



EUROPEAN COMMISSION

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Belgium

**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 2018/3864**

Dear [REDACTED],

I refer to your e-mail of 27 September 2018, registered on the next day, 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 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 19 July 2018, registered under the reference GESTDEM 2018/3864 and dealt with by the Directorate-General for Migration and Home Affairs, you requested access to the ‘Guidelines “Recommending to the Member States a common approach on the non-recognition of certain categories of ordinary Russian passports” issued in June 2016’.

¹ Official Journal L 345 of 29 December 2001, p. 94.

² Official Journal L 145 of 31 May 2001, p. 43.

In its initial reply dated 7 September 2018, the Directorate-General for Migration and Home Affairs, after consulting the European External Action Service, refused access to the requested document on the basis of Article 4(1)(a), first indent (protection of the public interest as regards public security) and third indent (protection of the public interest as regards international relations) of Regulation 1049/2001.

In your confirmatory application, you request a review of the position of the Directorate-General for Migration and Home Affairs.

You support your confirmatory application with several arguments that have been taken into account in the assessment of the Secretariat-General, the results of which are described under point 2 below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

Following this review, taking account of the opinion of the European External Action Service, which has been re-consulted at confirmatory level, I can inform you that partial access is granted to the document requested, pursuant to Article 4(1)(a), first indent (protection of the public interest as regards public security) and third indent (protection of the public interest as regards international relations) of Regulation 1049/2001.

2.1. Protection of the public interest as regards public security and international relations

In accordance with the case law of the Court of Justice, the European Commission, ‘when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation No 1049/2001’ and two different exceptions can, as in the present case, be ‘closely connected’.

According to Article 4(1)(a), first indent of Regulation 1049/2001, the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] public security [...]’.

Article 4(1)(a), third indent of Regulation 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 [...]’.

The General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions 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’.³

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation No 1049/2001, ‘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’.⁴

The document requested is entitled ‘European Commission and EEAS Guidelines recommending to the EU Member States a common approach on the non-recognition of certain categories of ordinary Russian international passports’ and it has been examined in light of the above-mentioned case law.

It contains non-binding guidelines of the European Commission and the European External Action Service to provide the responsible authorities of the Member States, after the illegal annexation of Crimea and Sevastopol to Russian territory, with uniform criteria for identifying certain categories of Russian passports issued to Crimean citizens, the non-recognition of which is recommended and to which a Schengen visa may not be affixed.

The redacted parts of the document contain technical criteria on how to identify the relevant categories of Russian passports at consulates and at external borders. Moreover, they define the factual circumstances under which the guidelines should be reviewed.

The public disclosure of these parts would entail the risk that the Russian Federation uses this information in order to design and/or implement counter-measures aimed at neutralising the EU’s policy of non-recognition in the area of visa policy. Indeed, a number of such counter-measures have already been taken since the year 2016. Therefore, there is a foreseeable and serious risk that the public disclosure of this information would lead to further such measures counteracting the non-recognition of the categories of Russian passports concerned.

³ Judgment of 25 April 2007 of the General Court, at the time Court of First Instance, in Case T-264/04, *WWF European Policy Programme v Council of the EU*, EU:T:2007:114, paragraph 40.

⁴ Judgment of 11 July 2018 in Case T-644/16, *Client Earth v Commission*, EU:T:2018:429, paragraph 23.

For these reasons, I conclude that the public disclosure of the protected parts would risk undermining the policy of the non-recognition of the relevant categories of Russian passports, which is an important part of the EU's general policy of non-recognition of the annexation of Crimea and Sevastopol. This, in turn, would involve a deterioration in bilateral relations between the EU and the Russian Federation and thus put the international relations of the EU at risk in this particular context.

Moreover, there is the risk that the redacted information, if publicly disclosed, could give the necessary knowledge to interested parties to put in place practices to circumvent the non-recognition criteria and rules. The press article to which you refer in your confirmatory application proves that this risk is indeed realistic.

However, such circumvention would constitute a considerable danger to the internal and the external public security of the EU and its Member States, for which a functioning visa policy is indispensable. Indeed, the concept of 'public security' as contained in Article 4(1)(a) of Regulation 1049/2001 covers both the internal and external security of EU Member States.⁵

Finally, I would like to highlight that the implementation of the guidelines is continuously discussed by the Member States, at central level in the working groups of the Council of the EU, as well as by the Member States' consuls in Russia and Ukraine in the framework of the local Schengen cooperation, established by Title V of the Visa Code⁶. Therefore, the public disclosure of the redacted parts is not necessary in order to 'help in efforts and discussions aimed at their broader implementation', as highlighted in your confirmatory application.

Consequently, I conclude that the redacted parts of the document are protected against public disclosure pursuant to the exceptions provided for in Article 4(1)(a), first and third indents of Regulation 1049/2001.

3. PARTIAL ACCESS

Partial access is hereby granted to the document requested, as set out above.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that the exceptions provided in Article 4(1)(a), first and third indents of Regulation 1049/2001 have an absolute character and do not include the possibility to demonstrate the existence of an overriding public interest.

⁵ Judgment of 17 June 1998 in Case T-174/95, *Svenska Journalistförbundet v Council*, EU:T:1998:127, paragraph 121.

⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code); Official Journal L 243, 15.9.2009, p. 1.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision concerning public access to the requested documents, that is, judicial proceedings and complaints to the 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 European Commission
Martin SELMAYR
Secretary-General

Enclosure: (1)