GUIDANCE NOTE ON
ACCESS TO DOCUMENTS REQUESTS
RELATED TO CLOSED INFRINGEMENT CASES

Commission services receive a large number of requests under Regulation 1049/2001 for access to documents relating to ‘closed infringement cases’.

For the purpose of this guidance, an infringement case is considered as closed either following a Commission decision (closure or withdrawal from the Court) or a judgment by the Court of Justice of the European Union. Once the infringement proceedings are closed and the Court has rendered its judgment on an infringement under Article 258 TFEU, the general presumption of confidentiality of infringement files no longer applies, regardless of the continuation of negotiations which may lead to a case under Article 260 TFEU.  

Particular attention should be given to requests concerning cases under the specific procedure of Article 259 TFEU.

---

1 Adopted in application of Article 10 of the Detailed Rules of Application of Regulation 1049/2001, which provides that ‘the 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 See Judgment of the Court of Justice of 21 September 2010 in case Sweden and Others v API and Commission, C-514/07, EU:C:2010:541, paragraphs 121-122. (This is notwithstanding the fact that a Court judgment finding a breach does not have the effect of closing the infringement file. The case remains active in THEMIS, while the legal basis for further proceedings shifts from Article 258 to Article 260 TFEU. Moreover, cases under Article 260(2) TFEU are only closed once transposition is considered complete.)

3 This procedure is triggered when the Commission receives a complaint from a Member State stating the reasons why it considers that another Member State has infringed EU law. For such cases, the Commission's procedure ends when it delivers a reasoned opinion or when a three-month period ends without the delivery of a reasoned opinion. However, the Member State which referred the case to the Commission can decide to bring an action to the Court regardless of the Commission's conclusions in its reasoned opinion or the absence of a reasoned opinion.
Requests usually concern the whole file of an infringement case, or documents relating to the closure of the case, or a specific document belonging to a file.

This note describes the current administrative practice on the identification of documents, procedural steps to follow and assessments to be made in case of such a request. It aims at ensuring consistency in our practice at initial and confirmatory levels.

The current administrative practice seeks to strike a balance between, on the one hand, the right of access to documents⁴ and, on the other hand, the protection of private and public interests under Regulation 1049/2001 such as the protection of the decision-making process or the protection of personal data.

1) FIRST STEP: THE CORRECT IDENTIFICATION OF THE DOCUMENTS RELATING TO AN INFRINGEMENT PROCEDURE

Having regard to the wording of the request for access, a full list of documents falling within the scope of the request must be drawn up. If the request is not clear, services are invited to clarify the scope of the request with the applicant in accordance with Article 6 (2) of Regulation (EC) No 1049/2001.

Attention must be paid to the scope of the request, in particular whether it concerns: (a) the whole file of the case, and/or (b) the decision to close the case and underlying documents.³

(a) Request for all documents relating to a closed case

The following documents must be identified:

- third-party documents⁵, including the complaint and conformity studies, if applicable;
- the documents drawn up by the Commission, including replies to the complainants, EU Pilot letters, administrative letters, political letters, letters of formal notice, reasoned opinions and internal referral notes (‘notes de saisine’) if applicable.
- replies from the Member States⁶ to the documents drawn up by the Commission if applicable;
- documents relating to procedure(s) before the Court of Justice;
- all documents leading to the closure under point (b)(ii) hereafter.

Internal documents, including e-mails, should be included in the list of identified documents insofar as they meet the registration criteria of Guidelines on Document Registration⁷.

---

⁴ As defined in Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) and Regulation 1049/2001.
⁵ In this respect the rules for consultation of third party' author according to Article 4(4) of Regulation 1049/2001 should be followed.
⁶ 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.
(b) Request for documents relating to the decision to close an infringement case or leading to its closure

The following documents must be identified:

(i) If the request is limited to the Commission Decision concerning the closure of an infringement case: only the following documents need to be identified:

- Commission Decision (SEC document) relating to the infringements cycle in which the decision was taken;
- its annex (list of decisions) 8; and
- the ‘infringement fiche’ 9.

(ii) 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:

- the three documents listed under point (b) (i) (namely the Commission Decision; the annex to the Commission Decision; and the ‘infringement fiche’); and
- 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 (for further guidance access to documents of interservice consultations, see our dedicated Fiche 4).

The Secretariat-General (Unit responsible for the Implementation and Enforcement of EU Law) can provide the Commission Decision, its annex and the infringement fiche to the Directorate-General handling the access-to-documents request upon request.

2) SECOND STEP: ASSESSMENT OF THE ACCESS-TO-DOCUMENTS REQUEST IN LIGHT OF THE EXCEPTIONS OF REGULATION 1049/2001

For closed cases, there is rarely a justification for not disclosing the documents identified as refusal cannot any longer be based on the need to protect the purpose of the relevant infringement investigation. The administrative practice so far has been to grant access to the documents once the case has been closed by a Commission decision (closure or withdrawal from the Court) or a judgment by the Court of Justice of the European Union 10.

---

8 Depending on the wording of the request, information included in the Commission Decision and its annex concerning other infringement cases may be outside the scope of the request, in which case this information should be redacted on that basis.

9 The purpose of the infringement fiche is to provide the College with the necessary information for deliberation on decisions on infringements. Before the roll-out of THEMIS/Infringements, infringement fiches were known as ‘NIF fiches’, see Monitoring the application of EU law – infringements - Guide to procedures - EC Extranet Wiki (europa.eu).

10 For the specific procedure under Article 259 TFEU, in case the complaining Member State decides to bring the matter before the Court, access can be considered after the Court has given its judgment. In the event that the complaining
Exceptionally, the Unit of the Directorate-General responsible for drafting the initial access-to-documents decision may find, after having consulted its infringement coordinator, that there is a need to protect (parts of) the documents identified. In that case, the information contained in those (parts of) documents should be assessed against the exceptions of Regulation 1049/2001. The most commonly relevant ones, to be assessed on a case-by-case basis, are:

- the ‘privacy’ exception of Article 4(1)(b), which applies to the parts of the documents containing personal data, including the names and functions of the complainant(s) or other third parties and staff other than the names and functions of Commissioners and their Cabinet members and staff in senior management positions (Secretary-General, Directors-General and Directors), unless the applicant can demonstrate the need to access the data for a specific purpose in the public interest. (see fiche9 on third-parties' personal datahttps://myintracomm.ec.europa.eu/sg/docinter/Documents/Fiche9-Third-party names and signatures.pdf and Guidance note on access to names and functions of Commission Staff for further guidance);

- the 'investigation' exception of Article 4(2), third indent, which could continue to apply if other similar, related infringement files are still ongoing and releasing the documents would concretely and effectively undermine protection of their purpose, unless there is an overriding public interest in disclosure; the ‘closed decision-making process’ exception provided under the second subparagraph of Article 4(3), which 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 in disclosure. However, there is a need to specifically motivate the refusal decision on the basis of elements proving, the concrete and non-hypothetical risk11 that the position of the Commission would be undermined if (parts of) the documents were to be disclosed.

- the ‘legal advice and court proceedings’ exception laid down in Article 4(2), second indent of Regulation 1049/2001 can be invoked if the disclosure would concretely and effectively undermine the protection of legal advice and court proceedings, unless there is an overriding public interest in disclosure. This exception may apply, for example, if disclosure would seriously compromise the integrity of specific (or highly likely) court proceedings and the equality of arms between the parties. It may also apply, if disclosure would undermine, in a reasonably foreseeable and not purely hypothetical way, the Commission’s ability to receive ‘frank, objective and comprehensive [legal] advice’. In the absence of such justification, reasoned in a detailed and concrete manner, legal advice in closed (and unchallengeable) procedures must in principle be released.

If only parts of the requested document(s) are covered by any of the exceptions of Article 4, the remaining parts of the document(s) must be released in accordance with Article 4(6) of Regulation 1049/2001.

---

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