

DECISION No BoR/2019/03

of the Board of Regulators of the Body of European Regulators for Electronic Communications of 14 June 2019 on detailed rules on access to documents

The Board of Regulators (BoR);

HAVING REGARD TO Article 15(3) of the Treaty on the Functioning of the European Union, by which a right of access to documents of the EU institutions, bodies, offices and agencies is guaranteed according to the principles and conditions as defined by regulations adopted by the European Parliament and the Council;

HAVING REGARD TO Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter referred to as 'Regulation 1049/2001');

HAVING REGARD TO Regulation (EU) 2018/1971 of the European Parliament and of the Council, of 11 December 2018, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, and in particular Articles 36 and 37 thereof;

Has adopted this Decision on detailed rules on access to documents.

Article 1 - Purpose

1. This Decision prescribes the arrangements under which any natural or legal person shall be granted access to documents held by the Body of European Regulators for Electronic Communications (hereinafter, referred to as 'BEREC'), when applying Regulation 1049/2001.
2. BEREC shall ensure the widest possible access to documents.

Article 2 – Scope

1. Any natural or legal person residing or having its registered office in a Member State or in a State of a National Regulatory Authority (hereinafter referred to as 'NRA') participating in BEREC without the right to vote, has a right to request access to documents, subject to the principles, conditions and limits defined in this Decision. The Decision-maker may, subject to

the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State or in a State of a NRA participating in BEREC without the right to vote.

2. This Decision shall apply to documents drawn up or received by BEREC and in its possession, concerning any matter related to the policies, activities and decisions falling within its remit and responsibilities.

Article 3 - Definitions

For the purpose of this Decision:

- a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within BEREC sphere of responsibility;
- b) 'third-party' shall mean any natural or legal person, or any entity, other than BEREC or the BEREC Office. Third-party includes, *inter alia*, individual members of BEREC (NRAs) and NRAs participating in BEREC without the right to vote, Member States, other Union or non-Union institutions and bodies or institutions of third countries and of international nature.
- c) 'Decision-maker' shall mean the Head of the Programme Management Unit of the BEREC Office, in case of an initial decision, or the Director of the BEREC Office in case of a confirmatory decision.

Article 4 - Exceptions

1. Access to a requested document will be denied only if one of the exceptions listed in Article 4 of Regulation 1049/2001 will be considered applicable.

2. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

3. Sensitive documents as defined in Article 9(1) of Regulation 1049/2001 shall be subject to special treatment in accordance with that Article.

Article 5 - Applications

1. Applications for access to a document shall be sent in writing to BEREC via the website, by electronic mail or by mail, in one of the official languages of the European Union and in a sufficiently precise manner to enable BEREC to identify the document.

2. As soon as the application is received, an acknowledgement of receipt shall be sent to the applicant.

3. If an application is not sufficiently precise, BEREC shall invite the applicant to clarify the application or to provide additional information and shall assist the applicant in doing so, for example, by providing information on the use of the Register of documents.

4. In the event of an application relating to a long document or to a large number of documents, BEREC may confer with the applicant informally, with a view to finding a fair solution as quickly as possible.

5. BEREC shall provide information and assistance to applicants on how and where applications for access to documents can be made. The relevant contact details to this end shall be provided and updated periodically on the BEREC website.

Article 6 - Deadlines

1. An application for access to a document shall be handled promptly, and an initial or confirmatory decision either to grant total or partial access to the document requested or refusal of access shall be made within 15 working days from registration of the initial application or of the confirmatory application. The registration shall be done within one working day from the date the sufficiently precise request is received, in accordance with article 5.

2. In exceptional cases, for example in the event of an application relating to a long document or to a large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days. BEREC shall notify the applicant thereof as quickly as possible and, in any case, prior to expiry of the original deadline.

3. Failure by BEREC to reply within the prescribed time-limit, set in accordance with paragraph 1 and 2, shall entitle the applicant to make a confirmatory application under article 10.

Article 7- Processing of applications

1. The relevant Decision-maker shall check whether one of the exceptions provided for under Article 4 applies, and inform the Board of Regulators of the results of such assessment, unless it is clear that the document shall not be disclosed, be disclosed with specific redactions or shall be disclosed with no redactions (e.g. a document that has already been made public).

2. The relevant Decision-maker may consult with the relevant BEREC working Groups Co-Chairs or the Contact Network Chair.

3. For third-party documents article 8 shall apply.

4. If any of the BEREC members and participants without voting rights signal any disagreement with the initial assessment, within two working days after they have been informed following the assessment in paragraph 1 above, the Decision-maker shall seek advice from the BEREC Mini-Board without prejudice to his or her responsibility.

5. Taking into account the advice received from the Mini-Board and any feed-back received, including from third-parties, the Decision-maker shall decide on the request for access of documents and inform the applicant as well as the BEREC members and participants without voting rights.

6. The initial decision shall be taken by the Head of the Programme Management Unit of the BEREC Office.

7. Any initial or confirmatory decision to refuse access partially or fully shall state the reason for the refusal and shall inform the applicant of the remedies available to him/her.

Article 8 - Documents of third parties

1. As regards third-party documents, including documents originating from BEREC members and participants without voting rights, BEREC shall consult the third-party with a view to assessing whether an exception in article 4 is applicable, unless it is clear that the document shall or shall not be disclosed.
2. BEREC shall grant the access without consulting the third-party author where:
 - a) the document requested has already been published either by its author or under Regulation 1049/2001 or similar provisions;
 - b) it is clear that the disclosure, or partial disclosure, of its contents would obviously not affect one of the interests referred to in Article 4 of Regulation 1049/2001.
3. In all other cases, and in particular if an application for access concerns a document originating from an EU Institution, a Member State or an NRA, the third-party author shall be consulted.
4. The third-party author consulted shall have a deadline for replying which shall be no shorter than five working days and must allow BEREC to abide by its own deadlines for replying. In the absence of an answer within the prescribed period, or if the third-party is untraceable or not identifiable, BEREC shall decide in accordance with the rules on exceptions in Article 4, taking into account the legitimate interests of the third-party on the basis of the information at BEREC disposal.
5. If BEREC intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten working day period.
6. Any third-party may request BEREC not to disclose a document without its prior agreement.

Article 9 - BEREC documents with third parties

When BEREC receives a request for consultation from a third-party, in accordance with article 5 of Regulation 1049/2001, the relevant provision of Article 7 shall apply.

Article 10 - Confirmatory decision

1. In the event of total or partial refusal, the applicant may, within 15 working days of receiving BEREC's reply, make a confirmatory application asking BEREC to reconsider its position. Paragraphs 1 to 5 of Article 7 shall apply.
2. The Director of the BEREC Office shall take the decisions on confirmatory applications.
3. Failure by BEREC to reply within the prescribed time-limit, set out in Article 6, shall be considered as a negative reply and thus also entitle the applicant to institute court proceedings and/or make a complaint to the Ombudsman, if applicable, under the relevant provisions of the Treaty on the Functioning of the European Union.

Article 11 - Access following an application

1. The applicant shall have access to documents either by consulting them on the BEREC Office premises or by receiving a copy.
2. Copy of documents shall be supplied in an existing version and format, including electronically, with full regard to the applicant's preference.
3. The cost of producing and sending copies, in any format or medium, may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 100 A4 pages or with a cost of less than ten euros, and direct access in electronic form or through the register shall be free of charge.
4. If a document has already been released and is easily accessible to the applicant, BEREC shall inform the applicant on how to obtain the requested document, including information on the publication references and/or the place where the document is available and/or its web address on BEREC's or other websites.

Article 12 - Register

1. BEREC shall provide public access to a register of documents approved by the BoR. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without undue delay.
2. For each document the register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received, drawn up or adopted and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

Article 13 - Documents directly accessible to the public

1. BEREC shall as far as possible make documents directly accessible to the public in electronic form or through a register with a link to the original text.
2. At least the following BEREC documents shall be made directly accessible by electronic means:
 - a) The rules of procedure, annual work programme, medium term strategy and annual report;
 - b) Documents to be made publicly available under Article 4(3) of Regulation (EU) 2018/1971, of 11 December 2018;
 - c) Agendas and the final conclusions of the Contact Network and the Board of Regulators meetings, as well as reports of electronic voting, in their non-confidential versions;
 - d) Brochures, promotion or informational videos and other documents meant for the general public issued by BEREC;
 - e) An up-to-date list of BEREC tasks and an up-to-date list of members alternates and other participants of their organisational bodies, including BoR, Contact Network and working groups;
 - f) Declarations of Interests and Commitment;
 - g) Any document adopted by the BoR for publication.
3. The following documents shall be provided on request and, as far as possible, made directly accessible to the public by electronic means:

- a) documents originating from third-party which have already been published by their author or with his/her consent;
- b) documents already disclosed without redactions following a previous application for access to documents.

Article 14 - Administrative practice

1. The BEREC Office, in consultation with the BEREC Chair, shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Decision, that may include a list of documents with information that could qualify for *prima facie* redactable information, based on legal practice and jurisprudence related to the implementation of Regulation 1049/2001.

2. The BEREC Office shall publish annually a report, annexed to the BEREC Office's annual report, for the preceding year including the number of cases in which BEREC refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

Article 15 - Reproduction of documents

The release of documents is without prejudice to any existing rules on copyright which may limit the applicant's right to reproduce or exploit released documents. BEREC shall assume no liability for any unlawful or unauthorised use, disclosure or reproduction of the released documents.

Article 16 - Repeals

1. The following documents are replaced by this Decision:

- a) Document BoR (10) 26, concerning the transparency and access to documents at BEREC;
- b) Document BoR (11) 37 on the Establishment of a Public Register of the BEREC Documents, as amended by Decision BoR/2016/01.

2. References to the repealed decisions shall be construed as references to this Decision.

Article 17 - Entry into force

This Decision shall enter into force on 21 June 2019.