



EUROPEAN COMMISSION

Brussels, 31.7.2019  
C(2019) 5884 final

Ms Giulia Crescini  
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Italy

**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 2018/6744**

Dear Ms Crescini,

I refer to your letter of 22 February 2019, registered on 25 February 2019, in which you submit 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> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 7 December 2018, addressed to the Directorate-General for Neighbourhood and Enlargement Negotiations, you requested access to 'documents which contain the [...] information concerning the activities that are being implemented by the International Organisation for Migration (hereafter 'IOM') within the project "Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya", which is funded through the EU Trust Fund'. In particular, you requested access to documents including the following information:

- number of individuals assisted through the project;

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

- details on sex, age, movements and multi-sectoral needs of vulnerable migrants assisted;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding confidentiality (i.e. whether and how is the obligation to hide sensible data respected);
- number of interventions carried out throughout the implementation of the project;
- number of monitoring reports drafted;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding the repatriation procedure from Libya to other countries, including the assessment of the voluntary nature of the repatriation (e.g. whether the information regarding the repatriation procedure are provided in any language that each beneficiary can understand; whether interpreters and/or mediators participate in the assessment; whether the will to participate in the procedure is expressed in written form; etc.);
- number of individuals repatriated;
- statistics on the countries where individuals have been repatriated to;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding concrete safeguards in case of repatriation of unaccompanied minors (UAMs) or migrants with special medical needs;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding pre-departure counselling interviews;
- details on fit-to-travel checks;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding the involvement of the International Organisation for Migration in the issuance and/or replacement of missing, lost or expired travel documents;
- text of any agreements concluded by the International Organisation for Migration with countries of destination of the repatriation procedure;
- text of any protocols concluded by the International Organisation for Migration with countries of destination of the repatriation procedure;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding their activities within the migrant's country of origin, including its involvement in facilitating onward transportation to the final destination;

- text of the Convention concluded by the European Commission with the International Organisation for Migration;
- text of any Protocols additional to the Convention concluded by the European Commission with the International Organisation for Migration.

The European Commission identified the following two documents as falling under the scope of your request:

- 5th Quarterly report to the European Union, EU-IOM Joint Initiative on Migrant Protection and Reintegration: Libya, EU Emergency Trust Fund for Africa – North Africa window, 1 May 2018 – 31 July 2018, Ares(2019)2656440 (hereafter 'document 1');
- PowerPoint presentation: Protecting vulnerable migrants and stabilising communities in Libya, EUTF-IOM Joint initiative for migrants' protection and reintegration, Ares(2019)2656440 (hereafter 'document 2').

In its initial reply of 05 February 2019, the Directorate-General for Neighbourhood and Enlargement Negotiations refused access to these documents based on the exception of Article 4(1)(a), first indent (protection of the public interest as regards public security), of Regulation (EC) No 1049/2001.

In its assessment, the Directorate-General for Neighbourhood and Enlargement Negotiations took into account the position of the International Organisation for Migration, consulted in line with the provisions of Article 4(4) and (5) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You reduce the scope of your application by requesting the documents and information on:

- number of individuals assisted through the project;
- details on sex, age, movements and multi-sectoral needs of vulnerable migrants assisted;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding confidentiality (i.e. whether and how is the obligation to hide sensible data respected);
- number of interventions carried out throughout the implementation of the project;
- number of monitoring reports drafted;

- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding the repatriation procedure from Libya to other countries, including the assessment of the voluntary nature of the repatriation (e.g. whether the information regarding the repatriation procedure are provided in any language that each beneficiary can understand; whether interpreters and/or mediators participate in the assessment; whether the will to participate in the procedure is expressed in written form; etc.);
- number of individuals repatriated;
- statistics on the countries where individuals have been repatriated to;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding concrete safeguards in case of repatriation of unaccompanied minors (UAMs) or migrants with special medical needs;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding pre-departure counselling interviews;
- details on fit-to-travel checks;
- guidelines, implementation plans or documents of the International Organisation for Migration (however named or referred to) regarding their activities within the migrant's country of origin, including its involvement in facilitating onward transportation to the final destination;

In addition to the document 1 and 2, the European Commission has identified one more document received in the meantime and falling in the scope of your confirmatory application:

- 6<sup>th</sup> Quarterly report to the European Union, EU-IOM Joint Initiative on Migrant Protection and Reintegration: Libya EU Emergency Trust Fund for Africa – North Africa window, 1 August 2018–31 October 2018, Ares(2019)3047080 (hereafter 'document 3').

In other words, the scope of your confirmatory application covers documents 1, 2 and 3.

## **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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that partial access is granted to documents 1, 2 and 3. The withheld parts of the documents 1, 2 and 3 are redacted based on the exceptions provided for in Article 4(1)(a), first indent and Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of, respectively, the public interest as regards public security and privacy and the integrity of individual), for the reasons set out below.

## **2.1. Consultation of the International Organisation for Migration**

The documents 1, 2 and 3 originate from the International Organisation for Migration. According to Article 4(4) of Regulation (EC) No 1049/2001, ‘as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed’.

Under the provision of Article 4(4) of Regulation (EC) No 1049/2001 and taking into account the arguments put forward in your confirmatory application, a renewed third-party consultation of the International Organisation for Migration was initiated by the Secretariat-General at confirmatory stage. The International Organisation for Migration agreed to full disclosure of document 2 and partial disclosure of documents 1 and 3 based on the exception of Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001.

The International Organisation for Migration indicated that full disclosure of the documents 1 and 3 would undermine the public interest as regards public security. It underlined that considering the highly volatile, unstable and insecure context in which this EU-funded Action in Libya is being implemented, the disclosure of sensitive information contained in document 1 and 3 could put their staff and contractors at risk, impede future access to the final beneficiaries of the Action as well as impact the trustworthy relationship with the Libyan national and local authorities established over the past years.

In addition, documents 1 and 3 include information on the locations of activities implemented by the International Organisation for Migration staff, implementing partners and contractors as well as the whereabouts of the reached target groups, comprising primarily vulnerable migrants such as unaccompanied minors, returnees and internally displaced people. The two documents contain exact locations of internally displaced people, host families, ‘safe shelters’ and centres where assistance to beneficiaries is provided.

These two documents also contains detailed information on the strategy and plans for future activities of the International Organisation for Migration, which involve emergency services and direct protection assistance in identified areas of intervention. Releasing this information could undermine operationalization of these envisaged activities in Libya.

Furthermore, according to the International Organisation for Migration, documents 1 and 3 contain information on their partners, including NGOs, and their responsibilities in this project. The release of this information could pose risks (including considerable security risks) as they could be targeted for their involvement in the project. It could damage the ability of the International Organisation for Migration to work in Libya but also prejudice the relations between the International Organisation for Migration with other governments mentioned in the two reports.

Finally, the International Organisation for Migration pointed out that the information contained in documents 1 and 3 illustrate the internal policies, guidelines and standards of procedures regarding hiring staff, selecting implementing partners and procuring, which are confidential in nature. They contain information on the assessment of suitability of partners to work alongside the International Organisation for Migration in this project. The release of this information could damage future relationships of the International Organisation for Migration with those partners that were not selected.

## **2.2. European Commission's assessment**

I have carried out an assessment at first sight of the reply provided by the International Organisation for Migration and have come to the conclusion that their arguments justify at first view the non-disclosure of parts of the documents 1 and 3 on the basis of the exception provided for in Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001. In addition, I have concluded that certain parts of the documents 1, 2 and 3 need to be withheld on the basis of the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of individual).

The reasons are set out below.

### *2.2.1. Protection of the public interest as regards public security*

Article 4(1)(a), 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 the public interest as regards public security’.

In its recent judgment in Case *Pagkyprios Organismos Ageladotrofon v Commission*, the General Court clarified that ‘before refusing access to a document originating from a Member State, the institution concerned must examine whether that Member State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Consequently, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in the decision it makes at the end of the procedure’.<sup>3</sup>

The General Court clarified in this judgment that the institution ‘must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access provided for in Article 4(1) to (3) of the regulation applies’.<sup>4</sup>

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<sup>3</sup> Judgment of the General Court of 8 February 2018, *Pagkyprios Organismos Ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 55.

<sup>4</sup> *Pagkyprios Organismos Ageladotrofon v Commission* judgment quoted above, paragraph 56.

The General Court also clarified that ‘the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the Member State’s decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001.[...] The institution must, however, check whether the explanations given by the Member State appear to it, *prima facie*, to be well founded’.<sup>5</sup>

Furthermore, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, the General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions 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>6</sup>

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’.<sup>7</sup>

In this context, it is important to mention that when (partial) access is given to documents as a result of an application submitted under Regulation (EC) No 1049/2001, this access is automatically granted to the public at large, and not only to the applicant concerned. Taking into account the highly volatile and complex situation in Libya at the moment, this fact is of particular importance. A recent airstrike on Tajoura detention centre in Libya killed at least 44 migrants and injured more than 130 others, including some registered with Voluntary Humanitarian Return programme managed by the International Organization for Migration.

Documents 1 and 3 contain concrete information whose disclosure would put at risk not only the International Organisation for Migration staff, partners and contractors but also the project target groups, consisting mostly of vulnerable migrants such as unaccompanied minors, returnees and internally displaced people. The two documents include concrete information on the location of activities implemented by the International Organisation for Migration staff, implementing partners and contractors as well as the whereabouts of the reached target groups, locations of internally displaced

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<sup>5</sup> Idem, paragraph 57.

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

<sup>7</sup> Judgment of the General Court of 11 July 2018, *Client Earth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

people, host families and ‘safe shelters’. Likewise, the disclosure of the figures from certain tables in the two documents could lead to the identification of the beneficiaries or to targeted attacks.

The full disclosure of documents 1 and 3 would put in the public domain detailed information that could put a number of stakeholders at risk and thereby undermine public security. The two documents requested contain information on the partners of the International Organisation for Migration and their responsibilities in the projects. They also contain information that, if revealed, could impede future access to the final beneficiaries of the activities run by the International Organization for Migration. This would undermine the strategy for future activities, which involve emergency services and direct protection assistance in identified areas of intervention. Finally, the disclosure of certain parts of the two documents would harm the trustworthy relationship with the Libyan national and local authorities and certain governments.

Having regard to the above, I conclude that there is a reasonably foreseeable and non-hypothetical risk that full disclosure of documents 1 and 3 would undermine the protection of the public interest as regards public security. Therefore, I consider that the use of the exception under Article 4(1)(a), first indent of Regulation (EC) No 1049/2001 (protection of the public interest as regards public security) is justified, and that access to certain parts of the documents in question must be refused on that basis.

#### 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>8</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>9</sup> (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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>10</sup> (hereafter ‘Regulation (EU) 2018/1725’).

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<sup>8</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>9</sup> Official Journal L 8 of 12.1.2001, page 1.

<sup>10</sup> Official Journal L 205 of 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.

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>11</sup>

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

The documents 1, 2 and 3 contain personal data such as the names and photos of the migrants and International Organisation for Migration staff, as well as other information that would make them identifiable. Such parts have been redacted based on the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001.

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>12</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, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

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<sup>11</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>12</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.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the personal data 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to those parts of documents 1, 2 and 3 that contain 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.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(1)(a) and (b) of Regulation (EC) No 1049/2001 are absolute exceptions which do not need to be balanced against overriding public interest in disclosure.<sup>13</sup>

### **4. PARTIAL ACCESS**

Partial access is granted to documents 1, 2 and 3. The non-disclosed parts of these documents are protected based on the exceptions provided for in Article 4(1)(a), first indent and Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of, respectively, the public interest as regards public security and privacy and the integrity of individual).

### **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.

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<sup>13</sup> Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 46.

Yours sincerely,

*For the Commission*  
*Martin SELMAYR*  
*Secretary-General*

**CERTIFIED COPY**  
For the Secretary-General,

**Jordi AYET PUIGARNAU**  
Director of the Registry  
**EUROPEAN COMMISSION**

Enclosures: (3)