



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director General

Brussels,
HOME.A2

Access to documents – Regulation 1049/2001 HOME guide

This note updates information and guidance to DG HOME units on how to deal with **applications for access to Commission documents. It gives the main rules applicable and cannot cover all specific cases.**

For any question, please refer to
Unit A2, Legal Affairs,
and HOME access to documents coordination team
functional mailbox: HOME-ACCESS-DOCUMENTS@ec.europa.eu

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| | HOME Access to Documents Coordinator, legal and sensitive questions | tel. |
| | HOME Access to Documents Assistant, management of GESTDEM | tel. |
| | back-up | tel. |

The requests must be handled in accordance with Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹.

1. Purpose and scope of Regulation 1049/2001

The purpose of the Regulation is to give the fullest possible effect to the right of public access to documents, conceived as a fundamental right. The **underlying rationale is that all documents** (including sensitive² and other classified documents) **of the Institutions must in principle be accessible to the public.**

Regulation 1049/2001 sets out the conditions and limits for exercising the public right of access to documents of the institutions and bodies of the EU, granted by Article 15(3) of the TFEU and article 42 of the Charter. Members of the public have a right to request access to any document held by EU institutions, bodies, offices and agencies. Access can only be refused if disclosure would harm a specific public or private interest, such as public security, privacy, commercial interests, legal proceedings and investigations.

¹ OJ L 145, 31/05/2001, p.43, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049>

² Classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL'

The detailed rules for the application of Regulation 1049/2001 (Commission Decision 2001/937³) lay down the procedures for the handling of requests for access to documents by the Commission. Requests are handled at initial level by the relevant DGs ("initial reply"). Appeals ("confirmatory applications") against a refusal given at initial level are handled by the Secretariat-General. The Secretary-General decides by delegation of power from the College. Decisions taken by the Secretary-General can be challenged by making an application to the General Court or by filing a complaint with the European Ombudsman.

The Regulation applies to all documents held by the Commission, *i.e.* that it has produced or received from a Member State or another third party, provided that they relate to its activities.

A document is defined as any content, whatever its medium, concerning a matter relating to the policies, activities and decisions falling within the Commission's sphere of responsibility⁴.

All documents relevant for the purpose of access to documents must be registered into ARES or another Commission system of registration. SG recently reminded the rules on appropriate registration of documents, in particular into ARES, including e-mails. In view of the importance of fully implementing from now on these rules, SG letter is linked to the present guide.

Who is entitled to apply for access to documents?

- Any citizen of the European Union,
- Any natural or legal person resident or having its registered office in a Member State,
- Citizens of third countries who are not resident in a Member State,
- Legal persons that do not have their registered office in a Member State.

No category of applicants should receive preferential treatment (*e.g.* journalists, MEPs).

The rules on public access to documents do not affect the rules for the official transmission of documents between the Commission and the other Institutions (*e.g.* in Expert groups, Comitology committees, etc.).

Access rights

Access may be requested for any document drawn up or received by the Commission. The request must be in writing and the applicant does not need to state the reasons for applying. **All requests must be examined on a case-by-case basis, taking into account the content of each document.**

All refusals, even partial ones, of access must be duly justified on the basis of one of the exceptions provided for by the Regulation. Whenever full access is refused, partial access must be considered.

All negative replies, included partial ones, are signed by the Director General.

³ OJ L 345, 29.12.2001, p. 94. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0937>

⁴ Access to documents over 30 years old is governed by Council Regulation on historical archives 354/83, OJ L 43, 15/02/1983, p.1

<http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:31983R0354&qid=1423573498880&from=EN>

2. Exceptions under Article 4 of Regulation 1049/2001

Any refusal to grant access must be based on one of the exceptions explicitly provided for in the Regulation. The exceptions must be interpreted in a strict way and the reasons for refusal properly stated.

The Regulation makes a distinction between a few absolute exceptions⁵ and other exceptions that may be overruled by an overriding interest of public interest⁶.

- Article 4(1) of the Regulation provides for a few absolute exceptions. Access must be refused if disclosure would undermine the protection of:
 - Public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Union or a Member State;
 - Individual privacy and integrity.
- Article 4(2) provides for exceptions that may be overruled by an overriding interest of public interest. Access must be refused if disclosure would undermine:
 - Commercial interests of a natural or legal person, including intellectual property;
 - Court proceedings and legal advice;
 - The purposes of inspections, investigations and audits.

Access to the aforementioned documents can be granted if there is an overriding interest in their disclosure.

Article 4(3) provides for an exception protecting the Commission decision-making process. This exception may be overruled by an overriding interest of public interest. Access to a document, drawn up by an institution for internal use or received by the Commission which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure would seriously undermine the institution's decision-making process. The same applies for a document containing opinions for internal use as part of deliberations and preliminary consultations, even after the decision has been taken, if disclosure of the document would seriously undermine the Commission's decision-making process.

Nevertheless, access to the aforementioned documents can be granted if there is an overriding interest in their disclosure. The overriding public interest justifying disclosure must be objective and general in nature⁷.

The Regulation applies to sensitive and other classified documents, which are not exempt from disclosure in an automatic way. Possible disclosure should be examined under the criteria of the Regulation and these should be analysed by officials with clearance to handle those documents: if access cannot be refused on the basis of the exceptions, the document should be declassified before sending it to the applicant.

Applications for documents produced by committees/expert groups should be treated as requests for documents produced by the Commission and not as requests for documents originating with third parties.

If the document originates with a third party or a Member State, the Commission is obliged to consult them, except if the document is already public or if it is clear that the document should not be disclosed (see paragraphs 4 and 5).

⁵ Article 4(1)

⁶ Article 4(2) and 4(3)

⁷ Case T-237/05, *Éditions Odile Jacob SAS v/ European Commission*

3. Specific cases

Documents concerning procurement and grant award procedures

Regulation 1049/2001 applies to requests for documents concerning procurement and award procedures. The following exceptions may be applicable:

- "commercial interests, including intellectual property": the documents may contain information of a commercial nature or relating to the intellectual property of a company or organisation or an expert;
- "individual privacy and integrity" concerning e.g. names or CVs;
- "decision-making process" in cases where the Commission has yet to take a decision on award.

For more information refer to 'Guidelines on access to documents concerning procurement and grant award procedures'⁸, to be found under *my intracomm/policy workflow/legal issues/access to documents*⁹.

Documents relating to infringement proceedings

In accordance with the *Petrie* case law¹⁰, exchanges with Member States in investigations which may lead to infringement proceedings are covered by the 'investigations' exception of Regulation 1049/2001. This case law has been confirmed since then and supports practice to date which has generally refused access.

EU Pilot is regarded as a pre-infringement proceeding. If the EU Pilot procedure leads to an infringement proceeding, the presumption of non-disclosure will continue until the case is closed or the Court has delivered a judgment.

If a file is closed as a result of the work done in EU Pilot without an infringement proceeding being launched, the situation is similar to a closed infringement proceeding.

As long as the file remains open, access to Member State documents is denied without consulting that Member State, unless, given specific circumstances, documents could be disclosed.

Once proceedings are closed, in principle access is granted to Commission documents. Access may still be refused on exceptional grounds, such as if the closed case is linked with a pending case and if disclosure would affect this pending case. Parts of documents related to closed cases will be withheld if specific exceptions apply, such as the protection of personal data or of commercial interests. Member States are consulted on disclosure of their documents, pursuant to Article 4(5) of the Regulation. According to case law of the Court of Justice, when Member States object to disclosure of documents originating from them, they must give reasons in line with the exceptions listed in Article 4 of the Regulation.

For more information refer to "Public access to documents relating to infringement proceedings"¹¹, to be found under *my intracomm/policy workflow/legal issues/access to documents*¹².

⁸ SEC(2006)485, https://myintracomm.ec.europa.eu/corp/sg/en/docinter/Documents/marchespub_en.pdf

⁹ See under <https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>

¹⁰ Case T-191/99

¹¹ SEC(2003)260

¹² See under <https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>

Documents relating to trilogues-related documents

Instructions have been recently provided by SG / LS¹³, consolidating the rules applicable since the adoption of the 2002 Memorandum of Understanding between the services of the European Parliament, the Council and the Commission on the application of Article 4 (4) of Regulation No 1049/2001¹⁴.

The Commission has so far, following a specific analysis of the documents requested in each case, refused access to all the positions or proposed positions of the three institutions, to the extent that these were not yet in the public domain and that the co-legislators had not yet reached a formal agreement. It argues that the undisclosed parts fall under the exception of Article 4(3), first subparagraph of Regulation 1049/2001 (protection of the decision-making process), at least as long as the decision-making process is on-going. Indeed, if the release of the position of one of the institutions would seriously undermine the (inter-institutional) decision-making process, it can be assumed that the same would apply to the release of the positions of the other institutions.

For more information, refer to "*Public access to documents relating to trilogue-related documents*"¹⁵, to be found under *My intracomm/policy workflow/legal issues/access to documents*¹⁶.

4. Documents originating from third parties

Requests for access to documents can refer to documents received by the Commission. These documents are third-party documents. In this case, the Commission, in accordance with Article 4(4) of the Regulation 1049/2001, consults the third party with a view to assessing whether an exception to release is applicable and invites it to indicate whether it agrees with disclosure of their documents or, on the contrary, object to disclosure. In case it wishes to object to disclosure, it is invited to indicate how in its view, disclosure would affect one of the interests protected under Article 4, paragraphs 1 or 2 of Regulation 1049/2001.

5. Documents originating from Member States

Article 4(5) of the Regulation 1049/2001 provides that a Member State may request the institutions not to disclose a document originating from that Member State without its prior agreement. In case a document originating from a Member State is detained by the Commission and is identified as relevant for the purpose of the request for access to documents, the Commission consults the Member State in order to know whether it opposes disclosure of the concerned document[s] or parts of them. In case the Member State opposes, according to the judgment of the Court of Justice of 18 December 2007¹⁷, the Member State has to provide the Commission with explicit reasons justifying the application of one or more exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001.

¹³ Note Ares(2015)282423 – 23/01/2015

¹⁴ See https://myintracomm.ec.europa.eu/corp/sg/en/docinter/Documents/MoU_en.pdf
(<https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>)

¹⁵ SEC(2003)260

¹⁶ See <https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>

¹⁷ Case C 64/05 P Sweden/ Commission, ECR 2007 p. I-11389, paragraph 66 and case-law cited

6. Internal procedure

The management of applications for access to documents and replies thereto is decentralised within DG HOME.

DG HOME Access to Documents team (newly created Unit A2 – Legal Affairs) manages the functional mailbox HOME-ACCESS-DOCUMENTS@ec.europa.eu, the database where all access to documents cases are stored (GESTDEM) and coordinates access requests within the DG. Unit A2 attributes the requests to the relevant competent operational units with a standard message (see Appendix B).

All HOME and SRD units have an **access to documents contact person**, to whom the unit A2 can convey general messages of information about access to documents. This contact person follows the access to documents trainings, regularly organised by HOME.A2. S/he is the first information point for unit A2 when an issue about access to documents arises (elapsed deadline/desk officer in charge/specific matters, etc.), and for desk officers in charge of preparing the answers to access to documents request.

SG provides standard letters, to be adapted to each specific case. These letters are available under my intracomm/policy workflow/legal issues/access to documents¹⁸, and should be used as a first basis for work in all cases. The quality chart (see Appendix C) is useful to check if all relevant elements are provided in the reply.

The Head of Unit in attribution or the colleague whom s/he delegates the task to on her/his behalf must give a written **reply within 15 working days of the date of registration of the application**. This period may be extended by another 15 working days by sending a holding reply before end of first deadline. The deadlines mentioned above include the need to translate the reply in the official language that has been requested.

Failure to reply within this period is equivalent to refusing access. This means that after this deadline, any applicant who has not received a reply may make a confirmatory application to the Secretary-General.

In case of total or partial refusal of access and devoid of purpose (absence of documents), the letters to the applicants shall be signed by the Director-General. Total or partial refusal must always be based on one of the exceptions explicitly provided for in the Regulation. It must be accompanied by a reasoned argument referring specifically to the contents of the documents concerned and must show that disclosure could threaten one or more of the interests which the exceptions attempt to protect. If needed, reasoning about a possible overriding public interest overruling the exception must be done.

In case of devoid of purpose, and if the applicant lodges a confirmatory request, SG asks the Director General who signed the devoid of purpose letter to make a formal declaration that no document were identified for the purpose of the request.

For the sake of consistency, the Access to Documents Coordinator [REDACTED] must always be consulted in order to check the reply. It may also be useful to consult informally before launching signataires for the signature of the Director General, with a view to speed up the process of approval.

The reply whether granting or refusing access must be sent to the applicant with an ARES registration number by the unit concerned, with DG HOME Access to Documents team in copy - *ve_home access to documents* and e-mails to HOME-ACCESS-DOCUMExxx@xx.xxxopa.eu. See Appendix B with full process described in the standard attribution message. The replies to initial applications will then be registered by DG HOME Access to Documents team in GESTDEM database.

¹⁸ See <https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>

7. Reference documents

- A. SG note ARES(2015) 182108 of 16.01.2015: Document management and access to documents
- B. Standard attribution message of access to documents request to competent units
- C. Quality chart – initial replies to access to documents

B. Standard attribution electronic message of access to documents request to competent units

Dear colleagues,

Please find below a new request for HOME ACCESS TO DOCUMENTS to be handled by your unit.

A reply needs to be sent directly to the applicant by 18/03/2015.

The negative, partial and "devoid of purpose" replies have to be signed by the Director General and sent by registered post with confirmation of receipt (the cover note only, the documents, if any can be sent by e-mail with a copy of the letter). You will find the postal address in the request.

Any reply must be drafted in the same language as the request or translated into this language before sending it.

1. Instructions for preparing the reply

- Please always keep in mind the deadlines. If you are not able to reply within the first deadline, please send a holding reply before expiration of this deadline.
- Please always use standard letters drafted and updated by SG: <https://myintracomm.ec.europa.eu/corp/sg/en/docinter/pages/lettres.aspx>
- If, after your analysis, your conclusion is that access to the requested documents should be refused, please refer to the check-list to see whether your reply fulfills all the requirements of a negative reply: https://myintracomm.ec.europa.eu/corp/sg/en/docinter/Documents/check_list_2011.pdf
- For **information** on the legal framework and how to deal with requests to access to documents please check our Intranet: <https://myintracomm.ec.europa.eu/dg/home/policy/legal/Pages/Access-to-documents.aspx>
- For **legal advice** on how to treat the request, please contact unit A2 Legal Affairs, [REDACTED], HOME Access to Documents Coordinator (tel. [REDACTED]). Please note that your replies to be signed by the Director General will be subject to formal visa by the HOME access to documents Coordinator.
- For **technical advice** on how to treat the request, please contact unit A2 Legal Affairs, [REDACTED], HOME Access to Documents Assistant (tel. [REDACTED]) or [REDACTED], HOME Access to Documents Coordinator (tel. [REDACTED]).

2. Instructions for "signataires"

Workflow for negative, partial and "devoid of purpose" replies, to be signed by the Director General:

- Desk Officer in charge of the file
- Head of Unit
- Director
- [REDACTED], Home Access to Documents Coordinator
- [REDACTED], Head of Unit A2 - Legal Affairs
- [REDACTED], Chief Legal Adviser
- Marta Cygan, Director A
- Assistant DG
- Director General
- Secretariat of the unit in charge for sending the reply within deadline

3. Instructions for sending the reply

| OPTION 1 - if you use the "Areslook" button | OPTION 2 - if you don't use the "Areslook" button |
|--|---|
| <ul style="list-style-type: none">• Click on forward• Delete the instructions but leave the original request• Draft the e-mail• Put the applicant in the "TO" field and HOME-ACCESS-DOCUMxxxx@xx.xxropa.eu in "Cc" (If necessary, also your unit's common email address)• Click on "Add-Ins" and then "Areslook Send"• Assign now the filing to yourself or the virtual entity of your unit and click on "Register and send"• The recipient will receive directly your answer with an ARES number and HOME ACCESS DOCUMENTS will receive it as "cc" as well. Then we can close the file from our side | <ul style="list-style-type: none">• Click on forward• Delete the instructions but leave the original request• Draft the e-mail• Put the applicant in the "TO" field (if necessary, also your unit's common e-mail address)• Create in ARES the "save number"• Send the reply to the citizen with the ARES save number in Outlook• Upload your sent reply in ARES• Add "ve_home.access.to.documents" in "Cc"• Register ("Register and send") it in ARES• Then we can close the file from our side as well |

Thank you for your cooperation,
HOME ACCESS TO DOCUMENTS team

C. Reference document

Regulation 1049/2001 Quality Chart – Initial Replies to Access to Documents

Negative replies to requests for access to documents
(full or partial)

should

| | |
|---|---|
| (1) be signed by the Director General | Signature |
| (2) include a clear list of documents falling within the scope of the request | List of documents |
| (3) include a description of the content of the document(s) or part(s) of document(s) refused | Description of documents |
| (4) include the conclusions of the DG after a detailed examination | Conclusions of the analysis |
| (5) mention the exceptions set out in Article 4 (1) to (3) of the Regulation | Exceptions applicable |
| (6) include the reasoning and grounds that link each exception to the document(s) or part(s) of document(s) refused | Reasoning |
| (7) include the reasoning given by the third party to refuse its document or part of it | Reasoning regarding third party documents |
| (8) when partial access is not possible provide the reasoning | Partial access |
| (9) give the reasons explaining the absence of an overriding public interest | Overriding Public Interest |
| (10) mention the right of the applicant to make a confirmatory application | Right to request a review |