

Fiche 5

Access to documents from third parties

Main issues:

- All documents in the Commission's possession - including documents from third parties - fall within the scope of Regulation 1049/2001. If access to them is requested, the possibility of granting full or partial access needs to be assessed.
- Unless it is clear that the document(s) shall or shall not be disclosed, the third-party author must be consulted regarding the possibility to grant partial or full access to the document(s) requested.
- If the author of the document objects the disclosure on the basis of the exceptions provided for in Article 4 of Regulation 1049/2001, **the DGs/services should confirm the refusal and not overrule the third party at the initial level**, as explained below.

Current administrative practice:

How to assess documents from third parties under Regulation 1049/2001?

The course of action to follow depends on the content of the documents. No consultation is necessary in the following three cases:

- If access to the content of the documents originating from third parties manifestly does not affect one of the protected interests under the exceptions provided for in Article 4 of Regulation 1049/2001. Correspondence (letters, e-mails) from third parties can normally be made public, unless specific commercially sensitive elements, personal data of non-senior staff or other sensitive elements warrant protection under one of the exceptions of Article 4, and without prejudice to the need to consult in case of doubt;
- If the documents are clearly covered by one or several exceptions (such as documents containing commercially sensitive data);
- If the third-party documents are covered by a general presumption of non-disclosure, recognised by the case-law of the ECJ (for more information see the case-law table available on the access-to-documents webpages on *My Intracomm*).

In all other cases, the third-party author must be consulted (Article 4 of the Regulation; Article 5 of the internal rules). Consultations of third parties should enable the latter to explain their position with reference to the exceptions set out in Article 4 of Regulation 1049/2001.

When dealing with the request at the initial level, the DGs/services should **not grant access to the documents** concerned, or parts thereof, in cases where the author **objects** to disclosure and justifies the objection with reference to the exceptions provided for in Regulation 1049/2001. Where no such justification is given, the service concerned should insist that the third-party author provides one.

In the initial reply, the full or partial refusal to give access must be justified by the application of one or several exceptions provided for by paragraphs 1 to 3 of Article 4 of Regulation 1049/2001. Reference can be made both to the exceptions invoked by the third party and/or to other exceptions if these are considered applicable. The fact that a third party objected is not *in itself* an exception that can be invoked, as the refusal should always be argued on the basis of exceptions laid down in Article 4 of Regulation 1049/2001.

The decision whether the document is disclosed remains with the Commission. The Commission's current administrative practice is that the overruling of the author's explicit objections to disclosure is **done at the confirmatory level**, by the SG.

In case of Member State opposition, a reference should be made both to Articles 4(4) and 4(5) and to the *prima facie* assessment¹ of exceptions invoked by the Member State.

¹ The Commission checks whether the explanations put forward are manifestly wrong.

If the third party does not respond², the Commission must still assess the document to determine whether it falls under any exceptions, while taking into account the third party's interests.

How to assess Commission documents reproducing the position of a third party?

Art. 4(4) concerns consultation of third parties regarding disclosure of documents originating from them. In principle, we do not consult third parties on disclosure of the Commission's own documents. However, insofar as Commission documents quote or reflect the content of third-party documents, the general Commission's administrative practice is to consult the third parties on the possible disclosure of the relevant parts. The decision whether or not to consult a third party on the relevant section of the Commission documents is taken on a case-by-case basis, depending on the sensitivity of the content and the possible harm in disclosure, in light of the interests protected under Regulation 1049/2001.

For example, the Commission does not necessarily have to consult third parties on the possible disclosure of minutes of meetings held with third parties (drafted by Commission services unilaterally and for internal use), unless the views of the third parties reflected therein are particularly sensitive.

In case of documents reflecting Member States' positions, it is however recommended to consult the respective Member States, in accordance with the principle of loyal cooperation. If the positions were expressed in the framework of meetings of the Council or its preparatory bodies, it is the Council, rather than the Member States, to whom the consultation should be addressed.

Case-law:

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Reference documents/links:

- Standard letters for consultation of third parties, as well as examples of confirmatory decisions and the summary of the case-law are available on the Commission's access-to-documents webpages on *My Intracomm*³;
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu

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² And the Commission service concerned clearly indicated that, in the absence of a reply within the set deadline, it would decide.

³ <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>;