



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Acting Director-General

Brussels,

Subject: Your application for access to documents – Ref. GestDem 2022/0035

Dear Mr Astuti,

I refer to your application dated 24 December 2021¹, registered under the above-mentioned reference number². You requested access to:

‘Documents which contain the following information:

- *Financial reports (interim and final) produced by IOM, UNHCR, UNDP, UNICEF and GIZ in relation to the project "Managing mixed migration flows in Libya through expanding protection space and supporting local socio-economic development" T05-EUTF-NOA-LY-03*
- *Narrative reports (interim and final) produced by IOM, UNHCR, UNDP, UNICEF and GIZ in relation to the project "Managing mixed migration flows in Libya through expanding protection space and supporting local socio-economic development" T05-EUTF-NOA-LY-03’*

Your application concerns the following 22 documents:

- Project 141 EUTF-NOA-LY-03-01 Protecting vulnerable migrants and stabilizing communities in Libya, concluded with the International Organization for Migration (IOM), containing the following documents 1 to 6:
 1. First Financial report 2017-2018, EUTF-NOA/2017/T05.141, 30/01/2019, Ares(2019)538946.
 2. First Narrative report 2017-2018, EUTF-NOA/2017/T05.141, 30/01/2019, Ares(2019)538946.

¹ Ref. Ares(2022)65499

² Ref. Ares(2022)65796

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3. Second Financial report, EUTF-NOA/2017/T05.141, 19/12/2019, Ares(2019)7828163.
 4. Second Narrative report, EUTF-NOA/2017/T05.141, 19/12/2019, Ares(2019)7828163.
 5. Third Financial report, EUTF-NOA/2017/T05.141, 17/08/2021, near.r.4(2021)1076223.
 6. Third Narrative report, EUTF-NOA/2017/T05.141, 17/08/2021, near.r.4(2021)1076223.
- Project 157 EUTF NOA-LY-03-05 Municipal development in the context of mixed migration, concluded with the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), containing the following documents 7 to 10:
 7. Financial report, 01/06/2017-30/06/2018, EUTF-NOA/2017/T05.157, 05/09/2018, Ares(2018)4554347.
 8. Narrative report 01/06/2017-30/06/2018, EUTF-NOA/2017/T05.157, 05/09/2018, Ares(2018)4554347.
 9. Narrative report 2020, EUTF-NOA/2017/T05.157, 25/03/2021, Ares(2021)2106924.
 10. Financial Report 2020, EUTF-NOA/2017/T05.157, 02/03/2021, Ares(2021)1580792.
 - Project 156 EUTF NOA-LY-03-04 Reinforcing International Protection and Delivery of Assistance to refugees, asylum seekers, migrants and host communities in Libya, concluded with the United Nations High Commissioner for Refugees (UNHCR), containing the following documents 11 and 12:
 11. Overall financial report, EUTF-NOA/2017/T05.156, 19/02/2020, near.r.4(2019)2747460.
 12. Final narrative report, EUTF-NOA/2017/T05.156, 19/12/2019, Ares(2019)7821952.
 - Project 144 EUTF NOA-LY-03-02 Resilience building programme for vulnerable children in Libya, including host communities, migrant and refugee children, concluded with the United Nations Children's Fund (UNICEF), containing the following documents 13 to 18:
 13. 2nd Financing report 2017-2019, EUTF-NOA/2017/T05.144, 21/11/2019, Ares(2019)7191796.
 14. 2nd Narrative report 2017-2019, EUTF-NOA/2017/T05.144, 16/12/2019, Ares(2019)7728406.
 15. Financial report 2020, EUTF-NOA/2017/T05.144, 14/02/2022, Ares(2022)1059447.
 16. Narrative report 2020, EUTF-NOA/2017/T05.144, 21/12/2020, Ares(2020)7825545.
 17. Financial report 2021, EUTF-NOA/2017/T05.144, 30/11/2021, Ares(2021)7379204.
 18. Narrative report 2021, EUTF-NOA/2017/T05.144, 30/11/2021, Ares(2021)7379204.

- Project 149 EUTF NOA-LY-03-03 (UNDP) Strengthening Local Capacities for Resilience and Recovery, concluded with the United Nations Development Programme (UNDP), containing the following documents 19 and 22:
 - 19. Financial report 2017-2018, 2nd Progress Report, EUTF-NOA/2017/T05.149, 29/04/2019, Ares(2019)2876396.
 - 20. Narrative report 2017-2018, 2nd Progress Report, EUTF-NOA/2017/T05.149, 29/04/2019, Ares(2019)2876396.
 - 21. Financial report 2017-2020 report, 3rd Progress Report, EUTF-NOA/2017/T05.149, 14/06/2021, Ares(2021)3865134.
 - 22. Narrative report, 3rd Progress Report, EUTF-NOA/2017/T05.149, 14/06/2021, Ares(2021)3865134.

All the above documents originate from third parties. Pursuant to Article 4(4) of Regulation (EC) No 1049/2001³ regarding public access to documents, we consulted these third parties with a view to assessing whether the documents shall be disclosed.

Please note that the concerned projects are not comparable to each other in the sense that their specific background for implementation are different and unique for each partner. Consequently, each third party may have a different approach regarding the disclosure of their documents due to these specific circumstances.

Following an examination of the documents under the provisions of Regulation (EC) No 1049/2001 and taking into account the opinion of the third parties, I have decided that:

- Full access can be granted to documents 13, 15, 17, 19, 20, 21, 22.
- Partial access can be granted to documents 14, 16 and 18 as full disclosure is prevented by the exceptions to the right of access laid down in Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation (EC) No 1049/2001.
- Access must be refused to documents 1 to 12 as disclosure is prevented by the exceptions to the right of access laid down in Article 4(1)(a) first indent (public security), Article 4(1)(a) third indent (international relations), Article 4(1)(b) (protection of the privacy and integrity of the individual) and Article 4(2) first indent (protection of the commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

The justifications are as follows:

1. Protection of the privacy and the integrity of the individual

Full disclosure of documents 1 to 12, 14, 16 and 18 is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article

³ 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.

4(1)(b) of Regulation (EC) No 1049/2001. In particular, these documents contain the names of individuals who are not public figures.

Article 9(1)(b) of the Data Protection Regulation⁴ does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data, nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

2. Protection of the public interest as regards public security

Article 4(1)(a), first indent, 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 public security’*.

As regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, the General Court has ruled that, ‘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’⁵.

In this context, it is important to mention that when (partial) access is given to documents as a result of an application submitted under Regulation (EC) No 1049/2001, this access is automatically granted to the public at large, and not only to the applicant concerned. Taking into account the highly volatile and complex situation in Libya at the moment, this fact is of particular importance.

Concerning documents 1 to 6, the author, IOM, objects disclosure as it would put at risk not only IOM’s and partner organizations’ staff members, contractors, and governmental and consular authorities in Libya but also stranded, rescued, detained, and vulnerable migrants (including unaccompanied migrant children, victims of trafficking, and survivors of gender-based violence), members of crisis-affected host communities, internally displaced people and returnees. The documents include concrete information

⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

⁵ Judgment of the General Court of 11 July 2018 in case T-644/16, *Client Earth v European Commission*, paragraph 23.

on the locations of IOM's activities implemented by its staff, implementing partners and contractors, as well as location and name of detention centres. Taking, inter alia, the sensitive and volatile security situation of the region into consideration, the release of this information could pose high risks (including considerable security risks) for the specific individuals, who could be targeted because of their involvement in the project. This information is treated as sensitive confidential information since the lives of the migrants, staff and partners are IOM's highest priority.

The documents in question further contain information on IOM partners, and other UN agencies like UNHCR and UNICEF. The release of this information could pose risks (including considerable security risks) for IOM's partners, that could be targeted because of their involvement in the project, in particular in the extremely sensitive context of Libya. Furthermore, the release of information related to IOM's partners could impact the ability of IOM and its partners to work in Libya now and in the future.

Unfortunately, the airstrike on a detention centre in Libya on 2 July 2019, which caused over 50 casualties, is one of many examples showing that the risks described here are not hypothetical, even if not all of them can be predicted in advance. Even if some information is already publicly available on the web, the fact that an IOM report to the EU, or any other document transmitted by IOM to the EU, is including such information, constitutes strong corroborating evidence and would provide additional insight into the activities carried out at sensitive locations, posing an increased security risk.

Regarding documents 7, 8, 9 and 10, the author, GIZ, has objected disclosure given their concerns from a security point of view to disclose information on their areas of operation in Libya.

Having regard to the above, I conclude that there is a reasonably foreseeable and non-hypothetical risk that disclosure of documents 1 to 10, or parts thereof, would undermine the protection of the public interest as regards public security. Therefore, I consider that the use of the exception under Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 is justified, and that access to certain parts of the documents or to some of the documents in question must be refused on that basis.

3. 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 covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest'*⁶.

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*

⁶ Judgment of 3 July 2014 in case C-350/12, *Council v In 't Veld*, paragraph 63.

*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*⁷.

Concerning documents 1 to 6, the author, IOM, considers that the public disclosure would, severely affect the international relationship between (i) the EU and the authorities in Libya, (ii) IOM and the authorities in Libya, and (iii) EU/IOM and their international and regional partners, given the content of the documents. The documents provide insight into relevant actors' involvement and decision-making on the ground and could thereby undermine the strategic planning for envisaged project activities funded by the EU. This could, in turn, further jeopardize IOM's and other actors' ability to provide support to vulnerable migrants in Libya and ultimately impede future access to final beneficiaries. It also informs about mitigating measures taken by IOM, such as monitoring political situation where there is a risk of political instability in the area and possible changes of government, which could be misconstrued.

These documents were drafted by IOM and contain sensitive operational and financial information, including the duration, budget, and detailed project description and operations. Disclosing such documents, which were not designed for external communications purposes, might lead to misunderstandings and/or misrepresentations regarding the nature of EU-funded activities implemented by IOM in Libya. This could be broadly relayed and negatively impact established international relations with authorities in Libya, third-country representatives and partner organizations, which could ultimately lead to a heightened security risk for all stakeholders involved.

Regarding documents 11 and 12, the author, UNHCR, states that all contractual documents including reports submitted by UNHCR to the European Union Emergency Trust Fund (EUTF) are of confidential nature, as UNHCR is providing details which are not for the public consumption since they could harm the relations between UNHCR and the Libyan authorities, if they were to be disclosed. Under the principle of 'Do-no harm', a key aspect in the EU's policy of implementing activities in politically sensitive contexts such as Libya, the disclosure would jeopardize the already fragile relation UNHCR has established with various Libyan authorities, including those in charge of the detention centers and the Libyan Coats Guards, possibly leading even to reduced access to persons of concern to UNHCR, and therefore, an even more limited capacity to implement life-saving assistance in those detention centres or at disembarkation points. Indirectly, such disclosure may also have a negative impact on the EU itself.

UNHCR recalls that there is yet no host-country agreement with the Government of National Unity (GNU) and current government relations are tense and fragile and must be preserved. High level discussions are continuing to that effect but without success for the moment. Thus, any disclosure of sensitive information contained in the above mentioned documents, is deemed not possible under the current situation.

Against this background, there is a risk that full disclosure of documents 1 to 6, 11 and 12, or parts thereof, 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 in Libya.

⁷ Judgment of 25 April 2007 in case T-264/04WWF *European Policy Programme v Council*, paragraph 40.

4. Protection of the commercial interests of a natural or legal person, including intellectual property

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...], unless there is an overriding public interest in disclosure*".

It should be noted that the exception relating to commercial interests can be applied to non-commercial entities such as public entities. This is due to the fact that giving access to the requested information could be used to distort competition in future procedures, because of its commercial value. Alternatively, its disclosure can prejudice the legitimate interests of economic operators who participated in the relevant procedures.

Regarding documents 1 to 6, its author IOM, has objected disclosure as they include financial reports and information that is considered confidential by IOM and consistently treated as such; it constitutes commercially sensitive information and should not be released. Its release would jeopardize IOM's advantage in terms of cost-effectiveness and efficiency over other entities implementing or aiming to implement similar projects worldwide, and that may also apply for funding from the EU. The documents, if disclosed, are expected to interfere not only with IOM's negotiations with other parties involved in the protection of vulnerable migrants in Libya, and possibly elsewhere, but also with other programmes funded by EU and/or other entities. If these documents were to be disclosed and read in conjunction with other documents available via other sources, the negotiations of future EU-IOM agreements may be negatively affected. Notwithstanding, IOM wishes to highlight that it is an international organization and not a private commercial entity operating for profit.

Concerning documents 7, 8, 9 and 10, GIZ, the author of the documents, has objected the access as it would affect the commercial interests of GIZ. These reports include operational details, including on GIZ internal instruments and approaches, as well as information on personnel structure.

Finally, the exception of Article 4(2), first indent, of Regulation (EC) No 1049/2001 has to be read in light of Article 339 of the Treaty on the Functioning of the European Union, which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components;

In consequence, there is a real and non-hypothetical risk that public access to the abovementioned information would undermine the "commercial interests" of the third parties.

No overriding public interest in disclosure

To the extent that access is refused on the basis of Article 4 (2), first indent, of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosure. For such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. it must outweigh the interest provided by virtue of Article 4 (2), first indent, of Regulation (EC) No 1049/2001.

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 commercial interests of the participating tenderers.

Partial Access

We have considered whether partial access could be granted to documents 1 to 12, 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

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 its 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

Enclosures: Documents 13 to 22