



EUROPEAN COMMISSION

SECRETARIAT-GENERAL
Unit B4 - Transparency

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GUIDANCE NOTE¹

WIDE-SCOPE INITIAL REQUESTS FOR ACCESS TO DOCUMENTS UNDER REGULATION 1049/2001

1. BACKGROUND

The Commission often receives requests for access to documents, lodged under Regulation 1049/2001, which have such a wide temporal and/or material scope that their detailed treatment could substantially impair the normal functioning of the relevant Commission services.

The sections below provide guidance on the Commission services' possible responses, at the level of initial applications, to such cases, taking into account the recent case law reproduced in Annex 1.

2. SUGGESTED APPROACH

2.1. If appropriate, request a clarification under Article 6(2)

If an initial application is worded in imprecise terms which do not enable the documents falling under the scope of the application to be sufficiently easily identified, the Commission services are encouraged, as a first step and as soon as possible after registration, to:

- ask the applicant to further clarify his/her request pursuant to Article 6(2), by referring where relevant to the public register of documents;
- specify that the time-limit for replying to the application will be suspended from the time of the request of the clarification and will be resumed from the receipt of such clarification;²
- only where appropriate, ask the applicant in this framework if he or she would agree that the request is dealt with as a request for information under the Code

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' (Commission Decision 2001/937 of 5 December 2001, OJ L 345, of 29 December 2001).

² Article 2 of the Implementing Rules of Regulation 1049/2001 (OJ L 345 of 29.12.2001, p. 94), which provides that 'the deadline for reply shall run only from the time when the Commission has this information.'

of Good Administrative Conduct, outside of Regulation 1049/2001 and answered with information and not documents (for example, providing a simple reply by letter or e-mail)³; However, the request should be dealt with under Regulation 1049/2001 if the applicant does not accept that it be treated as a request for information.

This possibility should only be used for genuinely imprecise requests and not for all wide-scope requests.

2.2. Consider the following options

2.2.1. Extension of the time-limit

In the case of an initial request with a clear but too wide scope, involving one or several very long documents or a very large number of documents, the treatment of which would substantially impair the normal functioning of the Commission services, those services shall, as soon as they identify the need thereto, extend the time-limit by 15 working days (Article 7(3) of Regulation 1049/2001), notifying the applicant in advance and providing detailed reasons for that extension.

2.2.2. Application of a general presumption

Account should also be taken of the possibility of applying a general presumption based on the applicable legislative framework. The Court has so far recognised the existence of such a general presumption of non-disclosure with regard to State aid, competition, merger, infringement⁴ and judicial proceedings (see Annex 1). A general presumption may be applied by analogy⁵ in other fields in which the Union legislature has provided for the confidentiality of the documents lodged with the Commission or has decided to exclude a right of access to the administrative file.

If a general presumption based on the applicable legislative framework is not applicable, services may also try to rely on a general presumption which applies to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents with the same characteristics (see Annex 1). This second kind of presumption allows to regroup the requested documents into different categories according to the common characteristics of those documents, and to give common grounds for the (full or partial) refusal to disclose each category of documents.

³ Certain wide-scope requests might be formulated in such a way because the applicant is not aware where and how to find the needed information. In certain cases, it might therefore be possible to confer with the applicant and provide him or her with the specific information that he or she seeks (but has not specifically requested).

⁴ For EU Pilot documents, please see Case T-306/12, *Spirlea v Commission* (EU:T:2014:816), which is however subject to a pending appeal (Case C-562/14 P, *Spirlea v Commission*). In view of the judgment in Case C-612/13 P, *ClientEarth v Commission* (EU:C:2015:486), paragraphs 77 to 82, it is not clear whether the *Spirlea* judgment of the General Court remains applicable and whether a general presumption of non-accessibility applies to the documents in a EU pilot file.

⁵ For instance, in anti-dumping or OLAF cases. Before using a general presumption in other fields, services are advised to consult the SG's transparency unit, which will consult the Legal Service.

2.2.3. Fair solution

If these possibilities are not available, the Commission service dealing with the initial application may confer with the applicant informally pursuant to Article 6(3) of Regulation 1049/2001, as soon as possible after the application has been registered, to try to find a fair solution. In this framework, the institution may also ask the applicant to specify his/her interest in obtaining the documents requested.

The solution under Article 6(3) may concern the **number and content** of the documents applied for, but not, in principle, the timeframe for dealing with the initial request. In any case, **the institution is not empowered to unilaterally extend the time limits laid down in Regulation 1049/2001.**

However, the applicant may agree to withdraw explicitly or implicitly some parts of his or her initial request, to be reintroduced or deemed to be reintroduced at a later stage or stages, and to be dealt with in a staggered way according to the time-limits applicable to those later lodgings.

Such a fair solution can thus consist of inviting the applicant to one or more of the following options:

- reduce the temporal and/or material scope of his/her initial request, so as to enable the request to be dealt with within the double fifteen-day time limit;
- split his/her request into several requests and formally withdraw part(s) thereof and/or to introduce them in successive stages;
- set an order of priority and agree to a calendar for dealing with the documents, or define criteria enabling the Commission to establish such a calendar. This means that parts of the application are implicitly and provisionally withdrawn and will be considered to be lodged at a later stage or stages, and dealt with within the time-limits corresponding to that or those later lodgings.⁶

The applicant's agreement with any of these possibilities must be unequivocal and recorded in writing.⁷

The institution should provide the applicant with concrete elements enabling the latter to take an informed decision, in particular:

- a list of documents or of categories of documents;
- an estimation of their total number and if possible the total of number of pages covered;
- the estimated number and/or category(ies) of documents that could be dealt with within 30 working days;
- the estimated time needed to deal with the remaining parts of the application.

⁶ In such a case, the institution should be sure of the continued interest of the applicant in obtaining part of the documents at later stage. The aim is to avoid, in accordance with the principles of proportionality and good administration, dedicating scarce public resources to parts of the request which may have become obsolete when treated only at a later stage.

⁷ Through a written declaration, letter or e-mail.

If the applicant's proposal is deemed unreasonable, the Commission service concerned can put forward its own counter-proposal, with a clear deadline for the applicant's feedback.

2.3. In exceptional cases: balance the interests of the applicant with those of good administration

In practice however, applicants do not always seem ready to confer with the Commission to find a fair solution. In other cases, a solution satisfying both the applicant and the Commission cannot be found.

In such cases, the institution may exceptionally **refuse access to certain documents** on the ground that the workload relating to their disclosure would be disproportionate in comparison with the interest of the applicant.

In practice, this means that the institution would only deal with those documents which, having regard to their number and content, can be treated with within the time-limits laid down in Regulation 1049/2001. It must explain in detail why the full treatment of the request or any possible alternative solution would entail an unreasonable amount of work.

The amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature and the diversity of their authors.

In assessing whether the **workload would be disproportionate as compared with the objectives of the application**, it is appropriate to consider the number of relevant resources necessary to process the request and the extent to which this would substantially impair the Commission services' other activities, and assess whether the interest of the applicant in receiving the documents would justify such an impairment of other activities. In this regard, it is relevant whether the necessary expertise for dealing with the application is concentrated only with a limited number staff⁸ or, to the contrary, widely spread within the service.

This "administrative burden threshold" will differ substantially from one service to another, depending on the relevant resources available to process access-to-documents requests, and the extent to which these resources are also involved in carrying out other functions of the Commission.

This option should be used only in exceptional and manifest cases, where the Commission service concerned has sufficient, concrete and convincing documentary evidence to establish both the disproportionate character of the request and the practical impossibility of dealing with it effectively in view of the workload and the available human resources at the relevant time.⁹

⁸ For instance, if only a limited number of staff know the file and are in a position to assess the applicability of the exceptions set out in Regulation 1049/2001.

⁹ In case of doubt, services are advised consult the SG's transparency unit, which will, where necessary, consult the Legal Service.

This implies that, in the initial reply, the Commission service concerned:

- specifies the (actual or estimated) number of documents (and if possible pages) covered by the request and describing the (categories of) documents in as detailed a manner as possible;
- specifies, based on a reasoned workload assessment, the estimated time needed to deal with the successive steps in handling the request, i.e.: identification, retrieval, saving, listing and/or scanning of the documents, assessment of their content, conduct of third-party consultations, drafting of the reply, redaction of those parts falling under one or several exceptions of Regulation 1049/2001, clerical handling of the output;
- explains that the resulting workload has to be balanced against the general interest in ensuring that the Commission manages its resources efficiently;
- specifies which (categories of) documents can be reasonably dealt with within 30 working days and states that the scope of the request has been limited accordingly, with reference to the *Strack* judgment (C-127/13);
- invites the applicant to introduce (a) new initial request(s) covering the remaining documents if he/she is still interested in receiving those documents.

Annex 2 contains an example of a decision covering these different elements.

Annex 1

Relevant excerpts from the relevant case law

Strack (C-127/13): the fair solution under Article 6(3) may concern only the number and content of the documents applied for, not the deadline for replying

26. In the case of an application relating to a very long document or to a very large number of documents an extension of 15 working days of the time-limit laid down in Article 8(1) of that regulation is authorised in exceptional cases. Although, in such a case, Article 6(3) allows the institution concerned to find a **fair solution** with the applicant seeking access to documents in its possession, that solution **can concern only the content or the number of documents applied for**.

27. That finding cannot be undermined by the Commission's argument relating to the possibility for the institutions to reconcile the interests of an applicant for access to documents in their possession with the interest of good administration. It is true, as stated in paragraph 30 of the judgment in *Council v Hautala* (C-353/99 P, EU:C:2001:661), that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an **inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration**.

28. Thus, an institution **may, in exceptional circumstances, refuse access to certain documents** on the ground that **the workload relating to their disclosure would be disproportionate as compared to the objectives set by the application** for access to those documents. However, reliance on **the principle of proportionality cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed** without creating a situation of legal uncertainty.

Turco (C-39/05)¹⁰: possibility to use general presumptions for categories of documents

50. It is, in principle, open to the Council to base its decisions in that regard on **general presumptions which apply to certain categories of documents**, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.

¹⁰ Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, paragraph 50.

Strack (F-121/07)¹¹: no need for the institution to conduct the preliminary research in case of imprecise requests

87. Par conséquent, lorsque des dispositions claires, tel l'article 6, paragraphes 1 et 2, du règlement n° 1049/2001, prescrivent sans équivoque l'obligation de formuler une demande de façon suffisamment précise pour permettre à l'administration d'y répondre, **l'inexécution de cette obligation ne saurait obliger celle-ci à procéder elle-même à des recherches pour combler cette imprécision** en mobilisant, le cas échéant, des moyens considérables;

88. Or, en l'espèce, dans sa lettre du 22 décembre 2006, le requérant a demandé, un accès «complet à toutes les données et à tous les documents disponibles [le] concernant». Cette demande était, certes, accompagnée d'une énumération de dix sujets de préoccupations opposant le requérant à la Commission, mais celle-ci n'était pas limitative. En outre, cette énumération consistait essentiellement en un **inventaire indicatif de domaines d'investigation dans lesquels le requérant sommait la Commission de rechercher des documents, le cas échéant simplement supposés exister, susceptibles de le concerner.**

VKI (T-2/03)¹²: possibility to reconcile the interests of the applicant against those of good administration and the burden of work

101. (...) [I]t is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a **manifestly unreasonable number of documents**, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution.

(...) [W]here a request relates to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to **Article 6(3)** of Regulation No 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to **reconcile the interests of the applicant with those of good administration.**

102. An institution must therefore retain the right, in particular cases where concrete, individual examination of the documents would entail an **unreasonable amount of administrative work**, to **balance the interest in public access to the documents against the burden of work so caused**, in order to safeguard, in those particular cases, the interests of good administration.

(...) 115. It follows that the institution may **avoid carrying out a concrete, individual examination** only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

¹¹ Judgment of the Civil Service Tribunal of 20 January 2011, *Guido Strack v European Commission*.

¹² Judgment of the General Court (then: "Court of First Instance") of 13 April 2005 in Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities*.

EnBW (T-344/08)¹³: possibility to ask the applicant to specify his interest, and to forego an individual examination of the documents

105. (...) [W]here the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to **ask him to specify his interest in obtaining the documents in question** and, on the other, to consider specifically whether and how it may adopt **a measure less onerous than a concrete, individual examination of the documents**. Since a right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access [...].

VKI (T-2/03): in case of refusal of access, the Commission must explain why individual examination or alternative options represented an unreasonable amount of work

122. In this case, therefore, there are a number of factors which suggest that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. Nevertheless, without there being any need to take a definitive view as to whether those factors demonstrate sufficiently in law that the amount of work involved exceeded the limits of what might reasonably be required of the Commission, it must be pointed out that **the contested decision, which refuses altogether to grant the applicant any access, could in any event be lawful only if the Commission had previously explained specifically the reasons for which the alternatives to a concrete, individual examination of each of the documents referred to also represented an unreasonable amount of work**.

VKI (T-2/03): the amount of work entailed in considering a request depends not only on the number of documents and their volume, but also on their nature and the resulting depth of the analysis

111. Sixthly, **the amount of work entailed in considering a request for access depends not only on the number of documents** referred to in the request **and their volume, but also on their nature**. Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of work entailed in processing a request for access, since that amount of work also depends on the **required depth of that examination**.

¹³ Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg AG v European Commission*.

Co-Frutta (T-355/04): the number of documents and the diversity of their authors are factors to be taken into account when qualifying a request as “complex” enough to warrant a time extension

72. With regard to the lawfulness of the extension of the period for responding, the second paragraph of Article 2 of the Annex to Decision 2001/937 provides that the period may be extended in the event of a complex application. The number of documents requested and the diversity of their authors – the factual situation in the present case – are factors to be taken into account in the classification of an application for access to documents as complex. In that regard, the Commission informed the applicant of the need to extend the period, in accordance with the legislation in force. The argument that the extension of the period was unlawful must therefore be rejected.

EnBW (C-365/12 P): general presumptions in four particular cases

66. The Court has already acknowledged the existence of such presumptions *in four particular cases*, namely with regard to the *documents in the administrative file relating to a procedure for reviewing State aid* [Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, paragraph 61], the *documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings* [Case C-404/10 P, *Commission v Éditions Odile Jacob*, paragraph 123, and Case C-477/10 P, *Commission v Agrofert Holding*, paragraph 64], the *pleading lodged by one of the institutions in court proceedings* [see C-532/07 P, *Sweden and Others v API and Commission*, paragraph 94] and the *documents concerning an infringement procedure during its pre-litigation stage* [Case C-514/11, *LPN and Finland v Commission*, paragraph 65]¹⁴.

EnBW (C-365/12 P): general presumption which applies to certain categories of documents:

46. Secondly, **a single justification may be applied to documents belonging to the same category**, which will be the case, in particular, **if they contain the same type of information**. ... In contrast to the [general presumptions in the four particular cases], **the criterion applied to all the documents in question thus concerns their content**, since it is by reference to the information contained in the documents requested that the institution to which the request has been made must justify its refusal to disclose them, under the various exceptions to the right of access which are laid down in Article 4 of Regulation No 1049/2001.

¹⁴ On EU-Pilot, see the judgment of 25 September 2014, in Case T-406/12, *Spirlea v Commission*.

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