



Brussels,

Subject: Your application for access to documents – Ref. GestDem 2022/0299

Dear Mr Agresta,

I refer to your application dated 23 December 2021¹, registered under the above-mentioned reference number². You requested access to:

- *‘Financial reports (interim and final) produced by IOM in relation to the project "Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya" T05-EUTF-NOA-LY-02.*
- *Narrative reports (interim and final) produced by IOM in relation to the project "Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya" T05-EUTF-NOA-LY-02.’*

You make in your application reference to the Financing Decision T05-EUTF-NOA-LY-02, under which project T05.141 "Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya" has been implemented. Please note that this project T05.141 has been merged with project T5.141 "Protecting vulnerable migrants and stabilizing communities in Libya", also implemented by IOM, under Financing Decision EUTF-NOA-LY-03. This is the reason why the documents which we have identified as corresponding to your request bear the reference EUTF-NOA-LY-03-01. These documents are:

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)1193075

² Ref. Ares(2022)1193392

Ms Diletta Agresta
Via Puccini 25,
65010 Moscufo
Italy

By email only:
ask+request-10433-ed6bc248@asktheeu.org

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.

IOM is the author of all these documents. Pursuant to Regulation (EC) No 1049/2001³, we have consulted IOM with a view to assessing whether the documents shall be disclosed.

Following an examination of the documents and taking into account the opinion of IOM, I have decided that:

- Access must be refused to all the six documents 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 these documents is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 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

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 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, Official Journal L 295, 21 November 2018, p. 39.

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.

The author, IOM, objects disclosure as it would put at risk not only IOM’s and its 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 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 projects. 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 these IOM partners, that could be targeted because of their involvement in the projects, in particular in the extremely sensitive context of Libya. Furthermore, the release of information related to IOM 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. We would like to highlight that even if some information is already publicly available on the web, the fact

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

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.

Having regard to the above, I conclude that there is a reasonably foreseeable and non-hypothetical risk that disclosure of the six 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 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 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.

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.

Against this background, there is a risk that full disclosure of the six 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 and the relevance of the above-referred information in the current context in Libya.

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.

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 non-profit associations or even 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.

The author, IOM, has objected disclosure of the documents 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.

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 the six documents, 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