document. Consequently, the judicial review will concentrate more on the process of applying the exception, especially on the obligation to state reasons regarding all elements of the decision to refuse access.

As mentioned, the exceptions allow ensuring protection of certain interests that would be undermined if the access to the requested document was granted. However, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Invoking of the exception is justified only if it is determined (on the basis of facts specific to the case) that granting the access to the document would specifically and actually undermine (or seriously undermine in case of exceptions under Article 4(3) of Regulation 1049/2001) the interest protected. It is therefore of paramount importance when invoking the exception that the justification of refusal includes logic argumentation, that shows in a convincing manner why the disclosure of the document would cause the risk of (seriously) undermining the interest in the specific case. The main elements of this risk should be represented, in order to prove that it exists. The ECJ has already ruled that: "*According to the case-law, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 "*[15]. Moreover, the risk of the protected interest being (seriously) undermined must be reasonably foreseeable and not purely hypothetical. It is thus not sufficient to state in the reasons for refusal of the access that the disclosure would e.g. seriously undermine the Commission's decision-making process because there could be an external pressure on the Commission following disclosure of the document. It must be stated which facts indicate that there will indeed be such a pressure and why it would seriously undermine the Commission's decision-making process. In other words, the provisions on the exceptions have to be interpreted and applied strictly, so as not to jeopardize the principle of widest possible access. Nevertheless, the strict interpretation and application of the exceptions should not lead to a policy of granting access in all uncertain cases, as it must be kept in mind that the exceptions exists to protect important interests, such as public security, privacy of individuals or business secrets, as well the proper functioning of the institutions in the public interest, where so required.

In case of relative exceptions, it is also necessary to verify whether the overriding public interest exists. The justification of refusal has to include the JRC's stance regarding (non)existence of such interest allowing for effectively relying on the exception and in consequence refusal of access to the document. In practical terms, at the stage of handling the initial application (see chapter II.1) it is enough to explain that the Institution does not consider such overriding public interest to

[15] See judgment of 11.3.2009 in case T-121/05 (Borax/Commission), par. 37

exist in the given case. It will be up to the applicant to bring up the argumentation overruling this stance at the stage of confirmatory application. This line of action would not apply in case of request submitted on the basis of the Aarhus Regulation (see chapter IV.4) and relating to documents containing information relating to emissions to the environment. As mentioned before, the Aarhus Regulation provides for that in such cases the overriding public interest exists by default.

*2. Concrete and individual assessment*

The EU Courts emphasise in virtually every case relating to access to documents that each request for access to documents submitted to the Institution has to be subject to concrete and individual examination. It follows primarily from the principle that no classes of documents are excluded from the scope of the Regulation 1049/2001 and therefore, it cannot be assumed that access to certain documents can be automatically refused. A concrete and individual examination ensures that the applicant's request was handled in compliance with good administrative practice and the other requirements deriving from the EU legislation.

Firstly, only the properly carried out examination allows for establishing whether the Institution would be in a position to invoke one or more exceptions provided for in Regulation 1049/2001 to protect the interest covered by their scope. However, as mentioned above, the mere fact that the contents of the document relates to the interest covered by the exception is not sufficient to invoke it. Therefore, it has to be determined if the circumstances allow for considering the risk of undermining the protected interest as actual, effective and reasonably foreseeable. This cannot be established without carrying out a concrete and individual assessment of the requested documents.

This concrete and individual examination allows for preparing the required justification of the decision refusing or granting access to the requested documents. In this way the Institution is able to comply with the requirements imposed by the EU legislation mentioned in the previous chapter.

The principle of proportionality is present also in the legislation concerning public access to documents. As required by Regulation 1049/2001, in cases where access to only a part of a document must be refused on the basis of exceptions, the access to the remaining part of it needs to be granted (partial access). E.g. in cases where the Institution intends not to disclose a contract because it would harm the commercial interests of a third party, it must nevertheless disclose the parts which are drafted in general and standard terms (such as e.g. the general conditions annexed to the contract) that do not touch the third party's commercial interests. Therefore, the concrete and individual examination is necessary to verify which parts of the document are covered by the exceptions and which are not and in consequence take a decision compliant with the principle of proportionality.

In practical terms, the concrete and individual examination would consist on the following steps:

1) Preparation of the list of all the documents to which the request relates (even if it is evident that they are covered by one of the exceptions and even if they are not listed in the request),

2) Concrete analysis of each document through the prism of the applicability of exceptions (existence of risk, risk is actual, effective and not purely hypothetical).

3) As a consequence, the answer to a request for access to documents has to include the following elements:

   – a list of all documents identified corresponding to the request,

   – for each document, indication whether the access (full, partial) is granted or not

   – if the full or partial access cannot be granted, a detailed and concrete justification based on the exceptions provided for in the Regulation (T-300/10 ; see chapter IV for more information).

The case law recognises 3 situations when the Institution may decide to not carry out the concrete and individual assessment of the received request for access to documents:

   – when it is evident that the access to a document can be granted or refused, for instance because the Institution has already adopted a position regarding the disclosure of this document when analysing another request for access to that document.

   – the documents listed contain the same information so the same justification can be applied to all these documents (independently of their type or denomination)

   – administrative burden disproportionately heavy to the purpose. In such a case, the Institution has the obligation to negotiate beforehand with the applicant with the view of granting the maximum possible access and to demonstrate the excessive administrative burden[16].

*3. Third party documents*

No classes of documents are automatically exempt from disclosure. This applies also to the documents held by the Institution but originating from third parties. Typical examples of the third party documents held by the JRC are the documents submitted by the participants of the tender procedures, or provided within the limits of the Framework Programme project where the JRC is the coordinator, as well as those resulting from the collaboration agreements. It needs to be emphasised, however, that the access to third party documents held by the Institution may be refused, as all other documents, solely on the basis of the exceptions provided for in Regulation 1049/2001. Nevertheless, given that they belong to a special category, Regulation 1049/2001 imposes on the Institution certain additional requirements in terms of workflow of handling the request for access to third party documents. Before the decision regarding the disclosure of such document is taken, the third party being the author of the document has to be consulted with a view to assessing whether one or more of the exceptions apply. It means that the third party cannot invoke a reason not foreseen in this Regulation requesting the JRC not to disclose the document. It is therefore important that the

[16] Case T-344/08

justification provided by the third party as a reply to our consultation is based on the exceptions. The third party opinion serves the purpose of assessing, by the Institution, whether the exceptions apply. If the justification provided by a third party is logic and comprehensive it is considered sufficient for the Institution to complete the assessment and take a decision whether the access is to be granted or refused. In practical terms, in the stage of assessing the initial application, the Institution simply needs to quote the reasoning provided by a third party (as long as it is based on one or more exceptions). The argumentation provided by a third party can be overruled only by the Secretariat General while assessing the confirmatory application.

## VI. Requests for access to public procurement documents

Requests for access to public procurement documents become the most frequent type of request the JRC services receive and their number is expected to increase in the future. Taking that into account, it is necessary to ensure that such requests are handled by the JRC services in an efficient and timely manner, without unnecessary administrative and bureaucratic burden.

- A request submitted by selected tenderers during the fifteen days period following the notification of the tender results[17] and relating to the information mentioned in Article 113.2 ("characteristics and relative advantages of the successful tender") of the Financial Regulation, will NOT be considered as a request for access to documents under Regulation 1049/2001, but as a request for information to which specific rules (Article 113.2 of the Financial Regulation) apply. The general rule of accessibility set in Regulation 1049/2001 may not be invoked to obtain more rights than foreseen by the specific rules. The requests falling into the scope of Article 113.2 will relate to the bid of the winning tenderer. Such requests will have to be treated in line with the requirements and according to the deadlines provided for in the Code of Good Administrative Behaviour and Article 113.2 mentioned above.

- All other requests, i.e. requests submitted by persons or entities not taking part in the procurement procedure or relating to other offers than the one of the winning tenderer or submitted after the fifteen days period following the notification of the tender results, will have to be recognised as requests for access to documents under Regulation 1049/2001.

- The decision to grant or refuse access to the document in the procurement procedures depends mainly on the type of the documents requested:

  – evaluation reports concluding the validation of the submitted offers are subject to partial release (i.e. with the names and other information allowing for identification of the bidders masked). The release may not, however, take place earlier than after the signature of the contract with the successful tenderer (before, the access may be rejected on the grounds of the exception relating to the EU institutions' internal decision-making process). Having

[17] Alcatel period

received a request for such documents, the services should provide a holding reply containing an appropriate explanation and information regarding the anticipated date of the release.

- The request for access to documents included in offers submitted by the tenderers (e.g. technical, economic documentation submitted by the tenderers together with the offers) will always be rejected, regardless whether it has been submitted as a request for information or as a request under Regulation 1049/2001. In the former case, it would be possible to provide the general description of the offer of the successful tenderer ("characteristics and relative advantages of the successful tender").

- In the latter case, the request for access will be rejected as the documents submitted by tenderers in public tendering procedures contain sensitive business information. The procedures for awarding public contracts, by their nature and by the scheme of Community legislation on the subject, are founded on a relationship of trust between contracting authorities and economic operators participating in them. The latter must be able to communicate to such contracting authorities any information in the procurement procedure, without fear that they disclose to third parties items of information whose disclosure could be prejudicial to such operators. Furthermore, as these[18] documents were not prepared by the Commission (although they are in the Commission's possession), it will be obligatory to consult its author(s), however (as mentioned in Chapter V.3) the Institution remains responsible for the final decision. When consulted, the authors of the requested documents must be made aware that the access to documents (or their elements) that are already in the public domain (e.g. description of a product included in the offer may be at the same time available on tenderer's website) may not be refused.

Additional explanatory information on accessibility of the procurement procedures documents can be found in the *Guidelines regarding public access to documents related to procurement and grants procedures*, drafted by the Secretariat-General. These guidelines contain also a list of documents related to public procurement, together with recommendations regarding their (non)disclosure. Additional information can also be found in the Vade-Mecum on public procurement in the Commission (Section 7.2.7.) drafted by DG BUDG.

If necessary, the corporate Legal Advice unit should be contacted through the JRC access to documents coordinator (functional mailbox: JRC ACCESS DOCUMENTS) for any further clarification and guidance.

## VII. Endnote

The present guidelines contain the description of the major principles public access to documents legislation is based on, and the information included therein will assist the JRC services in the majority of standard cases. However, the present document is not

[18] C-450/06

meant to be considered as exhaustive. In case of doubts, the corporate Legal Advice Unit (B06) should be contacted through the JRC access to documents coordinator (functional mailbox: JRC ACCESS DOCUMENTS) for any further clarification and guidance.