



EUROPEAN COMMISSION

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NR2 3 RP Norwich
United Kingdom

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/5252**

Dear [REDACTED],

I refer to your e-mail of 7 January 2019, registered on the same day, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our apologies for the late reply, due to the consultations with the author of most of the documents at issue.

1. SCOPE OF YOUR REQUEST

In your initial application of 5 October 2018, addressed to the Structural Reform Support Service, you requested access to ‘any communication (including but not limited to e-mails and attachments, notes and minutes of meetings, reports, etc.) between the European Commission (in particular, DG Home) and the management consultancy firm McKinsey concerning the Greek asylum system covering the period 1 October 2016 – 31 January 2017, at all levels, including Cabinet officials and relevant EU Commissioners.’

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

1. 1st Stakeholder meeting report of 19 October 2016, reference Ares(2018)6270486, (hereafter ‘document 1’);

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

2. 2nd Stakeholder meeting report of 3 November 2016, reference Ares(2018)6270544, (hereafter ‘document 2’);
3. 3rd Stakeholder meeting report of 16 November 2016, reference Ares(2018)6270593, (hereafter ‘document 3’);
4. 4th Stakeholder meeting report of 8 December November 2016, reference Ares(2018)6270649, (hereafter ‘document 4’);
5. Stakeholder meeting report of 25 January 2017, reference Ares(2018)6270285, (hereafter ‘document 5’);
6. Management summary report of December 2016, reference Ares(2018)6270695, (hereafter ‘document 6’);
7. McKinsey Proposal for operationalizing the EU-Turkey Statement on the Greek islands of January 2017, reference Ares(2019)115140, (hereafter ‘document 7’);
8. E-mail exchanges between the European Commission and McKinsey during the period of 1 October 2016 to 31 January 2017.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, as regards documents originating from a third party, the institution shall consult the latter with a view to assessing whether an exception in paragraphs 1 to 3 (if the third party is a Member State) or in paragraphs 1 and 2 (in case of a third party other than a Member State) is applicable, unless it is clear that the documents shall or shall not be disclosed. According to Article 4(5) of Regulation (EC) No 1049/2001, a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the Structural Reform Support Service consulted the third-party author, namely McKinsey company from which the documents concerned originate, on the disclosure of its documents. According to the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on the Functioning of the European Union, the Structural Reform Support Service consulted also the Greek authorities, insofar as they are directly concerned by the subject matter of the documents. Taking into account their positions, in its initial reply of 11 December 2018, the Structural Reform Support Service:

- granted wide partial access to documents 1, 2, 3, 4, 5 and 6 based on the exceptions of Article 4(1), first indent (protection of the public interest as regards public security), Article 4(1), third indent (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests of natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001;
- refused access to document 7 based on the exception laid down in the first subparagraph (protection of commercial interests of natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

Moreover, the Structural Reform Support Service highlighted with regard to the correspondence between the European Commission and McKinsey during the period of

1 October 2016 to 31 January 2017 that ‘they relate to administrative and organizational arrangements to set up meetings’.

In your confirmatory application, you request a review of this position.

I note that you do not contest the refusal of access to the personal data included in the disclosed documents. Although you do not contest expressly the non-disclosure of the exchanges between the European Commission and McKinsey which pertain to ‘administrative and organisational arrangements’ you ask the European Commission to clarify ‘that the attachments to the e-mails that you refer in your letter consist solely of the Stakeholder Meeting Reports and the Management Summary Report’.

You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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.

Under the provisions of Article 4(4) of Regulation (EC) No 1049/2001, the third party, the originator of the documents, has been duly re-consulted at the confirmatory stage. The authorities of the Hellenic Republic and the third party agreed to the (wider) partial access to the Management summary report of December 2016 (document 6) and the McKinsey Proposal for operationalizing the EU-Turkey Statement on the Greek islands of January 2017 (document 7). The redactions are based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

As regards the remaining redacted parts of documents 1, 2, 3, 4, 5 and 6, I regret to inform you that I have to confirm the initial decision of the Structural Reform Support Service to refuse access, based on the exceptions of Article 4(1), first indent (protection of the public interest as regards public security), Article 4(1), third indent (protection of the public interest as regards international relations), and Article 4(2), first indent (protection of commercial interests of natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001, for the reasons set out below.

The personal data, to which you do not request access, have been redacted as they fall outside of the scope of your request.

Finally, I would like to point out that the European Commission does keep and register a document when it contains important information that is not short-lived and/or may involve action or follow-up by the European Commission or one of its departments (Article 4 of Commission Decision 2002/47/EC of 23 January 2002 amending its Rules of Procedure).

The correspondence between the European Commission and McKinsey during the period of 1 October 2016 to 31 January 2017 was about meetings and includes administrative and logistical arrangements that were short-lived and not policy-relevant. Such exchanges have not been kept and registered by the European Commission. Therefore, I confirm that the European Commission does not hold any such further documents containing correspondence as requested by you other the ones identified at the initial stage.

2.1. Protection of the public interest as regards public security and international relations

In accordance with the case-law of the Court of Justice, the European Commission, ‘when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation No 1049/2001’ and two different exceptions can, as in the present case, be ‘closely connected’.³

According to Article 4(1)(a), first indent of Regulation (EC) No 1049/2001, the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] public security [...]’.

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 [...]’.

As a preliminary remark, please note that if access is granted to a document under Regulation (EC) No 1049/2001, this document becomes accessible to the public at large. 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

³ Judgment of the General Court of 13 September 2013, *Netherlands v European Commission*, T-380/08, EU:T:2013:480, paragraph 34.

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.

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

All documents requested have been examined in light of the above-mentioned case-law. The redacted parts of the documents requested contain data, analysis and details concerning interactions between stakeholders on, for instance, judicial and police related matters, as well as cooperation with third countries, which is highly sensitive. Please note that it is not possible to give more details justifying the need for confidentiality in respect of the requested document without disclosing its content and, thereby, depriving the exception of its very purpose.⁶

More specifically, the information concerned relates to the management of the migration crisis by the Greek authorities and the implementation of the EU-Turkey Statement in a number of sectors, for example working cooperation with a number of third countries, police and border cooperation, reception conditions in Greece and Turkey, return and readmission, relocation and resettlement. The EU-Turkey Statement has become an important element of the EU’s comprehensive approach on migration. Therefore, a detailed description of the actions concerned and of the information received would not be possible without jeopardising the protection of public interest as regards public security and international relations, as it would also affect third countries involved in the implementation of the EU-Turkey Statement.

This would jeopardise also the efforts of third countries involved in the implementation of the EU-Turkey Statement and the international cooperation with them. Regarding the exception protecting the public interest as regards international relations, it has been recognised that Article 4(1)(a) third indent can be invoked if it is clear that disclosure would harm the EU's international relations with third countries.⁷

Indeed, the redacted information included in the requested documents concern the identification of challenges in the process of reception of migrants and asylum seekers. There is a foreseeable and serious risk that public disclosure of this information would be exploited by third parties (for example smuggling networks) and thus undermine the protection of public interest as regards public security.

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

⁶ Judgment of the General Court of 8 February 2018, *Pagyprios organismos ageladotrofon v European Commission*, T-74/16, EU:T:2018:75, paragraph 71.

⁷ Judgment of the Court of First Instance of 7 February 2002, *Kuijter v Council*, T-211/00, EU:T:2002:30 paragraphs 62-65.

Moreover, the document requested contain very detailed weekly updates in the context of the project, which were meant to advise the Greek authorities on possible courses of action. Disclosure of the content of this information would therefore undermine the climate of mutual trust that is necessary for the on-going cooperation with international partners and the proper implementation of the EU-Turkey Statement. The overall migration situation remains fragile and the EU needs to ensure a continued, effective response to the migration challenges. Additional efforts, notably stepped up financial resources, will be needed from the EU to its international partners to ensure a continued, effective response to the migration challenge.

Consequently, I conclude that the redacted parts of all requested documents are protected against public disclosure, pursuant to the exceptions provided for in the first and third indents of Article 4(1)(a) of Regulation (EC) No 1049/2001 relating to the protection of the public interest as regards public security and international relations, respectively.

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

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that that '[t]he 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'.

The relevant undisclosed parts of the requested documents, in particular document 7, contain the author's methodologies, team composition, pricing breakdowns and other detailed commercially sensitive information of company McKinsey. They also show a unique approach to problem solving information for their client work which is sensitive and confidential.

The General Court found that documents, the disclosure of which would seriously undermine the commercial interests of a legal person, 'contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or their commercial relations or where those documents contain information particular to that undertaking which reveal its expertise'⁸.

In accordance with the case-law mentioned above, the information contained in the documents requested clearly relates to the business strategies and the commercial relations of this company. Public disclosure of these documents would damage these company's commercial interests, as it would put into the public domain confidential commercial information, thereby harming its commercial interests and its ability to exercise effectively commercial and business activities in the future.

⁸ Judgments of the General Court of 5 February 2018, *PTC Therapeutics Ltd v European Medicines Agency*, T-718/15, EU:T:2018:66, paragraphs 84-85 and Judgment of the General Court of 5 February 2018, *MSD Animal Health Innovation GmbH v European Medicines Agency*, T-729/15, EU:T:2018:67, paragraphs 67– 68 and also confirmed by Judgment of the General Court of 11 July 2018, *Rogesa v European Commission*, T-643/13, EU:T:2018:423, paragraph 70.

This information could indeed be exploited by other companies competing in this very specific market and competitors would be able to align their action on the basis of the information, thereby gaining a commercial advantage which they would otherwise not have had, undermining in this way the commercial interests of the company concerned.

Based on the foregoing, I consider that there is a real and non-hypothetical risk that public access to these documents would negatively affect the commercial activities of the company concerned and thereby seriously undermining the commercial interests of the latter.

I conclude that the disclosure of the withheld parts of the requested documents would undermine the protection of commercial interests of the company concerned within the meaning of Article 4(2), first indent of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that ‘while it may be that some of the specific financial information and pricing breakdowns are commercially sensitive, this does not justify a blanket rejection of my request. Consequently, I would urge the Commission to re-examine the document-proposal for phase 2 of the project- and disclose a redacted version’.

Further, you argue that ‘there is a strong public interest in understanding not only to what specific projects public money has been spent on but the specific steps taken by the European Commission and Greek authorities, as well as the role played by private entities like McKinsey, in responding to the increase in the arrivals of asylum seekers in Greece as part of the EU’s migration policy’.

I would like to underline that (wider) partial access is now granted to documents 6 and 7.

In that regard, I would like to refer to the judgment in the *Strack* case, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.⁹

In my view, such a pressing need has not been substantiated in this case. While I understand that there could indeed be a private and public interest in the subject matter covered by the documents requested, I consider that such a public interest in transparency

⁹ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 131.

would not, in this case, outweigh the need to protect the commercial interests of the company concerned.

I therefore consider that in this case, the public interest is better served by keeping the withheld parts of the requested documents undisclosed in conformity with the interests protected by the exception of Article 4(2), first indent of Regulation (EC) No 1049/2001.

Finally, I would like to underline that the European Commission, in addition to providing access to documents in its possession under Regulation (EC) No 1049/2001, proactively publishes on a regular basis, in a user-friendly way, a wide range of information and documents concerning migration, both in its various registers and on its webpages.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,¹⁰ provides further support to this conclusion.

Please note also that Article 4(1)(a) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) access to the requested documents.

As indicated above, further partial access is herewith granted to documents 6 and 7.

However, no meaningful further access to the redacted parts of the remaining requested documents is possible without undermining the interests described above.

¹⁰ Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *European Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

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.

Yours sincerely,



*For the Commission
Martin SELMAYR
Secretary-General*

Enclosures: (2)