



GUIDANCE NOTE¹ ON ACCESS TO DOCUMENTS REQUESTS RELATED TO CLOSED INFRINGEMENTS²

Commission services receive a large number of requests each year under Regulation 1049/2001, for access to 'all documents relating to the closure of an infringement file' ('*classement*'). These requests trigger a broader reflexion on the correct treatment of the closed infringement files.

The case law of the EU Courts provides some guidance on the general principles applicable to requests for documents related to ongoing infringement procedures, but it does not give any conclusive answers on how the institutions should proceed in case of closed infringement files. This note aims at ensuring consistency in our practice at initial and confirmatory level in dealing with such requests by describing the successive steps to follow.

It aims at striking a balance between, on the one hand, the right of access to documents³ and, on the other hand, the protection of private and public interests under Regulation 1049/2001 (e.g. commercial interests, protection of the decision-making process,...).

First Step: The correct identification of the list of documents relating to an infringement procedure

Having regard to the wording of the request for access, a full list of documents must be drawn up, including in particular:

- third-party documents⁴;
- correspondence with the Member States⁵;

¹ Adopted in application of Article 10 of the Detailed Rules of Application of Regulation 1049/2001, which provides that *[t]he Secretariat-General shall ensure coordination and uniform implementation of these rules by Commission Directorates-General and departments. To this end, it shall provide all necessary advice and guidelines.*

² This Guidance Note complements and further explains the Commission's Internal document 'Public Access to Documents relating to Infringement Proceedings' SEC (2003)260/3.

³ As defined in Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) and Regulation 1049/2001.

⁴ In this respect the rules for consultation of third party' author according to Article 4(4) of Regulation 1049/2001 should be followed.

- the documents drawn-up by the Commission (e.g. EU PILOT letters, 'the Letter of Formal Notice', the 'Reasoned Opinion'), documents drawn up for the purpose of court proceedings, etc.

If the request makes reference to **(all)** the documents **leading to the closure of the infringement file**, the initial reply should be based on the identification of the following documents:

- extract of the minutes ('procès-verbal') of the Commission meeting;
- extract of the list of decisions proposed for closure;
- the NIF fiche⁶, which is considered the basis for the decision made by the College.
- all other relevant elements that form the basis of the College decision to close the case, including notes or exchanges between the DG and the LS, can be the subject of an access request after closure of the file.

The relevant DG shall request the relevant documents from the Secretariat-General (Unit responsible for the Application of EU Law - SG/C3 and the 'Greffé').

Internal documents, including e-mails, should be included in the list of identified documents insofar as they correspond to the registration criteria of the Note of the Secretary-General on *Document management and access to documents*⁷.

Second Step: Assessment of the access-to-documents request in light of the exceptions of Regulation 1049/2001

The access-to-documents coordinator of the Directorate-General responsible for establishing the initial decision shall consult the respective DG's Infringement Unit in order to assess whether there is a need to protect (parts of) the documents identified based on one of the exceptions of Regulation 1049/2001. The most common ones are mentioned hereafter.

The *administrative practice so far* has been to grant access to the documents once the case has been definitely closed by a judgment by the EU Court of Justice or the deadline for initiating an appeal before the EU Courts has expired⁸. However, if other similar, related infringement files are still ongoing and releasing the documents would 'concretely and effectively' undermine protection of their purpose, the 'investigation' exception of **Article 4(2), third indent** of Regulation 1049/2001 could continue to apply⁹. This should be assessed on a case-by- case basis.

⁵ In this respect the rules for consultation of Member States' authorities according to Article 4(4) and (5) of Regulation 1049/2001 should be followed.

⁶ Summary on the basis of which the Commission can decide to close the case.

⁷ Ares(2015)182108.

⁸ T-191/99, *Petrie and Others v Commission* (EU:T:2001:284), paragraph 68 and [C-514/11](#) P and C-605/11 P, *LPN and Finland v Commission* (EU:C:2013:738), paragraph 50.

⁹ See point D.3. of the document 'Public Access to documents relating to Infringement documents' referred to in footnote 2.

Article 4(3), second subparagraph of Regulation 1049/2001 can be invoked if opinions of internal use should be protected even after the decision has been taken, if the disclosure would **seriously** undermine the institution's decision-making process, unless there is an overriding public interest. However, there is a need to specifically argue on a case-by-case basis, the **concrete and non-hypothetical** risk¹⁰ that the position of the Commission would be undermined if (parts of) the documents were to be disclosed. Likewise, **Article 4(2), second indent** of Regulation 1049/2001 can be invoked if the disclosure would undermine the protection of legal advice and court proceedings.

In accordance with Article 4(6) of Regulation 1049/2001, the possibility of granting partial access should, in any case, be examined¹¹.

¹⁰ For instance, if other similar, related infringement files or any linked Commission's decision-making process is still ongoing, the exceptions of Regulation 1049/2001 could continue to apply.

¹¹ See point 29 (D.4) of the document 'Public access in Infringement files' referred to in footnote 2.