



EUROPEAN COMMISSION

Brussels, 1.10.2023  
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Mr Nikolaj Nielsen  
Chaussée d'Alseberg 9  
1060 Saint-Gilles, Brussels  
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2022/3139**

Dear Mr Nielsen,

I refer to your e-mail of 7 August 2022, registered on 8 August 2022, by 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 documents<sup>2</sup> (hereinafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in replying to your request.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 24 May 2022, you requested access to, I quote:

*'On 21 April, 2022 in the LIBE committee, Mr [...] said that the European Commission has put in place third party monitoring of operations in Libya under the trust fund with particular attention to ensuring the respect of the Do No Harm policy.'*

*He said: "So far, the contractor didn't report any violations of do no harm principle directly related to all costs by our trust fund programmes. "*

*I am seeking access to documents, including emails, that reveals the identity of the third party contractor, the scope of the reporting, all financial costs associated to the contract, as well as the report itself.'*

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<sup>1</sup> OJ L 345, 29.12.2001, p. 94.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

The Directorate-General for European Neighbourhood and Enlargement Negotiations identified the following documents as falling under the scope of your request:

- 1. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 26-12-2019, Ares(2019)7917368.
- 2. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - Inception Phase Report - 08-05-2020, Ares(2020)2454417.
- 3. Addendum No 1 to service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 17-12-2020, Ares(2020)7713243.
- 4. Addendum No 2 to service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" - 19-05-2021, Ares(2021)3333184.
- 5. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" – Interim Report January 2021, Ares(2021)1283402.
- 6. Service contract T05-EUTF-NOA-REG-03-06 (T05.1117) "Third Party Monitoring of Local Impact in Libya" – Interim Report January 2022 - Ares(2022)859050.

In its initial reply of 27 July 2022, the Directorate-General for European Neighbourhood and Enlargement Negotiations refused access to these documents based on the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and you put forward a number of arguments in support of your application. These arguments will be addressed in the corresponding sections below.

## **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 concerned at the initial stage.

Further to this review, it has to be specified that the following documents, registered under reference number Ares(2022)5665115, have been identified as falling within the scope of your confirmatory application:

- Document 1 – Service Contract for European Union External Actions No T05-EUTF-NOA-REG-03-06 (T05.1117) financed from the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (hereinafter ‘document 1’);
- Document 2 – email (hereinafter ‘document 2’);

- Document 2 – Human Rights Monitoring Manual (hereinafter ‘document 2.1’);
- Document 2 – HR Monitoring Inception Phase report (hereinafter ‘document 2.2’);
- Document 2 – DNH Analysis & Monitoring Manual (hereinafter ‘document 2.3’);
- Document 3 – T05-1117 – Signed contract (hereinafter ‘document 3’);
  - Document 3 – T05-1117 – Annexes (hereinafter ‘document 3.1’);
- Document 4 – counter signed addendum (hereinafter ‘document 4’);
- Document 5 – email (hereinafter ‘document 5’);
  - Document 5 – Invoice of 10 February 2021; T05-EUTF-NOA-REG-03-06 (T05.1117) (hereinafter ‘document 5.1’);
  - Document 5 – HR Monitoring interim report Jan 2021 (hereinafter ‘document 5.2’);
- Document 6 – email (hereinafter ‘document 6’);
  - Document 6 – EU – Human – Invoice of 28 January 2022; T05-EUTF-NOA-REG-03-06 (T05.1117) (hereinafter ‘document 6.1’);
  - Document 6 – HR Monitoring interim report Dec 2021; T05-EUTF-NOA-REG-03-06 (T05.1117) (hereinafter ‘document 6.2’).

Please note that the above documents include those identified at the initial stage, and that the ARES reference of the documents identified does not put in question an earlier date of creation of these documents. The ARES reference is a mere registration number for the purpose of the European Commission’s documents management and records system. Each document identified in handling a request for access to documents is registered in the ARES system, and therefore the reference provided above includes all documents identified.

Following the review performed at the confirmatory stage, I am pleased to inform you that partial access is given to:

- Documents 1 and 4, with redactions based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security), the third indent of Article 4(1)(a) (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001; and
- Document 3 with redactions based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

However, taking into account the replies of the third party concerned by the following documents, detailed further below, I regret to inform you that access must be refused to:

- Documents 2, 2.1, 2.2, 2.3, 5, 5.2, 6 and 6.2 based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- Document 3.1 based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security), the third indent of Article 4(1)(a) (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001; and
- Documents 5.1 and 6.1 based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security), Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.

## **2.1. Consultation of the third party**

According to Article 4(4) of Regulation (EC) No 1049/2001, *‘[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 [of Article 4 of Regulation (EC) No 1049/2001] is applicable, unless it is clear that the document shall or shall not be disclosed’*.

The documents requested concern the contract *‘T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya’*, awarded by the European Commission to a Contractor, whose identity is protected for the reasons set out below.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the Directorate-General for European Neighbourhood and Enlargement Negotiations consulted the Contractor at the initial stage as to the possible disclosure of documents identified in its initial reply of 27 July 2022.

In its reply to this consultation, the Contractor stated that it accepted to take on the project on the basis of its assessment that it would be able to satisfactorily mitigate any exposure risks to its field-based monitor network by maintaining their anonymity but also, crucially, by not divulging that the Contractor itself was conducting activities funded by the project concerned in Libya. Furthermore, the Contractor stated that the dissemination of documents pertaining to the contract would present a serious challenge to the monitoring programme, to the Contractor itself, and most of all, to the safety of its field-based monitor network on the ground in Libya, without whom this research would not be possible. In support of these arguments, the Contractor considered that due to the unstable political situation in Libya, the disclosure of these documents would expose its employees, experts and the field-based monitor network located in Libya to danger or even life-threatening situation. Against this background, the Contractor considered that the documents concerned warranted protection based on the exceptions of the first indent

of Article 4(1)(a) (protection of the public interest as regards public security) and the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. Furthermore, the Contractor suggested the European Commission to consider the applicability of the exception based on the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Furthermore, in accordance with Article 4(4) of Regulation (EC) No 1049/2001, the Secretariat-General re-consulted the Contractor at the confirmatory stage as to the possible disclosure of documents 2, 2.1, 2.2, 2.3, 5, 5.1, 5.2, 6, 6.1 and 6.2.

In its reply to this consultation, the Contractor sustained its refusal to agree with the disclosure of documents 2, 2.1, 2.2, 2.3, 5, 5.1, 5.2, 6, 6.1 and 6.2 on the same grounds with additional and reinforced argumentation in favour of invoking the exceptions based on the first indent of Article 4(1)(a) (protection of the public interest as regards public security) and the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. In this respect, the Contractor stated that the disclosure would potentially permanently undermine its ability to conduct fieldwork in Libya.

## **2.2. Assessment of the Secretariat-General of the European Commission**

### *2.2.1. Protection of the public interest as regards public security and 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 relation to the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, 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*'<sup>3</sup>.

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*

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<sup>3</sup> Judgement of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 46.

*disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001] could undermine the public interest*<sup>4</sup>.

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'*<sup>5</sup>.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, *'[...] 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'*<sup>6</sup>. This was further confirmed by the Court of Justice<sup>7</sup>.

Following the 'Arab Spring' uprising in 2011, the EU rapidly responded to the needs of the Libyan population in close cooperation with the United Nations Support Mission for Libya<sup>8</sup> (UNSMIL). Since then, EU policy towards Libya aims at assisting the country in its efforts towards a democratic, stable and prosperous state through the so-called 'Berlin Process'<sup>9</sup> under the auspices of the UN. This involves promoting a democratic transition, strong, transparent and accountable institutions and vibrant civil society. The EU is also actively working to provide protection, assistance and economic alternatives to migrants, refugees and internally displaced people in Libya. Due to the unstable political situation in Libya, the EU planned its cooperation since 2017 through yearly 'Special Measures', rather than through a multiannual programming process, thus allowing optimal responses to the rapidly changing situation. Libya is a key country along the Central Mediterranean migration route, accounting for the highest number of departures towards Italy in recent years and hosting a particularly large number of migrants. In this context, the EU has been working to protect migrants and refugees and support local communities in Libya, while taking action to reduce irregular departures through border management and anti-smuggling and trafficking in human beings<sup>10</sup>.

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<sup>4</sup> Judgment of the Court of Justice of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

<sup>5</sup> Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

<sup>6</sup> Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

<sup>7</sup> 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.

<sup>8</sup> <https://unsmil.unmissions.org/>

<sup>9</sup> [https://unsmil.unmissions.org/sites/default/files/berlin\\_conference\\_communique.pdf](https://unsmil.unmissions.org/sites/default/files/berlin_conference_communique.pdf)

<sup>10</sup> [https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/libya\\_en](https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/libya_en); [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/20230208\\_factograph\\_libya\\_en.pdf](https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/20230208_factograph_libya_en.pdf)

As stated above, the documents requested were drawn up in the context of the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*, awarded by the European Commission to the Contractor. The allocation of EUR 2.249.840 (EUR 1.499.707 + 750.133) was financed from the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa<sup>11</sup> (hereinafter ‘EUTF’). The objective of this contract was to monitor: to which extent EUTF projects have contributed to the human rights situation of the final beneficiaries (migrants, refugees, internally displaced people and host communities), in particular the application of the Rights-Based Approach (RBA)<sup>12</sup> to which the EU has committed itself, and; how trained officials observe international human rights standards following EUTF training and capacity building activities.

The EUTF has been the EU’s main tool to support Libya in the area of migration, with a total of EUR 465 million committed between 2015 and 2021. The majority of these funds goes to the protection and assistance of migrants, refugees and internally displaced people, alongside actions to support municipalities along the migratory routes and to strengthen integrated border management. The implementation of projects can continue until December 2025.

Documents 2, 2.1, 2.2, 2.3, 3.1, 5, 5.1, 5.2, 6, 6.1, and 6.2 and parts of documents 1, 3 and 4 contain sensitive information such as the identity of the Contractor, locations where the contract will be conducted and detailed methodology developed by the Contractor in order to conduct the activities funded including information on how the relevant members of the field-based monitor network will operate. The Secretariat-General also notes that the identity of the Contractor is explicitly stated in all documents identified. Furthermore, pages 5-16 of document 1, pages 1-22 of document 3.1 and pages 4-23 of document 4 constitute the terms of reference of the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*. These pages contain detailed information on when, where and how the activities under the contract will be conducted.

The Secretariat-General takes the view that, considering the unstable political situation in Libya, if disclosed, this information could undermine public security, for example by facilitating attacks on the Contractor’s employees, experts and the field-based monitor network located in Libya and would thus be detrimental to the proper conduct of the Contractor’s activities financed by the contract. The Secretariat-General considers that this reasoning applies to the mere disclosure of the identity of the Contractor.

Furthermore, documents 2.2, 2.3, 5.1, 5.2, 6.1 and 6.2 have been drafted by the Contractor using specific graphical features such as design, layout and font. In the Secretariat-General’s view, the identity of the Contractor could be deduced solely based on these specific visual features as similar graphical features are reproduced in other documents which were drafted by the Contractor, and which are publicly available. In

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<sup>11</sup> [https://trust-fund-for-africa.europa.eu/index\\_en](https://trust-fund-for-africa.europa.eu/index_en)

<sup>12</sup> [https://international-partnerships.ec.europa.eu/policies/peace-and-governance/human-rights\\_en](https://international-partnerships.ec.europa.eu/policies/peace-and-governance/human-rights_en)

other words, the identity of the Contractor cannot be dissociated from the content of documents 2.2, 2.3, 5.1, 5.2, 6.1 and 6.2.

Additionally, Article 13.4. (Security arrangements) of the General Conditions (Annex I to the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*) stipulates that:

*‘The contractor shall put in place security measures for its employees, experts and their families located in the partner country commensurate with the physical danger (possibly) facing them.*

*The contractor shall also be responsible for monitoring the level of physical risk to which its employees, experts and their families located in the partner country are exposed and for keeping the contracting authority informed of the situation. If the contracting authority or the contractor becomes aware of an imminent threat to the life or health of any of its employees, experts or their families, the contractor must take immediate emergency action to remove the individuals concerned to safety.’*

The Secretariat-General considers that, by disclosure of (the parts of) the documents concerned, the Commission would put the Contractor in a position which would undermine its capacity to comply with the conditions laid down in Article 13.4. of the General Conditions. Conducting the activities financed by the contract posed challenges for the Contractor in terms of maintaining security and protecting its employees, experts and the field-based monitor network located in Libya. Taking into consideration the existence of reports that refer to the incidents in case of other similar entities, the Secretariat-General considers this risk reasonably foreseeable and not purely hypothetical.

As stated above, the implementation of projects under the EUTF can continue until December 2025. The European Commission negotiated a new phase of the monitoring exercise with the Contractor, where a new separate service contract was signed to continue the monitoring over the EUTF programmes. Therefore, it is necessary to preserve the public security by protecting the withheld information on the identity, methodology and the activities of the Contractor conducted in the framework of the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*.

It must be recalled that the sensitive information contained also in the documents originating from the Contractor was provided to the European Commission on confidential basis and was not intended to be disclosed to the public. In the same vein, the Contractor has been consulted on two occasions with regard to potential disclosure of the documents concerned, following both your initial and subsequent confirmatory application. Each time, it expressed its opposition to granting public access to these documents. The General Court found that, *‘the Commission could legitimately consider that, in the event that the documents requested [...] were to be disclosed despite the opposition expressed on two occasions by [the third party], the latter could regard such*



*an act as a breach of trust*<sup>13</sup>. The Secretariat-General therefore considers the threat of undermining the public security, resulting from the potential disclosure of the documents concerned, all the more relevant in view of the unstable political situation in Libya, in which the Contractor needs to operate in order to conduct its ongoing obligations in the framework of the new phase of the monitoring exercise, and in view of the security concerns expressed in the Contractor's replies to consultations, as quoted above.

In your confirmatory application, you state, I quote:

*'I would like to remind you that the Ombudsman has previously found that the Commission is obliged to respect the Charter in its entirety, in all its activities, including in the distribution and monitoring of EU funds, and that the Commission should ensure EU funds do not support actions that are not in line with EU values, notably the rights, freedoms and principles recognised by the Charter.'*

*According to EU case-law, in refusing to disclose documents, EU institutions must give concrete and specific reasons as to why granting access to the requested documents could undermine the interest protected by the exception being invoked.*

*Furthermore, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.*

*Your argument citing a "difficult context in Libya" is vague. Your argument that this would undermine the EU and its "implementing partner's ability to conduct human rights research" is also hypothetical.*

*The requested documents also do not refer to the position of any negotiating party and do not express any specific opinion of the Commission on any negotiating position.'*

Furthermore, the General Court concluded in its judgment in Case T-307/16 that *'the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country. Indeed, the pursuit and the quality of those relations depend on that perception'*<sup>14</sup>. This position was confirmed by the judgment in Case T-166/19, in which the General Court concluded that *'the pursuit and the quality of those relations depend on that perception'*<sup>15</sup>. Moreover, according to the same judgment, *'it is not required to establish the existence of a definite*

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<sup>13</sup> Judgment of the General Court of 25 November 2020, *Marco Bronckers v European Commission*, T-166/19, EU:T:2020:557, paragraph 63.

<sup>14</sup> Judgment of the General Court of 27 February 2018, *CEE Bankwatch Network v Commission*, T-307/16, EU:T:2018:97, paragraph 90.

<sup>15</sup> Judgment of the General Court of 25 November 2020, *Marco Bronckers v European Commission*, T-166/19, EU:T:2020:557, paragraph 61.

*risk of undermining the protection of the European Union's international relations, but merely the existence of a reasonably foreseeable and not purely hypothetical risk*<sup>16</sup>.

Pages 5-16 of document 1, pages 1-22 of document 3.1 and pages 4-23 of document 4, which constitute the terms of reference of the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*, also contain the Commission's detailed analysis of the political, security and human rights situation in Libya which is not publicly available, and which can be perceived by the Libyan authorities as undue criticism. Consequently, the international relations between the Commission and the Libyan authorities would be undermined if these pages were disclosed. As stated above, the EU aims at assisting the country in its efforts towards a democratic, stable and prosperous state through the so-called 'Berlin Process' under the auspices of the UN. Therefore, the Secretariat-General takes the view that the Commission must maintain quality relations with the Libyan authorities in order to achieve this goal.

In themselves, the explanations above allow you to understand why access to (the withheld parts of) the documents requested has to be refused. The institution, when dealing with a request for disclosure of certain information, is not required, in the statement of reasons for the confirmatory decision, to reveal information the effect of which would be, if that information were disclosed, to undermine the public interest covered by the exception relied on by that institution<sup>17</sup>.

The General Court confirmed in Case T-31/18 that, *'[i]f such an obligation existed, the institution [...], by providing those explanations on the use which may be made of the requested information, would itself create a situation in which, by its conduct, the public security which it is tasked with protecting, among other things, would be endangered'*<sup>18</sup>.

In the present case, the information at stake is of a sufficient level of detail and accordingly there is a reasonably foreseeable and not purely hypothetical risk that disclosure of (the parts of) the documents concerned would undermine the protection of the public interest as regards public security and international relations.

The Secretariat-General would like to recall that documents disclosed under Regulation (EC) No 1049/2001 are disclosed to the public at large ('erga omnes') and not only to the applicant who originally requested access.

Consequently, the Secretariat-General must conclude that documents 2, 2.1, 2.2, 2.3, 5, 5.1, 5.2, 6, 6.1 and 6.2 and the parts concerned of document 3 must be protected under the exception laid down in the first indent of Article 4(1)(a) (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001.

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<sup>16</sup> Idem, paragraph 60.

<sup>17</sup> Judgment of the General Court of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 114.

<sup>18</sup> Judgment of the General Court of 27 November 2019, *Luisa Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency*, T-31/18, EU:T:2019:815, paragraph 113.

Consequently, the Secretariat-General must conclude that document 3.1 and the parts concerned of documents 1 and 4 must be protected under the exceptions laid down in the first indent of Article 4(1)(a) (protection of the public interest as regards public security) and the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

This conclusion is all the more relevant in light of the case-law confirming, as stated above, that the exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are of a mandatory nature as they do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

#### 2.2.2. *Protection of privacy and the integrity of the individual*

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that *'[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'*.

In its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>19</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>20</sup> (hereinafter 'Regulation (EC) No 45/2001') becomes fully applicable.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 *'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation'*<sup>21</sup>. Likewise, in the *Psara* judgment, the General Court added that Article 4(1)(b) *'establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public [...]'*<sup>22</sup>.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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<sup>23</sup> (hereinafter 'Regulation (EU) 2018/1725').

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<sup>19</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereinafter referred to as '*European Commission v The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>20</sup> OJ L 8, 12.1.2001, p. 1.

<sup>21</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>22</sup> Judgment of the General Court of 25 September 2018, *Maria Psara and Others v European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 65.

<sup>23</sup> OJ L 295, 21.11.2018, p. 39.

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’<sup>24</sup>.

Parts of documents 1, 2, 2.1, 2.2, 2.3, 3, 3.1, 4, 5, 5.1, 5.2, 6, 6.1 and 6.2 contain personal data, such as the names, functions, contact details, CVs, handwriting and handwritten signatures of persons external to the European Commission who are not public figures and of staff members of the European Commission who do not form part of the senior management.

The names of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725<sup>25</sup>.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data<sup>26</sup>. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative,

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<sup>24</sup> Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>25</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>26</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, 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 the disclosure of the personal data concerned.

### 2.2.3. *Protection of commercial interests*

The first indent of Article 4(2) 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'*.

Firstly, the Secretariat-General notes that the first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be interpreted consistently with 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'*. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering Article 339 of the Treaty on the Functioning of the European Union, over which it does not have precedence, ineffective.

Secondly, the first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be interpreted consistently with the provisions of the Financial Regulation<sup>27</sup> and its Rules of Application<sup>28</sup> relating to access to information and confidentiality, which were applicable at the time of the signature of the document in question. Furthermore, as neither Regulation (EC) No 1049/2001 nor the Financial Regulation contain any provision expressly giving one regulation primacy over the other, the right to disclosure of documents under Regulation (EC) No 1049/2001 cannot apply in contradiction with the

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<sup>27</sup> Regulation (EU, Euratom) No. 966/2012 of the European Parliament and 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 of 26.10.2012, p.1, as amended.

<sup>28</sup> Commission Delegated Regulation (EU) No. 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and the Council on the financial rules applicable to the general budget of the Union, OJ L 362 of 31.12.2012, p.1, as amended.

specific confidentiality provisions laid down in the Financial Regulation and its Rules of Application, as this would result in these provisions being deprived of their meaningful effect.

Furthermore, the General Court confirmed in *Cosepuri*<sup>29</sup> judgment that Regulation (EC) No 1049/2001 and the Financial Regulation have different objectives and do not contain any provision expressly giving one regulation primacy over the other.

Therefore, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables their coherent application.

As the Court of Justice explained, *‘in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person. That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations [...]’*<sup>30</sup>. Furthermore, the Court of Justice recognised that, *‘[i]n order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible’*<sup>31</sup>.

In its judgment in Case T-439/08, the General Court ruled that *‘methodology and expertise [...] relate to the specific know-how [...] and contribute to the uniqueness and attractiveness of applications in the context of calls for proposals such as that at issue, which was intended to select one or more applications, following in particular a comparative review of proposed projects’*<sup>32</sup>. Furthermore, the General Court held that *‘the transparent conduct of public tenders procedures, which aims to make possible the monitoring of compliance with the relevant rules and principles does not require the publication of documents or information relating to the know-how, methodology or business relationships of the tenderers’*<sup>33</sup>. The General Court also stressed that *‘in principle, precise information relating to the cost structure of an undertaking constitutes*

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<sup>29</sup> Judgment of the General Court of 29 January 2013, *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)*, T-339/10, EU:T:2013:38, paragraph 85.

<sup>30</sup> Judgment of the General Court of 5 February 2018, *PTC Therapeutics International v European Medicines Agency (EMA)*, T-718/15, EU:T:2018:66, paragraph 85.

<sup>31</sup> Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt v Commission*, T-198/03, EU:T:2006:136, paragraph 71.

<sup>32</sup> Judgment of the General Court of 21 October 2010, *Kalliope Agapiou Joséphidès v European Commission and Education, Audiovisual and Culture Executive Agency (EACEA)*, T-439/08, EU:T:2010:442, paragraph 127.

<sup>33</sup> Judgment of the General Court of 22 May 2012, *Sviluppo Globale v Commission*, T-6/10, EU:T:2012:245, paragraph 88.

*business secrets, the disclosure of which to third parties is likely to undermine its commercial interests*<sup>34</sup>.

The present case concerns the abovementioned contract awarded by the European Commission to the Contractor under the so-called negotiated procedure for the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*.

Pages 60-77 of document 1 constitute the description of the action, annexed to the contract, and constitute a grant application submitted by the Contractor. Furthermore, pages 23-40 of document 3.1 and pages 24-41 of document 4 constitute amended versions of the description of the action, annexed to the Addendum No 1 and No 2, respectively, of the contract. They describe in detail the proposed actions to be conducted through the contract, methodologies, internal organisation, particular know-how, strategy and other specific information with competitive value, such as the scope and description of actions, their timetable and funding perspectives. This includes, for example, the descriptions of the planned activities, the elaboration of specific approaches to the problems described, pricing and reasoning how resources will be spent etc. Such information undoubtedly constitutes inside knowledge, experience and specific know-how belonging to the entity that submitted the grant application. This know-how was taken into account by the Commission when evaluating the grant applications and, therefore, had a major impact on the selection of this application for funding. Public disclosure of such information would undermine the commercial interests of the applicants, as it would give other potential grant applicants in future similar calls the possibility to copy from these applications and use it to support their own applications.

Even though the grant was awarded under the so-called negotiated procedure<sup>35</sup> (i.e. without a publication of call for proposals), the Secretariat-General concludes that the procedure itself was competitive in character. The available budget is limited by the financing decision and is allocated to grant applications based on their relevance, following certain guidance and criteria. In practice, this means that, in case there would not be enough budget for all applications received, applications could get rejected. This situation has already occurred in the past. In other words, the disclosure of the respective pages of documents 1, 3.1 and 4 would allow other eligible beneficiaries to copy their elements, submit a grant application and get awarded a budget. This would leave less remaining budget for other potential beneficiaries. As explained above, the Contractor invested its resources in elaborating its grant proposal and the disclosure of the respective pages of the documents concerned would undermine its commercial interests.

The commercial interest of the grant applicant is to submit a proposal that will be granted financial assistance and to have their investment – in terms of time and resources – in developing a viable grant proposal protected from other potential, current or future, grant applicants. The European Commission also has an interest in not revealing the

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<sup>34</sup> Judgment of the Court of First Instance of 30 January 2008, *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 95.

<sup>35</sup> Point 11 of Annex I to the Financial Regulation.

applicants' know-how in order not to distort the fair competition in subsequent calls for proposals, and therefore as a funding entity, to ensure that the projects selected in future calls win on their own merits, and not on the basis of the methodology developed by others.

Furthermore, pages 57-59 of document 1 constitute the financial identification, the confirmation of an opening of an account and an account statement of the Contractor. Moreover, documents 5.1 and 6.1 constitute invoices of the Contractor. These documents were submitted to the European Commission for the purpose of financing of the contract *T05-EUTF-NOA-REG-03-06 (T05.1117) – Third Party Monitoring of Local Impact in Libya*. These documents contain commercially sensitive information, such as the bank account details. Public release of bank account details for these types of financial transactions could make the account a target of cybercrime or malicious attacks.

Please note that it is not possible to give more detailed descriptions justifying the need for confidentiality without disclosing the content protected and, thereby, depriving the exception of its very purpose<sup>36</sup>.

The Secretariat-General must conclude, therefore, that access to (the parts of) documents 1, 3.1, 4, 5.1 and 6.1 must be refused based on the exception laid down in the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001, interpreted in light of Article 339 of the Treaty on the Functioning of the European Union and Article 170 of the Financial Regulation.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) 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. It is for the applicant to put forward specific circumstances that show that there is an overriding public interest, which justifies the disclosure of the documents concerned<sup>37</sup>.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal<sup>38</sup>.

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<sup>36</sup> To that effect, see Judgment of the General Court of 24 May 2011, *Navigazione Libera del Golfo Srl v Commission*, Joined Cases T-109/05 and T-444/05, EU:T:2011:235, paragraph 82; Judgment of the General Court of 8 February 2018, *Pagkyprios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 71.

<sup>37</sup> See e.g. judgment of the General Court of 5 December 2018 in Case T-312/17, *Campbell v Commission*, EU:T:2018:876, paragraph 58.

<sup>38</sup> Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General



In your confirmatory application, you state, I quote:

*'As the EU Courts have pointed out, transparency makes it possible for citizens to participate more closely in the decision-making process. This, in turn, enables the EU administration to enjoy greater legitimacy and to be more effective and more democratically-accountable to the public.*

[...]

*And finally, your argument that there is "no overriding public interest in disclosure" is undermined by the fact that senior European Commission official [...] is making public statements to the European Parliament, an EU institution that represents the overriding public interest of European citizens.*

*If there is no public interest, then why is the Commission making statements to an EU institution that represents the public? You are instead asking the public to take your statements for face value. My role as a journalist is, in part, to verify the veracity of such statements.'*

The Secretariat-General considers that these arguments do not demonstrate an existence of an overriding public interest in disclosure of the (withheld parts of the) documents requested. The mere fact that the documents requested are of interest to wider public does not mean that their disclosure cannot have any impact on the commercial interests of the Contractor, nor does it mean that there is an overriding public interest in disclosing the documents. Neither does the fact that the European Commission staff member concerned made a limited statement on the contract in the European Parliament warrant access to the documents related to that contract, nor does it constitute an overriding public interest.

In this context, please note that general considerations or references to transparency do not demonstrate a pressing need for the disclosure of the documents requested and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question<sup>39</sup>.

Furthermore, the Secretariat-General would like to emphasise that there is no privileged access to a document under Regulation (EC) No 1049/2001 deriving from the applicants' occupation, as the Court of First Instance<sup>40</sup> confirmed in Case T-391/03: *'It follows that the applicants' application must be examined in the same way as an application from any other person'*<sup>41</sup>.

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Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

<sup>39</sup> Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

<sup>40</sup> Now the General Court.

<sup>41</sup> Judgment of the Court of first instance of 6 July 2006, *Franchet and Byk v Commission*, T-391/03, EU:T:2006:190, paragraph 82.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the interests protected by the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

The Secretariat-General concludes therefore that an overriding public interest has not been demonstrated in this particular case.

Please note that, as stated above, Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

#### **4. PARTIAL ACCESS**

In your confirmatory application, you state, I quote: *'Finally, any exception to the public's right of access to documents must be interpreted strictly. If only one part of a requested document is covered by an exception, the other parts of the document should be disclosed.'*

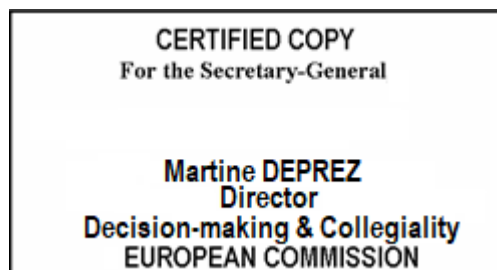
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, partial access is granted to documents 1, 3 and 4. No further partial access can be granted without undermining the interests described above.

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to documents 2, 2.1, 2.2, 2.3, 3.1, 5, 5.1, 5.2, 6, 6.1 and 6.2. However, for the reasons explained above, no meaningful partial access to these documents 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: (4)