



EUROPEAN COMMISSION

Brussels, 24.9.2021
C(2021) 7082 final

Ms Agresta Diletta
Via Puccini 25
65010 Moscufo (PE)
Italy

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2021/1754**

Dear Madame,

I refer to your letter of 29 April 2021, registered on 30 April 2021, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

I apologise for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 22 March 2021, attributed to the Directorate-General for Migration and Home Affairs and registered under number GestDem 2021/1754, you requested access to document C(2018)846 final – Commission Decision of 12.2.2018 approving, on behalf of the European Union, Good Practices between the Government of the Republic of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorisation to say (hereafter: ‘Good practices’).

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In its initial reply of 15 April 2021, the Directorate-General for Migration and Home Affairs refused access to the document requested, on the basis of the exception laid down in the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I have to confirm the position of the Directorate-General for Migration and Home Affairs refusing access thereto, based on the exception laid down in the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

The reasons are explained below.

2.1. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]’.

As far as the interests protected by virtue of Article 4(1)(a) of Regulation (EC) No 1049/2001 are concerned, the Court of Justice has confirmed that it ‘is clear from the wording of Article 4(1)(a) [of Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests’³.

The Court of Justice stressed in the *In ‘t Veld* ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’⁴.

³ Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison v Council*, EU:C:2007:75, paragraph 46.

⁴ Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

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’⁵.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’⁶. This was further confirmed by the Court of Justice⁷.

As a preliminary remark, The Gambia is one of the top ranking countries with citizens' arrivals in the Union. In 2018, discussions took place between representatives of the European Commission and of The Gambia with a view to drawing up a non-binding instrument setting out political commitments with regard to return procedures. The instrument ‘Good practices between the Government of the Republic of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorisation to stay’ is the result of those discussions. The instrument Good practices does not, nor is it intended to, create any legal obligations on either side under domestic or international law. They came as a support to the EU Member States’ bilateral relations with The Gambia and cannot be interpreted as superseding the existing or preventing the conclusion of future bilateral agreements between the EU Member States and The Gambia. Given the interest of the Union in the improvement of return procedures, prior to its signing by the European Commission on behalf of the Union, it was endorsed by the Council.

The document concerned established a structured and predictable cooperation mechanism between the relevant services of EU Member States and of The Gambia for the return of own nationals. It contain practical information regarding the return and readmission procedure, such as the description of the applicable steps and timelines for identification of third country nationals who are illegally staying in the EU, the issuance of travel documents and organisational aspects of return operations.

⁵ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁶ Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁷ Judgment of the Court of Justice of 19 March 2020, *ClientEarth v European Commission*, C-612/18 P, EU:C:2020:223, paragraphs 68 and 83.

Without prejudice to the fact that readmission is an obligation under international customary law, the decision by third countries to engage in such legally non-binding arrangements to enhance readmission cooperation with the EU is voluntary and remains politically very sensitive. Furthermore, due to their legally non-binding character their practical implementation is very much dependant on the willingness of the authorities of the third country to follow the agreed practices. In this context, a unilateral public disclosure of these arrangements would undermine in a concrete and non-hypothetical manner the international relationships in place with the third country concerned.

In your confirmatory application you argue, I quote, ‘The ‘Good practices documents on identification and return procedures’ between the EU and The Gambia must be considered as international agreement, thus shall be published in the Official Journal, following Article 13(1)(f) of Regulation 1049/2001: In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Article 4 and 9 of this Regulation be published in the Official Journal: [...] international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty’.

Contrary to your claim, the Good practices were concluded under Article 17(1) of the Treaty on the European Union⁸ that provides that the European Commission is to exercise executive functions and to ensure the Union’s external representation, with the exception of the common foreign and security policy and other cases provided for in the Treaties. Therefore, these arrangements are not considered as international agreements under Regulation (EC) No 1049/2001 and do not require publication in the Official Journal.

Consequently, the public disclosure of the document concerned, as explained by the Directorate-General for Migration and Home Affairs, could result in a serious and damaging loss of trust in the relations of the EU and the Member States with the third country in the context of the return and readmission policy and broader partnership.

Such disclosure would also undermine other readmission negotiations that the EU is currently holding, or may undertake, with other third countries.

The risk of a serious and damaging loss of trust in the relations between the EU, its Member States and third countries is not hypothetical, and has already materialised in the past, at various stages of engagement with different third countries. For instance, the public disclosure of the mere fact that authorities of a specific third country had pursued discussions and eventually concluded a legally non-binding arrangement with the EU, resulted in the withdrawal of that third country from finalising and implementing such arrangement. Consequently, since then it has been impossible to seek further procedural and practical improvements of the cooperation in any agreed document. As a result, operational obstacles remain and the ability to return from the EU to that third country has been hampered.

⁸ OJ C 326, 26.10.2012, p. 13–390.

In the light of the above, I conclude that there is a reasonable and concrete risk that public disclosure of the document concerned is likely to harm the interest protected by the third indent of Article 4(1)(a) (protection of the public interest as regards international relations), of Regulation (EC) No 1049/2001.

Moreover, this information could also be used by other third countries to bring undue pressure on the European Commission in support of their own interests, unduly limit the room for manoeuvre of the EU on the international stage, and jeopardise the EU's international position. I would like to remind you that the documents released under Regulation (EC) No 1049/2001 become available to the public at large ('erga omnes'), and not only to the applicant who had requested them.

There is therefore a reasonably foreseeable and not purely hypothetical risk that the disclosure of the document requested under this exception would undermine the international relations between the EU with The Gambia.

Consequently, I must conclude that access to the document requested need to be refused under the exception laid down in the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception in Article 4(1)(a) of Regulation (EC) No 1049/2001, protecting a public interest such as 'international relations' does not need to be balanced against overriding public interest in disclosure.

4. PARTIAL ACCESS

No partial access is possible to the document concerned, as the entirety of its content is covered by the exception in the third indent of Article 4(1)(a), of Regulation (EC) No 1049/2001.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

