Access to documents

Training session DG HOME

09/09/2016

HOME A2
Request for Access to documents?

Transparency policy
Access to documents

Context
Principles
Procedures
Exceptions
Figures
Best practices
Further information
Context

Short History of the right of access
Legal Framework

The right of access - Short History

- Many member States have laws on access to documents or information
- Maastricht Treaty (1992): Declaration on access to information
The right of access - Short History (2)

- **Amsterdam Treaty:**
  new Article 255 TEC on access to EP, Council and Commission documents

- **Lisbon Treaty (in force 1-12-2009):**
  Article 15 (3) TFEU: access to documents extended to all EU bodies + Charter of Fundamental Rights of the EU – Article 42

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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)*
Principles

- Access to documents is conceived by the legislator as a fundamental right.
- As a consequence, when the Commission gets a request, access is the rule / refusing access is the exception.
Principles

Beneficiaries
Scope
Limits

Beneficiaries

- *Any natural or legal person*  
  [Art. 2(1) and 2(2) R and Art. 1 D]
- *No obligation to give reasons for the request*  
  [Art. 6(1) R]
- *No privileged access* *(confirmed by the General Court)*

HOME A2 - 2016
Access Rights of European Parliament

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

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

Scope

- 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]
- **Existing documents** in an existing version and format (no obligation to create or translate documents) [Art. 10(3) R]
- Documents not older than 30 years
- **ARES rules**
**Limits – Principle of harm**

- 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)

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**Restrictive interpretation**

**Case-law**

- Exceptions to be interpreted strictly
- No confidential information to be disclosed in the motivation of the refusal
- Concrete examination of documents
- Unless exception manifestly applies
Procedures

Handling of applications
Means of redress

Access to Documents Procedure
Summary

- Initial request (HOME)
- Initial answer (HOME)
- Confirmatory request (SG)
- Confirmatory decision (SG)
- Court of Justice
- Ombudsman
Initial Applications

- *Time limit:* 15 working days + extension with 15 working days [Art. 7(3) R]
- *If request not precise:* ask clarifications [Art. 6(2) R]
- *Voluminous request:* find “fair solution” [Art. 6(3) R]

Third Party Documents

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

- *Author consulted* unless it is clear whether document should be released or not
- *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 cannot be overruled at the initial stage
Positive replies

Answer signed by Head of Unit or any person to whom s/he delegates

Refusal

Answer signed by Director General

Visa A2 + Chief Legal adviser + Director A

(Caution: confirmatory request)
Partial Access

- If only parts of the document are covered by exceptions, the remaining parts must be released, in particular public information
- Principle of proportionality

Partial Access (2)

Answer signed by Director General

Visa A2 + Chief Legal adviser + Director A

(Caution: confirmatory request)
"Devoid of purpose"

No document found

Answer signed by Director General

Visa A2 + Chief Legal adviser + Director A

(Caution: confirmatory request +
DG declaration that no document found at initial level)

Repeated Requests

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

Institution must assess refusal in light of new situation
Sensitive documents

Article 9 R

Documents from public authorities

Classified as “EU Confidential” “EU Secret” or “EU Top secret UE” 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

Declassification
Confirmatory Applications

Art. 8 R and Art. 4 D

- Submitted to the **Secretary-General** within 15 working days [Art. 7(2) R]
- **Time limit:** 15 **working days** + extension with 15 working days [Art. 8(2) R]
- **Commission decision** (Secretary-General decides by delegation)
- **Legal Service approval** required

Remedies

Art. 8(3) R

- **Complaint to the European Ombudsman**
- **Proceedings** before the **General Court of the EU**
Specific cases  
(outside Reg. 1049/2001)

EU Documents in Member States

Article 5 R

- MS apply their national rules
- Regulation 1049/2001 does not affect national laws
- Principle of loyal cooperation: MS consult Commission if in doubt on disclosure
- Commission indicates whether or not it would grant access
- MS may refer request to the Commission
Requests from Public Authorities

- To be treated in the context of **sincere cooperation** (Art.4.3 of the EU Treaty)
- Reply in the same language as the request
- Reply to be approved by the Head of Unit or Director, with an ARES reference
- No GESTDEM reference
- **Copy SG DOSSIERS ACCES and HOME ACCESS DOCUMENTS** functional mailboxes when sending the reply

Requests for information

- The requestor makes a request through access to documents channels **but** asks for **information** (not a specific document).
- A2 informs the requestor that the request will be treated as a request for information (and not a request for access to documents).
- A1 coordinates the requests for information
- Reply prepared in accordance with the code of good administrative practice
- The operational unit sends the answer, **without** GESTDEM number
Exceptions

*Article 4 - Regulation 1049/2001*

**Types of Exceptions**

- **Absolute exceptions:**
  - In case of harm, access is denied

- **Relative exceptions:**
  
  **Double test:**
  - Harm?
  - Overriding public interest in disclosure?
Absolute exceptions

Protection of the public interest

Art. 4(1) a R

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

Protection of personal data (2)

- 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 (3)

In practice

- Documents to be disclosed are expunged of personal data (Adobe Acrobat Pro)
- Names of Commission staff in their professional context are disclosed from Director level on

Relative exceptions

Harm must be balanced against the public interest in disclosure
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

Court Proceedings and legal advice

Art. 4(2) second indent R

• Access refused if disclosure would undermine court proceedings and legal advice
• unless there is an overriding public interest in disclosure
Court Proceedings

Case law

• Applies only to documents drafted for the proceedings (application, defence, reply, rejoinder, exchanges with Legal Service or external legal counsel)

• Pending cases: presumption that all documents are covered by exception

• Closed cases: concrete examination
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
Infringements

Case-law

Pending cases:
exchanges between Member States and the Commission remain confidential (EU-Pilot and NIF stages)

• Administrative practice

Decision-making process

• Documents drawn up for internal use or received before the decision has been taken [Art. 4(3) 1st subparagraph R]

• Documents containing opinions for internal use even after the decision has been taken [Art. 4(3) 2nd subparagraph R]
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**
### Number of Access Requests (HOME)

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<thead>
<tr>
<th>Year</th>
<th>Applications received</th>
<th>Access granted</th>
<th>Access for purpose</th>
<th>Partial access</th>
<th>Access refused</th>
<th>Confirmation requests</th>
<th>Others</th>
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<td>2016 (mid- September)</td>
<td>206</td>
<td>104</td>
<td>8</td>
<td>16</td>
<td>19</td>
<td>8</td>
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<td>307</td>
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<td>7</td>
<td>9</td>
<td>63</td>
<td>10</td>
<td>96</td>
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<td>2014</td>
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</tbody>
</table>

* based on Reg. 1049/2001
** (Council/EP consultation, sincere cooperation, request for info & others)

### Number of Access Requests (COMMISSION)

<table>
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<th>Year</th>
<th>Applications received</th>
<th>Access granted</th>
<th>Partial access</th>
<th>Access refused</th>
<th>Confirmation requests</th>
<th>Others</th>
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<td>617</td>
</tr>
</tbody>
</table>

* based on Reg. 1049/2001
Requests per Unit (HOME)

147 Requests to date
Types of reply

devoid of purpose 5%
partially 11%
negative 13%
positive 72%
Different kind of cases (206 to date) coordinated by A2

Access to Documents Process at DG HOME

Best practices
1. Respect the deadlines

2. Always use the SG templates as a basis for your reply
   Templates to be adapted to EUROLOOK layout
3.

Use the checklist

4.

Consult HOME.A2 in case of issues/sensitive cases
5. **Signataires for negative/partial/devoid of purpose replies:**

1. In your directorate (Author/HoU/Director)
2. In Directorate A
3. Assistant to DG
4. DG

6. Requests made by organizations specialized in transparency questions, e.g.

ASKTHEEU
Statewatch
Access Info Europe
EDRi (European Digital Rights)
6 bis.

E.g. ASKTHEEU
- "online platform for citizens to send access to documents requests directly to the EU institutions"
- **Immediate publication online** of correspondence exchanged with them

7.

A reply to a request for access to documents is an **official** Commission reply
7 bis.

- Read and apply our instructions sent with the request

7 ter.

- Respect the Commission visual identity (EUROLOOK)
7 quarter.

- Apply the Commission rules for sending and filing official Commission documents:
  = > ARES rules

EurolooK / Ares rules

What does it mean?
Best Practices

Reply by Letter

- Use EUROLOOK (header, footer, signature, layout)
- Copy the right template available on Intranet (standard letters regularly updated by SG) on your EUROLOOK Word document, created for your reply
- Register your letter in ARES and get it stamped before sending
- Send with a cover mail (Do not send via ARESLOOK - the letter is already stamped)

Best Practices

Reply by mail

=> ARESLOOK
Best Practices

Specific cases

• **Acknowledgment of receipt**: scan and attach rapidly to the ARES document (as AR), original in the file
• **Unclaimed letter**: scan both sides of the document, attach quickly in ARES (as translation), and file

Examples
Further Information

Active information

Public registers of documents (Art. 11 R)
- Register of COM, SEC, C, OJ, PV documents
- Register on comitology
- Register of expert groups
- Transparency Register (interest groups - lobbies)
Useful links:

HOME intranet:

Useful links:

Email Registration:


The European Commission’s Visual Identity:

Eurolook:
http://www.cc.cec/itservices/en/content/eurolook
Reference documents:

- "trilogues" Ares(2015) 282423

DG HOME
Access to Documents Team (A2)

Legal Coordinator

Administrative Coordinator
Any questions?

Good luck for your next request for access to documents!
Thank you for your attention