



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The acting Director-General

Brussels

**Subject: Your application for access to documents
Ref GestDem No 2022/3139**

Dear Mr Nielsen,

I refer to your e-mail dated 24 May 2022¹ in which you made a request for access to documents, registered on 31 May² under the above-mentioned reference number. Your e-mail read:

“On 21 April, 2022 in the LIBE committee, Mr Francisco Gaztelu Mezquiriz (Head of Unit for Migration Assistance to Neighbouring Countries) said that the European Commission has put in place third party monitoring of operations in Libya under the trust fund with particular attention to ensuring the respect of the Do No Harm policy.

He said: "So far, the contractor didn't report any violations of do no harm principle directly related to all costs by our trust fund programmes. "

I am seeking access to documents, including emails, that reveals the identity of the third party contractor, the scope of the reporting, all financial costs associated to the contract, as well as the report itself.”

I also refer to our email of 22 June 2022³, in which we explained that an extended time limit is needed for the purpose of internal consultations.

¹ Ref. Ares(2022)4044978

² Ref. Ares(2022)4045010

³ Ref. Ares(2022)4579110

Mr Nikolaj Nielsen
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Belgium

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Based on the above, we have identified the following six documents as falling under the scope of your request:

1. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 26-12-2019, Ares(2019)7917368.
2. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - Inception Phase Report - 08-05-2020, Ares(2020)2454417.
3. Addendum No 1 to service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 17-12-2020, Ares(2020)7713243.
4. Addendum No 2 to service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 19-05-2021, Ares(2021)3333184.
5. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" – Interim Report January 2021, Ares(2021)1283402.
6. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" – Interim Report January 2022 - Ares(2022)859050.

Having examined these documents under the provisions of Regulation (EC) No 1049/2001⁴, I have decided that:

- Access must be refused to the six documents, as disclosure is prevented by the exceptions to the right of access laid down in Article 4(1)(a), third indent (protection of the public interest as regards international relations), and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

The justifications are as follows:

1. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 provides that the *'institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]'*.

As per settled case-law, the institutions 'must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields

⁴ 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, Official Journal L 145 of 31 May 2001, p. 43.

covered by [the exceptions provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001] could undermine the public interest'⁵.

Consequently, *'the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'*⁶.

The public disclosure of the six documents, identified as falling under the scope of the request, would be severely detrimental for the European Union's public interest, given the difficult context in Libya. In addition, the public disclosure could result in the permanent undermining of the EU and its implementing partner's ability to conduct human rights research in the country, by revealing the implementing partners' identity, their methodology, and the specific contexts in which they carry out their research.

Moreover, disclosure of documents under Regulation (EC) No 1049/2001 has an *erga omnes* effect, preventing the institution from opposing communication of the disclosed documents to other applicants⁷. As the General Court has stated, *'disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union'*⁸.

Against this background, there is a risk that full disclosure of these documents would undermine the protection of the public interest as regards international relations. I consider this risk as reasonably foreseeable and non-hypothetical, given the sensitivity of the issue and the relevance of the above-referred information in the current context.

I would also like to underline that Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

2. Protection of the decision-making process

Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 provides that *'[A]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'*.

The full disclosure of the six listed documents would reveal internal opinions and internal follow up points of documents designed for internal purposes and not for external

⁵ Judgment of 3 July 2014 in case C-350/12, *Council v In 't Veld*, paragraph 63.

⁶ Judgment of 25 April 2007 in case T-264/04, *WWF European Policy Programme v Council*, paragraph 40.

⁷ Judgment of 21 October 2010 in case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, paragraph 116.

⁸ Judgment of 19 March 2013 in case T-301/10, *In 't Veld v Commission*, paragraph 125.

communications. This could potentially cause confusion to the public, by placing in the public domain preliminary statements of staff members of the European Commission and its implementing partner, which do not necessarily reflect the final position of the Union.

Indeed, as the General Court has held, ‘*the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process*’⁹. In this sense, it is important for the quality of the Commission’s decision-making process that documents drawn up for internal use and opinions exchanged during internal deliberations are protected, so as to ensure an adequate analysis and discussion within the Commission services.

Unfortunately, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing their content and, thereby, depriving the exception of its very purpose¹⁰.

No overriding public interest in disclosure

The exception laid down in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your application, you do not invoke any interest except your own interest which is of a private nature. For these reasons, you have not established arguments that would show the existence of an overriding public interest in disclosure at this point in time. Neither has the Commission identified such an overriding public interest, based on the elements in its possession.

For all these reasons, I do not see in the case at hand a public interest within the meaning of Regulation (EC) No 1049/2001, that is to say objective and general in nature and which is not indistinguishable from individual or private interests that would outweigh the public interest in protecting the decision-making process.

Partial Access

We have considered whether partial access could be granted to the documents currently withheld but this was deemed impossible, as the sensitive elements are integral to them. Please note that we cannot provide you with more detailed information on these documents without disclosing their substance, which is protected by the quoted exceptions laid down in Article 4 of Regulation (EC) No 1049/2001.

Means of Redress

⁹ Judgment of 15 September 2016 in case T-18/15, *Phillip Morris v Commission*, paragraph 87.

¹⁰ Judgment of 24 May 2011 in joined cases T-109/05 and T-444/05, *NLG v Commission*, paragraph 82. Judgment of 8 February 2018 in case T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, paragraph 71.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[e-signed]

Maciej POPOWSKI