



Access to documents

Training session DG HOME

09/09/2016

HOME A2



Request for Access to documents ?

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Transparency policy

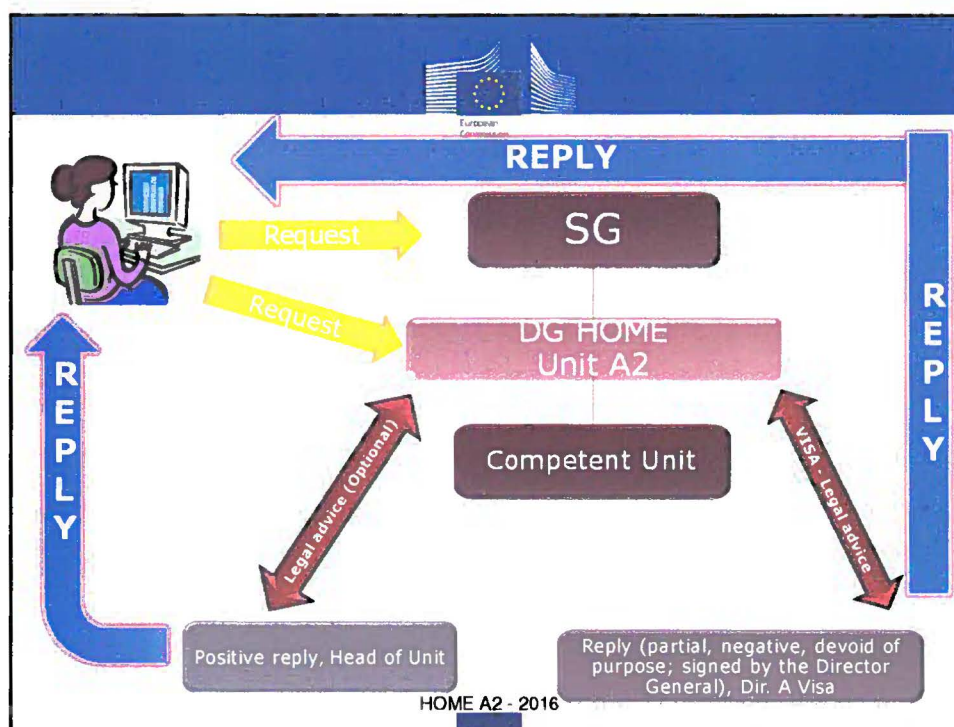
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Access to documents

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*
- *Council and Commission: Code of Conduct on access to documents (1993/1994)*



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



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)



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**

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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

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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*

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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***

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Positive replies

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

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Refusal

Answer signed by Director General

Visa A2 + Chief Legal adviser + Director A

(Caution: confirmatory request)

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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)*

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Repeated Requests

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

*Institution must assess refusal in light of new
situation*

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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

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Sensitive documents (2)

Handling by **authorised staff**

Refusal **based on the exceptions** laid down in Article 4

Disclosed only **with consent of originator**

Declassification

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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

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Remedies

Art. 8(3) R

- Complaint to the **European Ombudsman**
- Proceedings before the **General Court of the EU**

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Specific cases (outside Reg. 1049/2001)

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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*

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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**

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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

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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]*

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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*

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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*

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Relative exceptions

**Harm must be balanced
against the public interest in disclosure**

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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*

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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*

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Court Proceedings

Case law

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



Court Proceedings (2)

Case law

- **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*

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Inspections, Investigations, Audits (2)

Case-law

Applies during investigations

*May cover **follow-up actions**, but limited in time*

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Infringements

Case-law

Pending cases:

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

- **Administrative practice**

"Infringements" note SEC(2003)260/3



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*

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Figures



Number of Access Requests (HOME)

	Applications received	Access granted*	Devoid of purpose*	Partial access*	Access refused*	Confirmatory requests*	Others**
2018 (until 1st September)	206	104	8	16	19	8	59
2015	307	139	7	9	63	10	96
2014	173	115	5	7	16	9	35
2013	133	96	2	3	8	0	26

* based on Reg. 1049/2001

** (Council/EP consultation, sincere cooperation, request for info & others)

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Number of Access Requests (COMMISSION)

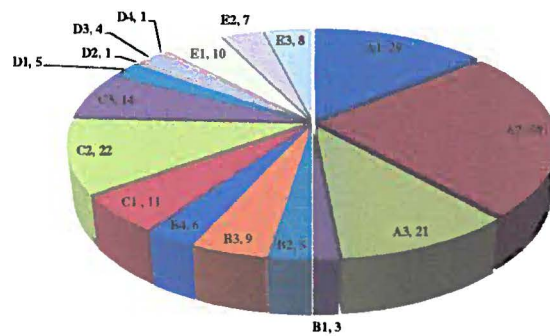
	Applications received	Access granted*	Partial access*	Access refused*	Confirmatory requests	Others
2015	6752	4002	888	926	231	936
2014	6227	4105	670	866	272	586
2013	6525	4400	868	640	189	617

* based on Reg. 1049/2001

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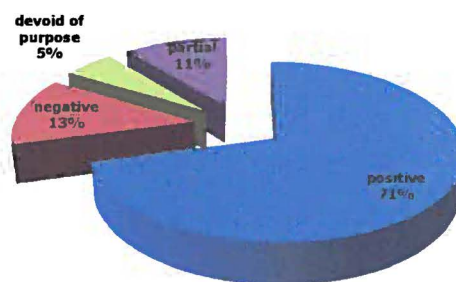
Requests per Unit (HOME)



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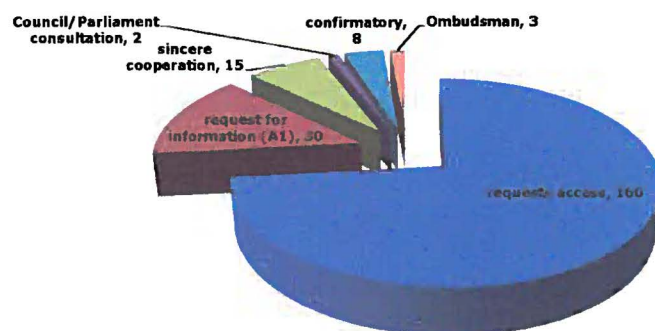
147 Requests to date Types of reply



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Different kind of cases (206 to date) coordinated by A2



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Access to Documents Process at DG HOME

Best practices

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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

<https://myintracomm.ec.europa.eu/dg/home/policy/legal/Documents/CheckListSG.PDF>



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
[REDACTED]
3. Assistant to DG
4. DG

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6.

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

ASKTHEEU
Statewatch
Access Info Europe
EDRi (European Digital Rights)

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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 quater.

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



Eurolook / Ares rules

What does it mean ?



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)



Reply by mail

= > **ARESLOOK**



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:

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

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Useful links:

Email Registration:

<https://myintracomm.ec.europa.eu/dg/home/it-document/document-mgmt/Pages/email-registration.aspx>

ARES toolkit (for printing, choose option "booklet, both sides"):

https://myintracomm.ec.europa.eu/corp/sg/en/edomec/doc_management/Documents/toolkit_edomec_mai2010_en.pdf

The European Commission's Visual Identity:

https://myintracomm.ec.europa.eu/corp/comm/VisualIdentity/Documents/Rules/implementing_rules-e_october_2013.pdf

Eurolook:

<http://www.cc.cec/itservices/en/content/eurolook>

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Reference documents:

- "Infringements" SEC(2003) 260/3
- "Public procurement" SEC(2006) 485
- "trilogues" Ares(2015)282423

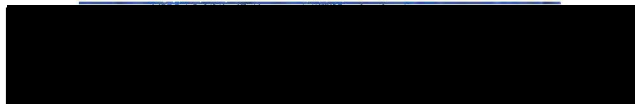


DG HOME **Access to Documents Team (A2)**

Legal Coordinator



Administrative Coordinator





Any questions?



***Good luck for
your next
request for
access to
documents !***



***Thank you for
your attention***