



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Director-General (acting)

Brussels,

Subject: Your application for access to documents – Ref. GestDem 2022/1757

Dear Mr Ambri,

I refer to your application dated 25 March 2022¹, registered under the above-mentioned reference number². You requested access to:

“all written correspondence (email or otherwise) that arose during or after the Euro-Arab border security conference from attendees of said conference, in which members of the EU commission for Neighbourhood and Enlargement are included. These can be limited to the period from December 1st 2021, until today.”

Your application concerns the following documents:

1. Remarks by Commissioner Várhelyi at the first Euro-Arab Border Security Conference
2. Joint Communiqué Issued by the Euro-Arab Border Security Conference (EABSC) 1-2 December 2021, 04/05/2022, Ares(2022)3436950
3. Euro-Arab Border Security Conference Amman 1-2 December 2021 Report, 04/05/2022, Ares(2022)3436988

¹ Ref. Ares(2022)2206490

² Ref. Ares(2022)2207601

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Having examined these documents under the provisions of Regulation (EC) No 1049/2001³, I have decided that:

- Document 1 is publicly available at the Europa website⁴.
- Access must be refused to documents 2 and 3 as disclosure is prevented by the exception to the right of access laid down in Article 4(1)(a) first indent (public security), Article 4(1)(a) third indent (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 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 political sensitivity of the file at hand, this fact is of particular importance.

Having regard to the above, I conclude that there is a reasonably foreseeable and non-hypothetical risk that disclosure of the two documents, 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 the documents in question must be refused on that basis.

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.

³Regulation (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 ec.europa.eu/commission/commissioners/2019-2024/varhelyi/announcements/remarks-commissioner-varhelyi-first-euro-arab-border-security-conference_en

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

2. 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 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.

Against this background, there is a risk that full disclosure of the two documents, 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.

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.

3. 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 two listed documents, would reveal internal opinions and internal follow up points of documents designed for internal purposes and not for external communications. This could potentially cause confusion to the public, by placing in the public domain preliminary statements of staff members of the European Commission, which do not necessarily reflect the final position of the Union.

In addition, there is a real and non-hypothetical risk of self-censorship by the European Commission services. The full public disclosure of the documents requested would undermine the protection of the decision-making process of the Commission, as it would reveal preliminary views and policy options, which are currently under consideration; the

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

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

Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

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*'⁸. 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 purpose⁹.

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

I have considered whether partial access could be granted to the 2 documents, but this was deemed impossible, as the sensitive elements are integral to them. Please note that I 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.

⁸ Judgment of 15 September 2016 in case T-18/15, *Phillip Morris v Commission*, paragraph 87.

⁹ 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, *Pagkyrios organismos ageladotrofon v Commission*, paragraph 71.

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