



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director-General

Brussels,
DG HOME/D3/IS/md

***By registered letter with
acknowledgment of receipt***

Mr Daniel FREUND
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10 rue de l'Industrie
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Subject: Your application for access to documents – Ref GestDem No 2017/3680

Dear Sir,

We refer to your e-mail dated 20/06/2017 in which you make a request for access to documents, registered on 21/06/2017 under the above mentioned reference number.

You request access to documents which contain the following information:

"The European Union has ratified the United Nations Convention against Corruption on 12 Nov 2008. Under the Convention, a review mechanism aimed at assisting countries to meet the objectives of UNCAC through a peer review process has been established. The Implementation Review Mechanism is intended to further enhance the potential of the UNCAC, by providing the means for countries to assess their level of implementation through the use of a comprehensive self-assessment checklist, the identification of potential gaps and the development of action plans to strengthen the implementation of UNCAC domestically.

I would hereby like to request all documents relative to the European Commission filling out self-assessment checklists or any other document detailing European Commission activities under UNCAC, particularly since the start of the second review cycle in 2015."

Based on the information you have provided, we have identified a number of 32 documents created or registered in the period between October 2015 when the second UNCAC review cycle was started until the date of your initial application, *i.e.* 21/06/2017. The full list of documents with their reference number is annexed to this letter.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the following conclusions:

- As regards documents: 5, 7, 9, 10, 23, 25 and 26 I am pleased to inform you that they may be partially disclosed. You will find them annexed to the present letter. Some parts of these documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.
- Document 31 can be fully disclosed. You will find it annexed to the present letter.
- As regards documents 1, 2-4, 6, 8, 11-22, 24, 27-30 and 32, I regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Please see below a detailed explanation of the justification of these conclusions:

Protection of personal data

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its 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. This applies to documents 1, 3, 5, 6, 8-10, 12-24, 26-32. The applicable legislation in this field is 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 data¹.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable².

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing documents 1, 5, 10, 23 and 26 expunged from this personal data.

Protection of international relations

According to Article 4(1)(a) of Regulation 1049/2001, access to a document shall be refused where disclosure would undermine the protection of international relations. This exception applies to documents 1-6, 8-9, 11-24, 27-30 and 32, which contain elements related to the European Commission activities in relation to the United Nations Convention against Corruption (UNCAC). This Convention was approved in September 2008 by the former European Community (now replaced by the EU) through Council Decision 2008/801/EC. The Commission is now in the process of assessing the extent of the modifications of the

¹ Official Journal L 8 of 12.1.2001, p. 1.

² Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

Union's competence with regards to all the matters governed by the UNCAC after entry into force of the Lisbon Treaty, as well as legal and institutional implications of this modification of competences. The Commission is also clarifying the exact legal and institutional questions relating to the review mechanism under this Convention, given that the EU is a unique regional economic integration organisation, and as such this raises specific and complex legal and institutional questions. Disclosure of these aspects would undermine the position of the EU in relation with other parties to the Convention and its Secretariat and is hence prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Protection of an on-going decision-making process

Pursuant to the first subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document, drawn up by an institution for internal use or received by an institution, which relates 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, unless there is an overriding public interest in disclosure. Furthermore, according to the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. This applies to documents 2, 4, 6-30 and 32.

The disclosure of this highly preliminary analysis would call into question the freedom of its authors to express their views and opinions. In case of granting access, assessments of those authors would be disclosed to the public, even though it had been their intention to put forward their views only to their addressees. The work of analysis, reflection and criticism was, at that stage, carried out for internal purposes and was not intended to be brought to the attention of the public, because it was designed to be submitted for internal discussions.

The situation is similar to those in the Case T-403/05, *MyTravel Group plc.*, where the European Court of Justice accepted arguments similar to the following ones. Disclosure of the documents in this case would carry the risk not only that the possibly critical opinions of Commission officials might be made public, but also that the content of the draft reports could be compared with the decisions ultimately taken on those points by the Commission and, accordingly, that that institution's internal discussions would be disclosed.

That would risk seriously undermining the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties. Furthermore, if the internal exchanges of views were to be disclosed, it would mean that the authors would take that risk of disclosure into account in the future, to the point when they might be led to practice self-censorship. The authors may cease putting forward any views that might involve the addressee of the report being exposed to risk. The result would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions.

To sum up, documents falling under the above categories reflect internal opinions, necessary for the Commission to decide freely and adopt the relevant documents. The access to them would curtail the space to think, i.e. the possibility of Commission staff to

freely submit uncensored advice. In this manner, public access to such documents would impair the quality of the decision-making process.

Protection of legal advice.

Finally, pursuant to Article 4(2) of Regulation No 1049/2001, access to a document shall be refused if disclosure would undermine the protection of legal advice, unless there is an overriding public interest in disclosure. This applies to documents 2, 4, 6, 14 and 32, which contain legal advice on aspects related to the EU participation in UNCAC.

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. The Commission has examined whether there could be an overriding public interest in disclosure. For the same reasons as explained above, I am of the opinion that no such overriding interest is present that would justify disclosure.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Matthias RUETE

[e-signed by delegation by
Simon MORDUE]

Enclosures:

1. List of documents identified
2. Documents 5, 7, 9, 10, 23, 25 and 26 (partly released)

3. Document 31 (fully released)