



EUROPEAN COMMISSION

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**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 2022/1929**

Dear Mr Lenaert,

I refer to your email of 26 May 2022, registered on 30 May 2022, 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’).

1. SCOPE OF YOUR REQUEST

In your initial application of 31 March 2022, addressed to the Service for Foreign Policy Instruments, you requested access to the ‘documents which contain the following information:

- Description of the "CT CLOSE" counter-terrorism project funded by the European Commission, including the expected outcomes, implementing modalities, funding available;
- List of implementing partners/entities;
- List of beneficiaries’.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In its initial reply of 25 May 2022, the Service for Foreign Policy Instruments refused access to the documents containing the information mentioned in your application, based on the exception provided in Article 4(1)(a) first indent (the protection of the public interest as regards public security) of Regulation (EC) No 1049/2001. The reply of the Service for Foreign Policy Instruments indicated that ‘[t]he information you requested cannot be disclosed because its disclosure would undermine the protection of the public interest as regards the public security of the partner countries in which the programme CT CLOSE works. In fact, putting this information in the public domain could threaten the safety and security of several participating entities and partners as well as it would affect the implementation and outcome of the programme’.

In your confirmatory application, you request a review of this position. You mention that you ‘find it extremely worrying that the European Commission can not disclose ANY document/information on a programme it funds in the field of counter-terrorism.’ You ‘believe the European Commission can disclose relevant information regarding the project (notably its description, expected outcome, implementing modalities, funding and the geographic scope) without compromising the security of the EU or its international partners / beneficiaries.’

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 review of the reply given by the Directorate-General/Service concerned at the initial stage.

The European Commission identified the following category of documents as falling under the scope of your application:

- Annual Action Programme 2017 for the Article 5 of the Instrument contributing to Stability and Peace to be financed from the general budget of the Union – Commission Implementing Decision C(2017)5360 of 3.8.2017 and its Annex I (Category 1);
- Contract IFS/2018/396-466 (EC) and its annexes (Category 2);
- Implementation Reports of the Contract (Category 3).

Following the above-mentioned review, I can inform you that full access can be granted to the documents in Category 1. Annex I to the Commission Implementing Decision C(2017)5360 provides a general description of the action CT CLOSE and explains the context of its implementation. However, I regret to inform you that I must refuse access to the documents in Categories 2 and 3 on the basis of the exceptions provided in Article 4(1)(a) first indent (protection of public interest as regards public security) and third indent (protection of public interest as regards international relations) of Regulation (EC) No 1049/2001. Detailed reasons are set out in the section hereunder.

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

The first 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 public security'.

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 [...]'

In accordance with the case-law of the Court of Justice, 'a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it'³. The exceptions relating to the protection of public security and the international relations are, in the present case, closely connected.

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'⁴.

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'⁵.

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'⁶.

³ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraphs 26 and 34.

⁴ Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison v Council*, EU:C:2007:75, paragraph 46.

⁵ Judgment of the Court of Justice of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁶ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

Moreover, the General Court ruled that ‘[a]s 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’⁷. This was further confirmed by the Court of Justice⁸.

As mentioned in the Annual Action Plan 2017 of the Instrument contributing to Stability and Peace to be financed from the general budget of the Union (Annex I to the Commission Implementing Decision C(2017)5360, part of Category 1 above), CT CLOSE provides support to partner countries across the counterterrorism cycle and engages the work of law enforcement and intelligence agencies.

Due to the need to protect the safety and security of the participating entities and partners, as well as in order to ensure effective implementation and outcome of the action, the service contract CT CLOSE was awarded pursuant to a negotiated procedure with a single tender, in accordance with Article 134(1)(i) of the Financial Regulation⁹ and section 3.2.4.1, point (g) of the Practical Guide applicable to the Contract procedures for European Union External Actions (PRAG, version 2016.0)¹⁰. These provisions allow the use of this type of procurement procedure, without prior publication of a contract notice, ‘for contracts declared to be secret or for contracts whose performance must be accompanied by special security measures, in accordance with the administrative provisions in force or when the protection of the essential interests of the Union so requires, provided the essential interests concerned cannot be guaranteed by other measures; these measures may consist of requirements to protect the confidential nature of information which the contracting authority makes available in the procurement procedure.’

The contract focuses on developing counterterrorism related capabilities of intelligence services, with a view to enhancing their rule of law function. In this context, CT CLOSE engages upon request from partner countries for support in addressing deficiencies along the full counterterrorism response cycle from a rule of law perspective, in line with the Annual Action Programme 2017 for the Article 5 of the Instrument contributing to Stability and Peace, financed from the general budget of the Union (the documents under Category 1 above).

⁷ 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.

⁸ 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.

⁹ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 26.10.2012, p. 1, applicable to the procurement procedure leading to the signature of the CT CLOSE contract, but now repealed and replaced by Regulation (EU, Euratom) 2018/1046, OJ L 193, 30.7.2018, p. 1.

¹⁰ Available at: <https://wikis.ec.europa.eu/display/ExactExternalWiki/ePRAG>

Disclosing the partner countries would effectively break the confidentiality under which they have agreed to work with the implementing entities of the action CT CLOSE. If disclosed to the public, the requested information on beneficiaries and the concrete issues of engagement of the programme would become accessible to everyone, including the targeted terrorist networks or other criminal organisations, which undoubtedly would weaken the capabilities of the partner countries in the fight against terrorism. From this perspective, the disclosure of documents from Categories 2 and 3 would also be harmful to the Union's international relations with the countries concerned.

Within the same context, I can point out that, due to the sensitive character of the documents pertaining to the action CT CLOSE, both the Commission and the implementing entities must apply specific security measures related to their handling and storage.

Within the Commission, the contract and the information concerning its implementation are treated as sensitive in accordance with Article 9(6) of Commission Decision 2015/443 on Security in the Commission¹¹. The Commission personnel having access to the information of the contract and its implementation is security cleared. The implementing entities themselves have very strict confidential restrictions, regulated in national law, concerning the scope of their activities and the identity of their experts. In addition, pursuant to a specific clause in the contract, the Contractor is exempted from applying the Communication and Visibility Manual for EU External Action and thus from acknowledging publicly the Union financing of the project.

Due to its sensitive character, public disclosure of detailed information about the operational structure and the functioning of the action would result in undermining the public interest as regards public security. In addition, public disclosure by the European Commission of the above-mentioned information would put the EU in a difficult situation towards the partner countries that are beneficiaries in the project, thus undermining the bilateral relations between them. For these reasons, there is a realistically foreseeable and non-hypothetical risk that disclosure of the documents from Categories 2 and 3, to the public at large, would undermine the intended outcomes of the action CT CLOSE.

I thus conclude that there is a reasonable risk that public disclosure of the documents in Categories 2 and 3 is likely to harm the interests protected by 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 (EC) No 1049/2001. Access to these documents must therefore be refused.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4 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.

¹¹ Commission Decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission, OJ L 72, 17.3.2015, p. 41.

However, Article 4(1)(a) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

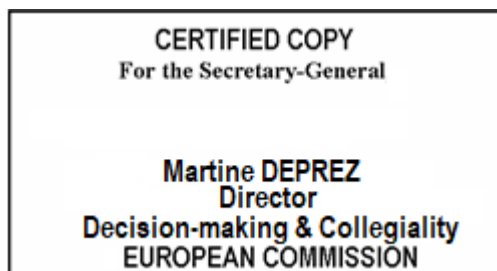
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents in Categories 2 and 3.

However, for the reasons explained above, no partial access is possible without undermining the interests described above.

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

Enclosures: 2