



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Director-General

Brussels,

By registered letter

Subject: Your application for access to documents

Dear Mr Fachile,

I refer to your application dated 21 March 2019¹, registered under the reference number GestDem 2019/1782², in which you make a request for access to:

- *“In-depth Guidelines on how to carry out the activities generically indicated in the Action Document T05-EUTF-NOA-LY-06;*
- *Any agreement signed between the EU and the project managing partners, which are the International Organisation for Migration (IOM) and UN High Commissioner for Refugees (UNHCR);*
- *Information concerning detailed activities that are being implemented by the IOM and the UNHCR with local partners (like DCIM and Libyan Coast Guard), especially:*
 - *implementation plans and agreements,*
 - *data on beneficiaries reached and estimated to be reached,*
 - *monitoring reports on performed activities*
 - *and a list of actions that have already been planned for the future;*

¹ Ref. Ares(2019)1951306

² Ref. Ares(2019)1951756

Mr. Salvatore Fachile
Piazza Giuseppe Mazzini no 8
00195 Rome
Italy

Advance copy by email:
ask request-6664-4e89bf48@asktheeu.org

- *Minutes of the meetings of the Operational Committee, as the body responsible for reviewing and approving the actions financed by the EUTF, and evaluating reports of the impact of this project on migrants and refugees human rights in Libya;*
- *Financial reports detailing the expenditure items of the 29 000 000 Euros budget so far invested in the project.”*

I. Review of requested documents

1. “In-depth Guidelines on how to carry out the activities generically indicated in the Action Document T05-EUTF-NOA-LY-06”

I regret to inform you that DG NEAR does not hold any documents that would correspond to this description. As specified in Article 2(3) of Regulation (EC) No 1049/2001³, the right of access applies only to existing documents in the possession of the institution.

Given that no such guidelines corresponding to the description given in your application are held by DG NEAR, DG NEAR is not in a position to fulfil this part of your request.

2. “Any agreement signed between the EU and the project managing partners, which are the International Organisation for Migration (IOM) and UN High Commissioner for Refugees (UNHCR)”

I regret to inform you that access to contractual documents (of the two Delegation Agreements) cannot be granted, as disclosure is prevented by the exception mentioned in Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001, for the reasons set out below in section II of this letter.

Nevertheless, I am pleased to inform you that wide access, subject to redaction of personal data (in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001), can be granted to the Minutes of the Steering Committee which provide information on the implementation of these programmes by the International Organisation for Migration (hereafter “IOM”) and the Office of the United Nations High Commissioner for Refugees (hereafter “UNHCR”). The justifications related to the redaction of personal data are presented below in section II of this letter.

- Minutes of the 1st Meeting of the Steering Committee, Managing mixed migration flows in Libya through expanding protecting space and supporting local socio-economic development, 18 October 2017;

- Minutes of the 2nd Meeting of the Steering Committee, Managing mixed migration flows in Libya through expanding protecting space and supporting local socio-economic development, 7 December 2018.

3. “Information concerning detailed activities that are being implemented by the IOM and the UNHCR with local partners (like DCIM and Libyan Coast Guard), especially:

³ 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.

- **implementation plans and agreements,**
- **data on beneficiaries reached and estimated to be reached,**
- **monitoring reports on performed activities,**
- **and a list of actions that have already been planned for the future”.**

Under the EU Trust Fund for Africa, the IOM has been providing trainings on a broad range of topics, i.e. human rights, the combatting of human trafficking, first aid, English language and IT skills. Beneficiaries have so far included a wide variety of local government institutions, public service providers and Libyan migration authorities, such as the Libyan Coast Guard, the Directorate for Combatting Illegal Migration, the General Administration for Coastal Security, and the staff of relevant Libyan ministries.

At the same time, the UNHCR has held trainings on long-term solutions and legal avenues for refugees and asylum seekers for relevant Libyan authorities (Ministry of Interior, Ministry of Foreign Affairs and Immigration Department), as well as to local NGOs (including the ones that are working in hard-to-reach areas, such as South and East Libya) on coordination, protection and humanitarian principles.

4. “Minutes of the meetings of the Operational Committee, as the body responsible for reviewing and approving the actions financed by the EUTF, and evaluating reports of the impact of this project on migrants and refugees human rights in Libya”

The following documents have been identified:

- Minutes of the 1st Operational Committee for the North of Africa Window of the EU Emergency Trust Fund for stability and addressing the roots causes of irregular migration and displaced persons in Africa (the EU Emergency Trust Fund), 16 June 2016;
- Minutes of the 2nd Operational Committee for the North of Africa Window of the EU Emergency Trust Fund for stability and addressing the roots causes of irregular migration and displaced persons in Africa (the EU Emergency Trust Fund), 16 December 2016;
- Minutes of the 3rd Operational Committee for the North of Africa Window of the EU Emergency Trust Fund for stability and addressing the roots causes of irregular migration and displaced persons in Africa (the EU Emergency Trust Fund), 23 May 2017;
- Minutes of the 4th Operational Committee for the North of Africa Window of the EU Emergency Trust Fund for stability and addressing the roots causes of irregular migration and displaced persons in Africa (the EU Emergency Trust Fund), 4 December 2017;
- Report – 5th Operational Committee of the EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa (EUTF) North of Africa window, 6 July 2018;
- Report – 6th Operational Committee of the EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa (EUTF) North of Africa window, 13 December 2018.

I am pleased to inform you that wide access is granted to these documents, subject only to redaction of personal data, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, for the justifications mentioned below under section III of this letter.

5. “Financial reports detailing the expenditure items of the 29 000 000 Euros budget so far invested in the project”

I regret to inform you that DG NEAR does not hold any documents that would correspond to this description. As the named programme (UNHCR component) only started on 1 September 2018, to date no financial report has been received.

Given that no such financial report is held by DG NEAR, DG NEAR is not in a position to fulfil this part of your request.

II. 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’.

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’.⁴

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’.⁵

Taking into account the highly volatile and complex situation in Libya at the moment, it is of particular importance to protect the overarching human security objective and the implementation of these programmes which aim at saving human lives. Contractual documents contain concrete information whose disclosure could put at risk not only the IOM and UNHCR staff, partners and contractors but also the project target groups, consisting mostly of vulnerable migrants such as unaccompanied minors, returnees and internally displaced people.

In addition, the documents in question contain information that, if revealed, could impede future access to the final beneficiaries of the IMO and UNHCR activities. This could also undermine the strategy for future activities planned by the IOM and UNHCR, which

⁴ 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.

⁵ Judgment of the General Court of 11 July 2018, *Client Earth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

involve emergency services and direct protection assistance in identified areas of intervention. This in itself also constitutes a risk for public security.

Therefore, disclosure of these documents would undermine the protection of the public interest as regards public security protected by Article 4(1)(a) first indent of Regulation 1049/2001, and access has to be refused on that basis.

III. Protection of the privacy and integrity of the individual

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 European Union legislation regarding the protection of personal data.

The applicable legislation in this field is 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 ('Regulation 2018/1725').

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁶

In its judgment in Case C-28/08 P (Bavarian Lager)⁷, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.⁸

Pursuant to Article 9(1)(b) of Regulation 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 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have

⁶ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Nowak v Data Protection Commissioner, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:C:2017:994.

⁷ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁸ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

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. In your request, 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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.

Consequently, I conclude 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 disclosure of the personal data concerned.

IV. Partial Access

I have considered whether partial access could be granted to the documents to which access is refused 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 exception laid down in Article 4 (1)(a) first indent of Regulation (EC) No 1049/2001.

V. 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 7/076
B-1049 Bruxelles/Brussel

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

Yours sincerely,

[e-signed]
Christian Danielsson