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 of 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

1\(^{st}\) paragraph: documents drawn up for internal use or received **before the decision has been taken**

2\(^{nd}\) paragraph: documents containing **opinions for internal use** even **after the decision has been taken**
Exceptions

- Legislative
- Closed
- Open
- Administr.
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)