



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Director-General

Brussels, 19th December 2018

Subject: Your application for access to documents – Ref GestDem No 2018/5450

Dear Ms Przywara,

I refer to your e-mail dated 18 October 2018¹ in which you make a request for:

"all documents generated or received by the Commission concerning implementation of the Commission Implementing Decision of 20.7.2016 on the Annual Action Programme 2016 in favour of the Republic of Belarus to be financed from the general budget of the European Union, Annex II Action Document for Helping Belarus Address the Phenomenon of Increasing Numbers of Irregular Migrants.

I request access particularly to the documents concerning:

Under component 1 Policy development, strengthening of legal, institutional and operational capacities

- policy-related and legal advice on the review of relevant legislation and the elaboration of an irregular migration management strategy and its implementation provided to the Belarussian part;*
- trainings on identification of migrants' identity and trainings for services involved in processing readmission applications provided to the Belarussian part;*
- development of gender-sensitive standard operating procedures for the management of Migrants Accommodation Centres;*

¹ Ref. Ares(2018)5351270

By registered letter
Ms. Danuta Przywara
Zgoda 11 00-018
Warsaw
Poland

Advanced copy by email:
ask+request-6022-80058ad9@asktheeu.org

- *Under component 2: Establishment of an Assisted Voluntary Return and Reintegration (AVRR) system for irregular migrants;*
- *support in legislative and policy development, as well as training provided to Belarusian law enforcement agencies staff (including number of policy dialogue meetings held);*
- *number of migrants supported under the AVRR Programme and what kind of support was provided to them;*
- *Under component 3: Establishment of Migrants Accommodation Centres (MAC) in line with best EU and international standards;*
- *study visits for senior officials (policy makers) and technical experts to several EU / non-EU countries where MACs already exist;*
- *number of MACs established or developments on establishing MACs (including location);*
- *assessment study on number of MACs, their location, conditions and needs.*

I request also documents concerning:

- *financing agreement with the partner country, referred to in Article 184(2)(b) of Regulation (EU, Euratom) No 966/2012 which was concluded to implement above mentioned actions;*
- *Mid-term evaluation carried out for this action or its components;*
- *Frontex bilateral working arrangements on the establishment of operational cooperation with the SBC."*

The following documents have been identified as falling under the description provided in your application:

- the Financing Agreement signed between the European Commission and the Government of the Republic of Belarus: Special conditions, Annex I Technical and Administrative Provisions and Annex II General conditions;
- Working Arrangement on the establishment of Operational Cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the State Border Committee of the Republic of Belarus;
- Delegation Agreement between the European Union and the International Organisation for Migration, together with its seven annexes.

With regard to documents related to implementation, please note that the contract between the European Union and the International Organisation for Migration was signed in late 2017. Registration by Belarus authorities at the ministerial level was completed only in August 2018, after which the project implementation has officially

started. The official opening ceremony took place on 23 October 2018 in Minsk (attended by representatives of the Ministry of Interior, the State Border Committee, the European Union, the International Organisation for Migration, the office of the United Nations High Commissioner for Refugees, the Belarus Red Cross Society, the Belarusian Movement of Medical Workers, diplomatic missions and journalists). The project has therefore not produced yet any concrete outputs in any of the components, nor any mid-term evaluation.

Following an examination of the documents identified under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents² and taking into account the opinion of the third parties, pursuant to Article 4(4) of Regulation (EC) No 1049/2001, I am in the position to grant:

- Full access to the Financing Agreement and its two annexes, the Working Arrangement between Frontex and the State Border Committee of the Republic of Belarus, Annexes II, V, VI and VII of the Delegation Agreement between the European Union and the International Organisation for Migration;
- Partial access to Annex I of the Delegation Agreement between the European Union and the International Organisation for Migration, as full disclosure is prevented by the exception to the right of access laid down in Article 4(1)(a) third indent (protection of the public interest as regards international relations) and Article 4(1)b (protection of the privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

On the other side, I regret to inform you that access to the Special conditions of the Delegation Agreement between the European Union and the International Organisation for Migration and its Annexes III and IV cannot be granted, as disclosure is prevented by the exceptions to the right of access laid down in Article 4(1)(a), third indent, (protection of the public interest as regards international relations), Article 4(1)b (protection of the privacy and integrity of the individual) and Article 4(2), first indent, (the protection of commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

1. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 provides that “*The institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations*”.

With regards to Article 4(1)(a) of Regulation (EC) No 1049/2001, the Court of Justice has acknowledged in Case C-350/12 P³ that the institutions enjoy “*a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest.*”

First, the co-authors of the documents have objected to the disclosure of these documents, which contain confidential information.

² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145 of 31 May 2001, p. 43.

³ Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, Case C-350/12 P, paragraph 63.

Please note that the Special Conditions of the Delegation Agreement contain articles related to the terms negotiated between the International Organisation for Migration and the Delegation of the European Union to the Republic of Belarus with regard to the services provided to migrants.

Annex I of the Delegation Agreement cannot be shared in its entirety, given the sensitivity of the information contained, related to the context of the action, specific assistance and locus of operations of activities, international relations and political notes.

The Commission considers that public disclosure of the above mentioned documents would expose its diplomatic relations with the International Organisation for Migration. In order to ensure the effective implementation of the object of the agreement which was signed, it is essential to foster an atmosphere of mutual trust and confidence between the two parties.

Therefore, full public disclosure of these documents would undermine the protection of public interest as regards international relations protected by Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, and access has to be refused on that basis.

2. Protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that *“access to documents is refused where disclosure would undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”*.

In Case C-28/08P⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001⁵ becomes fully applicable. Article 2(a) of Regulation (EC) No 45/2001 provides that *“personal data” shall mean any information relating to an identified or identifiable person [...]*. As the Court of Justice confirmed in Case C-465/00⁶, *“there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life”*.

The documents partially disclosed and withheld contain the names of Commission officials and representatives of the International Organisation for Migration not forming part of senior management as well as the hand-written signatures of these persons. This information clearly constitutes personal data in the sense of Article 2(a) of Regulation (EC) No 45/2001.

⁴ Judgment of the Court of Justice of 29 June 2010, European Commission v. the Bavarian Lager, Case C-28/08P, paragraph 59.

⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 8 December 2000 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data, Official Journal L8 of 12 January 2001, p.1. Please note that Regulation (EC) No 45/2001 will be repealed on 11 December 2018. 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, published in the Official Journal L295 of 21 November 2018 p. 39, will enter into force on 11 December 2018. Regulation (EU) 2018/1725 will not introduce changes to the content of this letter.

⁶ Judgment of the Court of Justice of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between Rechnungshof and Österreichischer Rundfunk, paragraph 73.

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.

I 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, I am disclosing a version of the documents requested in which these personal data have been redacted.

3. Protection of commercial interests of a natural or legal person, including intellectual property

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides that "*The 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*".

According to the Court of First Instance in Case T-380/04, this can be the case for a contract which "*is likely to contain confidential information concerning the contracting companies and their business relations*".⁷

Annex III of the Delegation Agreement includes confidential and commercially sensitive information. The disclosure of this information could jeopardize the International Organisation for Migration's advantages in terms of cost-effectiveness and efficiency over other entities which are implementing or aim to implement similar projects worldwide.

Annex IV of the Delegation Agreement which represents the financial identification form contains sensitive financial information pertaining to the International Organisation for Migration bank details.

The exception of Article 4(2), first indent, of Regulation (EC) No 1049/2001 has to be read also in light of Article 339 of the Treaty on the Functioning of the European Union, which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

It follows that disclosure of this information would prejudice the commercial interests of the International Organisation for Migration and that the documents withheld fall within the exception provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

4. No overriding public interest in disclosure

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exceptions to the right of access defined therein must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest first has to be public and, secondly, overriding, i.e. in this case it must outweigh the commercial interests of a natural or legal person protected under Article 4(2), first indent, of Regulation (EC) No 1049/2001.

⁷ Judgment of the Court of First Instance (Third Chamber) of 30 January 2008 in Case T-380/04, Terezakis v Commission, paragraph 57, 93.

In your request, you do not put forward any arguments demonstrating the existence of an overriding public interest in disclosure. Similarly, the Commission has not identified any public interest that would override the interests protected by Article 4(2), first indent, of Regulation (EC) No 1049/2001.

Moreover, I consider that the public interest in providing information concerning this matter is satisfied through wide access to the nine documents which are disclosed.

5. Partial Access

I have considered whether partial access could be granted to the documents requested and currently withheld but this was deemed impossible as the sensitive elements are integral to them. Please note that I cannot provide you with more detailed information on these documents without disclosing their substance which is protected by the quoted exceptions laid down in Article 4 of Regulation (EC) No 1049/2001.

6. Means of Redress

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review its position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG.C.1
BERL 5/282
B-1049 Bruxelles/Brussel

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

Yours sincerely,

(e-signed)

Christian Danielsson

Encl./ 9 documents (sent by e-mail only)