

EUROPEAN EXTERNAL ACTION SERVICE



DG Resource Management
The Director-General

Brussels, 13 April 2022
eeas.sg.2 (2022) 2772983

Mr Maximilian Henning
by electronic mail

Subject: Your confirmatory request for access to documents
Our ref: 2022/033

Dear Mr Henning,

I would like to thank you for your confirmatory application of 4 April 2022 following your request for access to documents (EEAS ref: 2022/033).

As requested, I have examined the decision of 1 April 2022 not to grant you access to the following documents:

1. 69 documents filled in ARES, related to technical specifications, financial offer, monthly specific contracts and contract amendments
2. 97 documents filled in ARES, related to invoices, monthly reports and payments

After carefully assessing the arguments in your confirmatory application letter, I regret to inform you that they did not lead us to reverse our position.

As our services explained in the initial reply, the disclosure of any of the documents, either listed above, as a whole, or partially, would make public the security setup and it would reveal security procedures and expose possible existing vulnerabilities, if any, of the EU Delegation in Afghanistan. Such information, if publicly released, would give an advantage to adverse actors such as terrorist organisations operating in the country, thus putting at risk the safety and security of EU staff based in Kabul. In addition, these documents also contain sensitive commercial information of the successful candidate, such as the prices that were offered for each post and service, yearly turnovers, operating plans, and information on other clients that were a crucial aspect during the evaluation of the tenders. Their public disclosure would harm the legitimate commercial interests of the successful candidate, and the EEAS could be seen as the actor facilitating industrial/corporate espionage.

Therefore, their release to the public would undermine the protection of public security, as well as commercial interests of a legal person as per Article 4(1)(a), first indent and Article 4(2), first indent of the Regulation 1049/2001. Although I share your view regarding the importance of transparency for the sake of public interest, the protection of the public interest regarding public security must also be preserved.

In particular, the public interest exception laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 is subject to a particular regime as compared to the other exceptions included in Article 4.

On the one hand, the Institution “must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest¹”.

On the other hand, once the Institution has reached the conclusion that release would indeed undermine the public interest in this area. It has no choice but to refuse access, because “it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001, that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests²”.

Therefore, while the EEAS enjoys a wide discretion in assessing the impact of the release of documents on public security, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless³.

For the sake of completeness and notwithstanding the fact that Article 4(1)(a) of Regulation (EC) No 1049/2001 imposes not to disclose the requested documents, nor in part nor in full, the EEAS considers, as regards your reference to the growing public scrutiny on the private security industry, that such an argument of a general nature is in any case not sufficient to override the public interests protected under that provision and Article 4(2), first indent of that Regulation.

For all these reasons, I hereby confirm that the above-mentioned documents cannot be released to the public, neither fully nor partially. Should you not be satisfied with this response, you have a right, in accordance with Article 8 of the Regulation, to institute court proceedings against the European External Action Service and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the Treaty of the Functioning of the EU respectively.

Yours sincerely,



Gianmarco Di Vita

¹ Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32; and of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

² Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited

³ Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.