RULES OF PROCEDURE

DECISION No 37-2023 OF THE EUROPEAN COURT OF AUDITORS REGARDING PUBLIC ACCESS TO ECA DOCUMENTS

THE EUROPEAN COURT OF AUDITORS (ECA),

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 15(3) thereof;

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Article 42 thereof;

Having regard to its Rules of Procedure ([1]), and in particular Article 35 thereof;

Having regard to Regulation (EU, Euratom) 2018/1046 of the Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 ([2]), and in particular Articles 258(1) second sentence, and 259(1) thereof;

Having regard to Regulation (EU) 2018/1725 of the Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ([3]);

Having regard to Decision of the European Court of Auditors No 6-2019 on the open data policy and the reuse of documents ([4]);

Having regard to Decision No 41/2021 of the Court of Auditors on the security rules for protecting EU classified information (EUCI) ([5]);

Having regard to the ECA's Information Classification Policy ([6]);

Whereas

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen;

(2) Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) restates the concept of openness and provides that, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible;

(3) The first subparagraph of Article 15(3) TFEU states that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium;

(4) In accordance with the third subparagraph of Article 15(3) TFEU, each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents;

([1]) OJ L 103, 23.4.2010, p. 1.
([2]) OJ L 193, 30.7.2018, p. 1.
([3]) OJ L 295, 21.11.2018, p. 39.
([4]) https://www.eca.europa.eu/Lists/ECADocuments/DECISION_ECA_6_2019/ECA-Decision_06-2019_EN.pdf.
([5]) OJ L 256, 19.7.2021, p. 106.
([6]) https://www.eca.europa.eu/ContentPagesDocuments/Legal_framework/Information_Classification_Policy_EN.pdf.

(5) Openness enhances an administration's legitimacy, effectiveness and accountability, thus strengthening the principles of democracy, making it important to promote good administrative practice on access to documents;

(6) Certain public and private interests should nonetheless be protected by way of exceptions to the principle of public access to documents, in particular the application of international audit standards concerning the confidential nature of audit information,

HAS DECIDED:

Article 1

Purpose

The purpose of this Decision is to define the conditions, limits and procedures under which the European Court of Auditors shall give public access to documents which it holds.

Article 2

Beneficiaries and scope

1. Within the framework and limits of the provisions laid down in this Decision and of international standards governing the confidentiality of audit information, any citizen of the Union, and any other natural or legal person residing or having its registered office in a Member State, has a right of access to documents held by the ECA.

2. Subject to the same principles, conditions and limits, the ECA may grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Decision shall be without prejudice to rights of public access to documents held by the ECA which might derive from instruments of international law or acts implementing them.

Article 3

Definitions

For the purpose of this Decision:

(1) 'document' shall mean any content, whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording), drawn up or received and held by the ECA concerning a matter relating to its policies, activities and decisions;

(2) 'third party' shall mean any natural or legal person, or any entity outside the ECA, including the Member States, non-EU countries, and other EU or non-EU institutions and bodies.

Article 4

Exceptions

1. The ECA shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest, including:

— public security,

— defence and military matters,

— international relations,

— the financial, monetary or economic policy of the European Union or a Member State;

(b) the privacy and integrity of individuals and their personal data, in particular in accordance with EU legislation regarding the protection of personal data.

2. In accordance with the confidentiality rules laid down in Articles 258(1) and 259(1) of Regulation (EU, Euratom) 2018/1046, and in corresponding provisions in other instruments of EU law, the ECA shall refuse access to its preliminary audit observations. It may also refuse access to documents used in the preparation of those observations.

3. The ECA shall refuse access to a document where disclosure would undermine the protection of:

— the commercial interests of a natural or legal person,

— intellectual property,

— court, arbitration and dispute settlement proceedings and legal advice,

— inspections, investigations and audits.

4. Access to the following documents shall be refused if their disclosure would seriously undermine decision-making by the ECA:

(a) documents drawn up by the ECA for internal use or received by it, which relate to a matter where the decision has not yet been taken;

(b) documents containing opinions for internal use as part of deliberations and preliminary consultations within the ECA, even after the decision has been taken.

5. Notwithstanding the exceptions set out in paragraphs 2, 3 and 4, the ECA shall decide to allow access to a document, in whole or in part, where there is an overriding public interest in its disclosure.

6. The overriding public interest used to justify disclosure must be both objective and general in nature. The person alleging the existence of an overriding public interest shall state which specific circumstances justify disclosure of the documents concerned.

7. If only parts of the requested document are covered by any of the exceptions in this article, the remaining parts of the document shall be released. Partial access may entail, for instance, data minimisation (anonymisation or pseudonymisation of content), blackening or deletion of some content or removal or one or more pages of the document.

8. The exceptions in this article shall apply without prejudice to the provisions on public access to the historical archives of the European Economic Community and the European Atomic Energy Community laid down in Council Regulation (EEC, Euratom) No 354/83 ([7]), as further amended.

9. This Article shall apply without prejudice to the provisions of Article 5.

Article 5

Third-party documents

1. Where an application for access to documents concerns a document held by the ECA but of which it is not the author, the ECA shall confirm receipt of the application and supply the name of the person, institution or body to whom the application must be addressed.

2. Where a document was created jointly with another third party, the ECA shall consult the third party before taking a decision.

([7]) Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (OJ L 43, 15.2.1983, p. 1).

Article 6

'Sensitive' and 'EU classified' ECA documents

1. 'Sensitive' or 'EU classified' ECA documents are documents classified as such in accordance with the ECA Information Classification Policy or with Decision No 41/2021, respectively.

2. Applications for access to such documents shall be handled only by ECA staff who have a right to acquaint themselves with these documents. The same persons shall also assess whether reference to 'sensitive' or 'EU classified' ECA documents can be made when replying to applications for access to documents.

3. Access to 'sensitive' and 'EU classified' ECA documents can only be granted after declassification. If the ECA decides to refuse access to such documents, it shall give the reasons for its decision in a way which does not harm the interests protected in Article 4.

Article 7

Applications

1. Applications for access to documents must be made in writing, preferably using the contact form ([8]) available on the ECA website, in one of the official languages of the Union. In exceptional circumstances, applications for access to documents can be sent by post.

2. Applications for access to documents must be sufficiently precise and shall contain, in particular, elements enabling identification of the requested document(s) and the applicant's name and contact details.

3. Applicants shall not be obliged to give reasons for their applications.

4. Where an application is not sufficiently precise, or if the requested documents cannot be identified, the ECA shall ask the applicant to clarify the application and shall assist the applicant in doing so.

5. The time limits provided in Article 8 shall not start to run until the ECA has received the requested clarifications.

6. Where an application relates to a very long document or to a very large number of documents, the ECA may confer with the applicant informally with a view to finding an appropriate solution.

Article 8

Processing of initial applications

1. Applications for access to documents shall be dealt with by the ECA-Info team.

2. Applicants shall be sent an acknowledgement of receipt without delay.

3. Depending on the subject matter of the application, the ECA-Info team shall consult the department concerned, and, where applicable, the Data Protection Officer and/or the Information Security Officer, with a view to deciding how to handle the application. The authority empowered to decide on the reply to be given to an initial application for access to a document shall be the Secretary-General, who may delegate this power.

4. Within a maximum of one month of registering an application, the ECA shall either grant access to the requested document, as described in Article 11, or reply in writing, indicating the reasons for the total or partial refusal, and informing the applicant of his/her right to have the ECA reconsider its position as described in Article 9.

([8]) https://www.eca.europa.eu/en/contact.

5. Where an application relates to a very long document or to a very large number of documents, or requires internal consultations or consultation of third parties, the time limit indicated in paragraph 4 may be extended by one month, provided that the applicant is notified in advance and that reasons are given.

6. In the event that ECA staff members receive personally an application for access to documents, they shall forward it without delay to the ECA-Info team.

Article 9

Confirmatory applications

1. In the event of a total or partial refusal, the applicant may, within one month of receiving the ECA's reply, make a confirmatory application to the President of the ECA, in which it asks the ECA to reconsider its position.

2. Failure by the ECA to reply within the time limits prescribed in Article 8 shall also entitle the applicant to ask for reconsideration.

3. Confirmatory applications shall be subject to the same requirements as set out in Article 7 for initial applications.

Article 10

Processing of confirmatory applications

1. On receiving a confirmatory application, the President of the ECA shall consult the Legal Service and, depending on the subject matter of the application, the department concerned and, where applicable, the Data Protection Officer and/or the Information Security Officer.

2. Within a maximum of one month of registering a confirmatory application, the ECA shall either grant access to the requested document, as described in Article 11, or reply in writing, indicating the reasons for the total or partial refusal.

3. In the event of a total or partial refusal, the ECA shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the ECA and/or making a complaint to the Ombudsman, under Articles 263 and 228 TFEU respectively.

4. In exceptional cases, for example, where the application relates to a very long document or to a very large number of documents, or requires internal consultations or consultation of third parties, the time given in paragraph 2 may be extended by one month, provided that the applicant is notified in advance and that reasons are given.

5. Failure by the ECA to reply within the time limits prescribed above shall be considered a negative reply and shall entitle the applicant to make use of the remedies referred to in paragraph 3.

Article 11

Access following an application

1. Documents shall be supplied in an already existing version and format (preferably electronically using means approved by the ECA to guarantee information security), having regard to the applicant's preference. The ECA is not obliged to create a new document or compile information for the applicant.

2. If documents are voluminous or difficult to handle, the applicant may be invited to consult them on the spot at a date and time agreed with the ECA.

3. The cost of producing and sending copies may be charged to the applicant, but may not exceed the costs actually incurred. Consultation on the spot, copies of fewer than 20 A4 pages and direct access in electronic form shall be free of charge.

4. If a document is publicly accessible, the ECA may fulfil its obligation of granting access by informing the applicant how to obtain it.

Article 12

Reproduction of documents

1. Documents released in accordance with this Decision shall not be reproduced or exploited for commercial purposes without the ECA's prior written authorisation.

2. This Decision shall be without prejudice to any rules on copyright which may limit a third party's right to reproduce or exploit released documents, and to ECA Decision No 6-2019.

Article 13

Transparency portal

1. To make citizens' rights under this Decision effective, the ECA's website includes a transparency portal.

2. Documents referred to in the transparency portal shall, wherever possible, be directly accessible through hyperlinks.

Article 14

Final provisions

1. Decision No 12-2005 of the Court of Auditors of 10 March 2005 is hereby repealed.

2. This Decision shall be published in the *Official Journal of the European Union*.

3. It shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Luxembourg, 13 July 2023.

For the Court of Auditors
Tony MURPHY
President