

Confirmatory Application regarding EU Anti-Corruption Report

Sent by AsktheEU.org on 11 May 2017

Link Here: <https://www.asktheeu.org/en/request/eu_anti_corruption_report#outgoing-8488>

Dear Secretariat General of the European Commission

Following receipt of the Commission Decision of 19 April 2017 in response to the access to EU documents request (Ref GestDem No 2017/1364)[1], we hereby submit a confirmatory application.

The Commission stated in its Decision that it had identified, “*documents consist[ing] of*

- category 1: the draft country analyses drafted in view of accompanying the follow-up to the 2014 EU anti-corruption report;

- category 2: minutes of meetings, preparatory documents, as well as emails and letters relating to the steps forward as regards the EU anti-corruption policy;

- category 3: any written communication between the Commission and Member States relating to the follow-up of the 2014 anti-corruption report in particular as regards the decision not to publish a second edition.”

The Commission concluded that “the five documents under categories 2 and 3, namely documents 1 to 5, may be partially disclosed; …[and] access cannot be granted to any of the six documents under category 1.”

The exceptions applied in order to refuse full access were:
- Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual);
- the first subparagraph of Article 4(3) of the Regulation (relating to a matter where the decision has not been taken by the Institution, shall be refused if disclosure of the document would seriously undermine the Institution's decision-making process)

The Commission also redacted information because “Some of the documents to which you have requested access contain aspects that are beyond the scope of your request”.

We hereby contest your Decision and ask that you ensure you have identified all the possible documents that fall under the scope of my request, and that you conduct a full and thorough review of the Decision to not provide access to the requested documents for the reasons given below.

**1. IDENTIFICATON OF DOCUMENTS WITHIN THE SCOPE OF THE REQUEST**

In the first instance we ask that the Commission review the list of documents identified as falling under the scope of this scope of the request.

**1.1 Country Chapters in their latest versions**

We kindly ask that the Commission confirm that the versions of the Country chapters presented at the 28 June 2016 meeting are indeed the latest versions and that no work was done on them between that date and the 16 December 2016, when decision not to proceed with the publication of the Anti-Corruption Report was taken.

In this regard we note that during the 4 May 2017 LIBE committee hearing, on the follow-up to the anticorruption reports, a representative of DG HOME, Mr Olivier Onidi, stated that “we definitely have a lot of material that we continue working on and I am sure that we will find a way with the Committee to make this available because we have no interest to hide this, on the contrary.” Mr Onidi’s statement indicates that there is more material available that that which you have identified with respect to this request. [1]

**1.2 Correspondence with Member States**

In our request we asked for “Communications between the Commission and Member States relating to forthcoming report and the decision not to make it public. We are particularly interested in any documents and communications received from Member States during the period since the first report was published in 2014 to date, in which the government representatives either object to or express an opinion in favour of finalising and publishing the reports.”

The Commission fairly summarises this as being a request for “*any written communication between the Commission and Member States relating to the follow-up of the 2014 anti-corruption report in particular as regards the decision not to publish a second edition*” but then narrows this by stating that “*your request focuses on the decision of the Commission to publish further editions of the Anti-Corruption Report and the related communications with Member states on that aspect. The Commission has identified one report related to a meeting held on 06/02/2015 with the National Contact Points on corruption [Ares(2015)799245] and one letter to National Contact Points on corruption dated 03/02/2017 [Ares(2017)617150]. No further relevant communication with Member states has been identified*.”

We wish through this Confirmatory Application to verify the following:

* That no other communications were received from Member States between 2014 to the date of submitting the request that related to the first or second Anti-Corruption Reports
* That there were no communications from Member States (such as from National Contact Points) after the decision was reached not to publish the Report, in particular but not limited to communications of any form in response to the 3 February 2017 letter up to the point of submitting our request on 2 March 2017.

We ask that the Commission conduct a thorough search of correspondence with member states to ensure that it has definitely considered all possible documents containing the information requested.

**2. EXCEPTIONS APPLIED INCORRECTLY AND OVERLY-BROADLY**

We argue below that the Commission has failed to appropriately apply the exceptions to access as stipulated in Regulation 1049/2001, particularly relating to the protection of the decision making process.

It should be stated at the outset that, in accordance with recital 11 of Regulation 1049/2001, the general principle is that “*all documents of the institutions should be accessible to the public*.”

It has been established by the Court of Justice that the burden to provide reasons for any decision based on the exceptions of Article 4 of the Regulation falls upon the institution. If an institution decides to deny full access to a document, it must explain two things:

“first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned”

**2.1 Commission’s First Ground for Refusal: (a) Some of the documents to which you have requested access contain personal data.**

The Commission has redacted from partially released documents 1, 3, 4 and 5 what it considers to be personal data as per Regulation (EC) No 45/2001.

It has done so arguing that the necessity of disclosing the aforementioned personal data has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

We hereby assert that whenever members of the European public request documents relating to the decision-making process and the activities of the Commission, the disclosure of the names of any Commission officials responsible for and/or intrinsically engaged in those decision-making processes should be provided to the public as there is an evident public interest in knowing who is responsible for developing and taking decisions by EU bodies.

It also cannot be assumed that disclosure of such names *would* prejudice the legitimate privacy-related rights of these persons (in other words: it is wrong to argue that you cannot assume that disclosure would not prejudice their legitimate rights) as, whilst these names can strictly be considered to be personal data, they relate solely to their professional activities and are, in many cases, already in the public domain and hence there can be no possibility of further damage being caused by the release of these names.

Furthermore, when it comes to the names of other participants in relevant meetings such as representatives of Member States (the national contact points on corruption and similar) and representatives of interest groups, these should be considered as data subject to being released for the same reasons as they are persons involved in taking and/or influencing the taking of decisions and hence the public has a strong right to know who has been engaged in this process both for reasons of scrutiny by the citizens of Member States of their representatives as well as for reasons of the broader scrutiny of all EU citizens and residents of the persons involved in EU processes which, in due course, affect their lives (in this particular instance in relation to the fight against corruption, as corruption has negative ramifications for all European economies and hence for all citizens). To the extent that the Commission failed to inform the participants in the meeting in advance that their names would be subject to possible release, the Commission should have contacted each individual once this request was received and cleared with them the release of their names.

We also note that there is information that has been redacted from documents 1 and 5 which is the work telephone numbers of William Sleath and Matthias Ruete respectively. Such information cannot be considered to be personal data and hence has been redacted without any justification having been provided. Furthermore, the data is publicly available online in the Whoiswho directory and thus the redaction is nonsensical. Even more contradictory in this regard is the denial of the contact information of Matthias Ruete where the very decision letter from the Commission in regard to this case is also on his headed notepaper and contains his contact information. We therefore ask that when new versions of the requested document are released pursuant to this confirmatory application, this data not be redacted.

**2.2 Commission’s second ground for refusal: (b) Some of the documents to which you have requested access contain elements that refer to matters where the decision has not been taken by the Institution.**

We argue that the Commission has failed to properly apply the first subparagraph of Article 4(3) of the Regulation, and should therefore disclose the documents that fall under the scope of our request in full.

Article 4(3) can only serve as a basis for refusing access to documents in rather exceptional circumstances. The Court of Justice has confirmed that in case an institution relies on Article 4(3) it cannot merely assert that there is a risk that the decision-making process will be seriously undermined. It is incumbent upon the institution refusing access to show that there is an actual “risk that one of the protected interests might be undermined”. That “*risk must be reasonably foreseeable and must not be purely hypothetical.*[2]

Furthermore, in demonstrating this risk it is incumbent on the Commission to support its refusal by “*detailed evidence*, having regard to the *actual content* of the [requested document(s)]”. [3] This obligation applies irrespective of whether the decision-making process has already been closed or not.[4]

In case an institution relies on Article 4(3) second subparagraph because an administrative procedure has already been closed, an institution refusing access must specifically explain and demonstrate why disclosure of the requested documents would still seriously undermine the decision-making process. The burden of proof is under Article 4(3) second paragraph accordingly stricter.

*With regard to the Category 1 Documents*

We understand that the six Category 1 documents contain near-completed country reports and possibly also the horizontal chapters of what would have become the Anti-Corruption Report. As the Commission itself notes, these “draft country analyses were prepared as part of the follow-up to the 2014 EU Anti-Corruption Report” and it goes on to state that “the first report was useful in providing an analytical overview and creating a basis for further work … .” Hence it can be assumed that these documents also contain an analytical overview and that, given that they were being prepared with the explicit aim of publication, it his highly unlikely that they contain “opinions” or “views” which the authors would not have expressed if they knew that the reports would become public.

Furthermore, the mere fact that the Commission might use these documents as part of future anti-corruption activities, is not sufficient to justify withholding them from release pursuant to our access to documents request. In particular, it is inconceivable that the reports in their entirety contain information that would harm a future decision-making process and, in any case, the Commission has failed to identify precisely which decision-making process could be harmed as a result of the publication of these documents and how such harm would be likely to come about.

Furthermore, as we argue below, to the extent that some minor part of these documents contain opinions, we argue below that there is an overriding public interest in the disclosure of these documents.

*With regard to Document 2*, we note that this contains analysis of the context, some of which has been redacted. It also contains a series of policy options as to the way forward. It is clear that the document was prepared as part of the process leading up to the decision not to proceed with the anti-corruption reports, and hence relates directly and specifically to a decision which has been taken rather than to future decisions.

In the context of a fundamental right of access to documents contained in the TFEU (in particular post the 2009 Lisbon Treaty, which is posterior to the 2001 access to documents regulation), along with its requirement that EU bodies “shall conduct their work as openly as possible”, the decision making exception should only be applied in very limited circumstances and there is a strong requirement in the settled case-law of the Court (as noted above) on the Commission to demonstrate actual harm to specific decision-making processes. This it has failed to do, rather arguing only in general and hypothetical terms that disclosure would have a negative impact on other, future and as yet unwritten documents, and their authors “to the point when they might be led to practice self-censorship” and hence “would curtail the space to think” and therefore “impair the quality of the decision making process.” Such vague allusions to a possible chilling effect of transparency fall far below the clear tests of evidence established by the European Court of Justice, flout the requirements for open decision making in the treaties, and run roughshod over the recognised benefits of transparency as captured in the preamble of Regulation 1049/2001.

Furthermore, it is hard to see how the various concrete policy alternatives put forward in this case (Document 2, Page 3) either constitute “opinion” or “views” – rather they are options for action – and in any case they relate to a decision that has already been taken and hence cannot harm future decision-making processes. In this regard the Commission has failed to provide specific argument for withholding these policy options.

*With regard to Document 3*, we note that the Commission has failed to indicate which parts of the document and which proportion of the redactions are exempted under the second ground for refusal (protection of decision making) and which under the third ground (documents outside the scope of the request; dealt with below). We respectfully ask that this be made clear.

To the extent that some of the redacted information in the document has been withheld on the grounds of protecting decision making, the same arguments as those for Document 2 apply, as well as the public interest arguments developed below.

**2.3 Commission’s Third Ground for refusal: (c) Some of the documents to which you have requested access contain aspects that are beyond the scope of your request.**

Parts of Document 3 have been blacked out because, the Commission asserts, they are beyond the scope of the request.

Reading the parts of the document that are available, it seems that such information relates to the fight against corruption and the measures in place to facilitate this and, in that sense, they are pertinent to the request and should either be excluded based on one of the exceptions in Regulation 1049/2001 or released.

Furthermore, Regulation 1049/2001 applies to access to documents containing relevant information. Article 4.6 provides that: “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.” Hence any document relating to my request shall be released in full unless specific exceptions apply, given that in principle all documents can be presumed to be in the public domain unless exceptions apply. There is no provision in Regulation 1049/2001 that allows the Commission to redact information “that does not fall under the scope of the request” and in this respect the Commission has withheld information without justification or proper reasoning and should now release the remainder of Document 3.

**2.4 Failure to provide grounds for redaction of Member State names from Document 4**

The Commission has redacted from partially released Document 4 what appear to be the names of Member States, whilst failing to indicate in its decision that this has been done and without invoking an exception permitted by Regulation 1049/2001 and hence failing to provide reasons for this redaction as required by Transparency Regulation and by the well-established case law of the European Court of Justice.

In its reply to the original request, the Commission argues that Article 4(1)b on the protection of personal data applies to Document 4, although it is not possible to apply this exception to the identification of Member States opinions or proposals as this cannot be considered personal data.

In its argumentation with respect to application of Article 4(3) on protection of decision making to documents in Category 3, which includes Document 4, but in this case the Commission in its argumentation fails to refer to the redaction of the country names, only referring to commission agents and officials. Furthermore, the Commission’s second ground for refusal is related to protection of future decisions whereas Document 4, which dates from February 2015, clearly and specifically relates to the process of developing the anti-corruption reports and contains concrete reflections upon that particular process. Releasing the names of the Member States would not be likely to harm other, unidentified and hypothetical future processes, and in any case the Commission has failed to identify and specify that harm.

Should the Commission try to identify an exception in order to provide reasons for the redacted information contained in Document 4, it has failed to consider the Court of Justice of the EU’s Case law where access to the positions of Member States is established to be acceptable and necessary for the purposes of holding governments to account and for the public to follow the proposals of member states, regardless of whether these may change or not during a decision making process.

The Court was explicit in its assessment that, “Regulation No 1049/2001 aims to ensure public access to the entire content of [EU institution] documents, including, in this case, the identity of those who put forward the proposals, and full access to those documents may be limited only on the basis of the exceptions to that right laid down in that regulation, which must, for their part, be based on a genuine risk that the interest which they protect might be undermined.” [C-280/11, 17 October 2013, *Council v Access Info Europe*, ECLI:EULC:2013:671]

Should the Commission establish that Article 4 of Regulation 1049/2001 applies, it has failed to explain which protected interest would be undermined and failed to provide an explanation of a genuine risk that might undermine the interest. It has also failed to establish that this would be foreseeable, and not purely hypothetical.

It has also failed to take into consideration the clear public interest in permitting members of the public to be able to hold Member States to account.

The Commission should therefore release Document 4, in full, including the names of member states contained in this document.

**3. FAILURE TO IDENTIFY THE OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Finally, the Commission has also failed to identify the overriding public interest in disclosure. Specifically, the Commission only stated, with the utmost brevity, that, “we are of the opinion that no such overriding interest is present that would justify disclosure.”

We have already argued that the application of Article 4.3 in this case is speculative, hypothetical and not foreseeable and that it is not reasonable to assume that access to current versions of anticorruption reports or communications about the decision to cancel publication of final versions of these reports would cause a generalised chilling effect on future discussions about anticorruption, the process of producing these reports, or other decision making processes.

Here we argue that the public interest in this information is particularly strong.

Anticorruption efforts are an issue of deep public interest, due to the fact that corruption directly impacts the public, either via the stealing of public funds for private enrichment, the illicit capture of policy making and legislation by private interests, or including the negative effect on fundamental human rights. The very nature of corruption is harmful to the public interest and so there is a clear overriding interest in knowing what is being done to tackle it.

They are an issue of particular pertinence at the present time. As EU officials themselves note in Document 2, Page 2-3: “*2016 is a year of increased societal, political and media attention to integrity issues. At the international level, OECD, UNODC and the Council of Europe, but also G7 and G20 continue efforts on countering corruption. The EU and other regional and international organisations as well as individual Member States and other countries made a series of high level commitments at the London Anti-Corruption Summit in May. The Panama Papers prompted initiatives to enhance the legal framework for transparency. At the EU level, the European Parliament, Ombudsman, EESC, and Court of Auditors have kept anti-corruption high on the agenda. Member States themselves have undertaken key reforms …* .”

Furthermore, as Document 2 states on Page 2: “*Anti-corruption is also a key component of the programming of EU funding, including the European Structural and Investment Funds, to help build institutional capacity and modernise public administration in the Member States.*”

The importance of these particular reports – and hence by logical extension in the decision not to publish them – is also highlighted by Commission officials in Document 2, Page 1: “*Many Member States, international organisations such as GRECO, UNODC and OECD and civil society organisations, including Transparency International have also inquired about the next report.*”

We further note that the fourteen (14) organizations which jointly submitted this request are all organisations working on corruption in our respective countries and across Europe, and hence have a particular interest in obtaining the information in order to advance the public good of reducing corruption and promoting probity, integrity and good government.

Hence, even if the Commission were to establish that, for at least some minor parts of these documents, Article 4(3) were to apply, we hereby assert that in this instance there is a strong and overriding public interest in disclosure of the documents.

There are also specific arguments in favour of the disclosure of the documents that you have identified:

*Category 1 Documents*

We have argued that the six Category 1 documents cannot possibly, in their entirety, contain information that would harm putative future decision-making processes.

Even to the extent that some parts of these documents may be deemed to be in some way “sensitive” in their evaluation with Member States (something which is likely as the reports were nearing completion in June 2016 and were designed for publication), we argue that there is an overriding public interest in their disclosure.

The reports contain information on the extent to which Member States are progressing or failing to progress on the fight against corruption. In the context (as well described by the Commission and cited above) of a widespread recognition of the importance of the fight against corruption, to the extent that the Commission holds information on what is being done by Member States, it is incumbent on it to make this information public as this is essential to enabling fully informed public debate on the measures undertaken by national public officials, the implementation of these measures, and professional judgement on those measures via such studies carried out by the European Union institutions.

Access to the information would ensure public debate is carried out using a comprehensive compilation of facts and comparative information – data and evidence compiled with European taxpayers’ money – rather than simply through selective evidence or high profile corruption scandals that maybe do to actually represent adequately the most important blackspots in anticorruption efforts.

*Documents in Categories 2 and 3*

There is a strong public interest in being able to hold to any decisions taken by European officials, as noted above and as supported both by the treaties of the EU and by the jurisprudence of the Court.

When those decisions related to matters of public importance, such as the fight against corruption, the public interest has even greater weight when put into the balance with any possible harm to the decision-making process.

In this case a decision was taken not to publish information which would have contributed directly to public understanding of the phenomenon of corruption in Member States as well as evaluations of progress – or lack of progress – in combatting it. It is imperative that the public is able to understand the arguments, logic and reasoning underlying the decision not to publish these reports, in the form that these arguments were presented to the relevant officials at the time that the decision was taken. This is the only way that to ensure proper public scrutiny of this decision.

We note that the European Parliament had a hearing at which this question was raised. During that hearing the Commission offered to provide more documents – either to MEPs or to the public, it is not entirely clear, but as Mr Onidi stated “we have nothing to hide”. Be that as it may, it does not obviate the obligation on the Commission to provide this information to those who have requested it directly.

We therefore conclude that a strong and overriding public interest exists and that these documents should be released in full.

Yours faithfully,
Helen Darbishire, Access Info Europe (Spain/EU)

For and on behalf of:
Sandor Lederer, K-Monitor (Hungary)
Krzysztof Izdebski, ePaństwo Foundation (Poland)
Jelena Berkovic, GONG (Croatia)
Stefanos Loukopoulos, Vouliwatch (Greece)
Arjan El Fassed, Open State Foundation (Netherlands)
Arne Semsrott, Open Knowledge Foundation (Germany)
Mathias Huter, Informationsfreiheit (Austria)
Guido Romero, Diritto di Sapere (Italy)
Gergana Jouleva, Access to Information Programme (Bulgaria)
Elena Calistru, Funky Citizens (Romania)
Carl Dolan, Transparency International EU
Christophe Van Gheluwe, Anticor Belgique (Belgium)
Zuzana Wienk, Fair-play Alliance (Slovakia)

Footnotes

[1] http://www.europarl.europa.eu/ep-live/en/committees/video?event=20170504-0900-COMMITTEE-LIBE

[2] C-280/11, 17 October 2013, Council v Access Info Europe, ECLI:EULC:2013:671, para 54.

[3] Case C-506/08 P, Kingdom of Sweden v Mytravel Group and Commission, ECLI:EU:C:2011:496, para 89 (emphasis added).

[4] Case C-506/08 P, Kingdom of Sweden v Mytravel Group and Commission, ECLI:EU:C:2011:496, paras 81-82..