



Brussels

Subject: Your request for access to documents — GESTDEM 2022/2310

Dear Mr Garcia,

I refer to your e-mail of 22 April 2022 in which you make a request for access to documents, registered on the same day under the above-mentioned reference number¹. I also refer to our email of 17 May 2022², in which we explained that an extended time limit is needed for the purpose of internal consultations

You requested access to:

- *“Ukraine questionnaire on EU membership submitted by Ukraine's president, Volodymyr Zelensky, to the EU envoy in Kyiv on April 18.”*

Your application concerns the following documents:

1. Empty questionnaires submitted by the EU to the Ukrainian Government.
2. Completed questionnaire submitted by Ukraine - Part I, 19 April 2022, Ares(2022)3072915
3. Completed questionnaire submitted by Ukraine - Part II , 10 May 2022, Ares(2022)3544141

¹Ref. Ares(2022)3163430

² Ref. Ares(2022)4144189

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Having examined these documents under the provisions of Regulation (EC) No 1049/2001³, I have decided that:

- Document 1 is publicly available at the website of the Ukrainian Government.⁴
- Access must be refused to documents 2 and 3, 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), and Article 4(3), first subparagraph (protection of the decision-making process) 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 [...]'.

As per settled case-law, the institutions 'must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest' .

Consequently, 'the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exception [...] 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' .

The full public disclosure of documents 2 and 3 would be severely detrimental for the European Union's relations with its Member States and with a Partner Government. The information in these questionnaires is entirely the property of the country in question. It is the right of the applicant country to decide whether to publish their answers. Publishing of the documents by the Commission would severely undermine trust of the Partner Government in our institutions. It is even more important given the geopolitical situation the Partner country is facing.

Moreover, the Commission was not publishing previous questionnaires received in the past from other countries. It is a decision of each country whether to make their answers public.

Against this background, there is a risk that full disclosure of these documents would undermine the protection of the public interest as regards international relations. I consider this risk as reasonably foreseeable and non-hypothetical, given the sensitivity of

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.

⁴ https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/ukraine_questionnaire_part_i.pdf
https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/ukraine_questionnaire_part_ii_0.pdf

the issue and the relevance of the above-referred information in the current international context.

I would also like to underline that Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

2. Protection of the decision-making process

Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 provides that *'[A]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'*.

The EU submitted to the Ukrainian Government the two questionnaires on 8 April 2022 (part I) and on 13 April 2022 (part II). The Ukrainian Government submitted the completed questionnaires on 17 April 2022 (part I) and on 9 May 2022 (part II). The analysis of these questionnaires by the relevant Commission services is currently ongoing.

The Commission is expected to provide the Council with an opinion on the request for accession to the EU submitted by Ukraine. At this stage of the process, disclosure of the requested documents could undermine the institution's decision-making process.

The full disclosure of documents 2 and 3 would reveal documents designed for internal purposes and not for external communications. They are a tool for the Commission to prepare its own recommendations on the future steps. The integrity of the internal decision-making process needs to be protected.

In addition, there is a real and non-hypothetical risk of self-censorship by the Commission services. The full public disclosure of the documents requested would undermine the protection of the decision-making process of the Commission, as it would reveal preliminary views and policy options, which are currently under consideration; the Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

Unfortunately, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing its content and, thereby, depriving the exception of its very purpose⁵.

3. No overriding public interest in disclosure

The exception laid down in Article 4(3), first subparagraph, 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.

⁵ Judgment of 24 May 2011 in joined cases T-109/05 and T-444/05, *NLG v Commission*, paragraph 82. Judgment of 8 February 2018 in case T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, paragraph 71.

In your application, you do not invoke any interest except your own interest which is of a private nature. For these reasons, you have not established arguments that would show the existence of an overriding public interest in disclosure at this point in time. Neither has the Commission identified such an overriding public interest, based on the elements in its possession.

For all these reasons, I do not see in the case at hand a public interest within the meaning of Regulation (EC) No 1049/2001, that is to say objective and general in nature and which is not indistinguishable from individual or private interests that would outweigh the public interest in protecting the decision-making process.

4. Partial Access

We have considered whether partial access could be granted to the documents currently withheld but this was deemed impossible, as the sensitive elements are integral to them. Please note that we 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.

5. 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 this 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
General Secretariat
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Brussels

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

Yours sincerely,

[e-signed]

Maciej Popowski

Enclosures: Empty questionnaires Part I and Part II