



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director-General

Brussels,
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Subject: Your application for access to documents – Ref GestDem No 2017/1364

Dear Ms Darbshire,

We refer to your letter dated 02/03/2017, in which you make a request for access to documents, registered under the above mentioned reference number.

Your application concerns the following documents:

- 1) Copies of the current versions of the country chapters for each Member state for what would have been the 2017 EU Anti-Corruption Report.
- 2) Copies of all documents relating to the decision not to publish this report, including minutes of all meetings at which this decision was discussed, the lists of participants in those meeting, copies of documents shared before or during such meetings, and relevant correspondence related to the decision-making process.
- 3) Communications between the Commission and Member States relating to forthcoming report and the decision not to make it public, in particular any document and communication received from Member States during the period since the first report was published in 2014 to date, in which the government representatives either object to or express an opinion in favour of finalising and publishing the reports.

After having examined the scope of your request, we conclude that the above mentioned documents consist of

- category 1: the draft country analyses drafted in view of accompanying the follow-up to the 2014 EU anti-corruption report;
- category 2: minutes of meetings, preparatory documents, as well as emails and letters relating to the steps forward as regards the EU anti-corruption policy;
- category 3: any written communication between the Commission and Member States relating to the follow-up of the 2014 anti-corruption report in particular as regards the decision not to publish a second edition.

As regards category 1, I inform you that the Commission identified six internal documents containing draft country analyses prepared for discussion at the 13th and the 15th meeting of the Expert Group on Corruption held on 30 June 2015 and on 28 June 2016 respectively. You will find more information on the discussions that took place on the expert group registry website of the Commission.¹

As regards category 2, the Commission has identified the following documents: (a) a document reporting on the meeting of 16/12/2016 where the steps forward on the anti-corruption policy were discussed [Ares(2017)1569514]. The document also contains the list of the meeting participants; (b) a preparatory document for the discussion at the meeting of 16/12/2016 drafted by the relevant Commission services [Ares(2017)1569040]; (c) a note on requesting launch of formal work on preparation of the second EU Anti-Corruption report with two annexes [Ares(2016)1595635].

As regards category 3, your request focuses on the decision of the Commission to publish further editions of the Anti-Corruption Report and the related communications with Member states on that aspect. The Commission has identified one report related to a meeting held on 06/02/2015 with the National Contact Points on corruption [Ares(2015)799245] and one letter to National Contact Points on corruption dated 03/02/2017 [Ares(2017)617150]. No further relevant communication with Member states has been identified.

The full list of documents identified is enclosed.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that:

(1) the five documents under categories 2 and 3, namely documents 1 to 5, may be partially disclosed;

(2) access cannot be granted to any of the six documents under category 1.

This conclusion is based on the following assessment:

(a) *Some of the documents to which you have requested access contain personal data*. 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 Community legislation regarding the protection of personal data. This applies to document 1 and documents 3-5. The applicable legislation in this field is 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 data².

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable³.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure

¹ The Minutes of the 13th Meeting of the Group of Experts on Corruption, 30 June 2015 are available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=19675&no=2>.

The minutes of the 15th Meeting of the Group of Experts on Corruption, 28 June 2016 are available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=24141&no=2>.

² Official Journal L 8 of 12.1.2001, p. 1

³ Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing document 1 and documents 3-5 expunged from this personal data.

(b) Some of the documents to which you have requested access contain elements that refer to matters where the decision has not been taken by the Institution. This applies to documents 2, 3 and 5 in categories 2 and 3 and to the six documents in category 1. These aspects have therefore been blackened out from the disclosed documents, as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation No. 1049/2001.

According to the first subparagraph of Article 4(3) of this Regulation, access 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.

Furthermore, according to the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the Institution concerned shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the Institution's decision-making process, unless there is an overriding public interest in disclosure.

The documents requested contain ‘opinions for internal use as part of deliberations and preliminary consultations within the [Commission]’, for the purposes of the first and the second subparagraph of Article 4(3) of Regulation No 1049/2001. The draft country analyses (documents under category 1) were prepared as part of the follow-up to the 2014 EU Anti-Corruption Report. However, while the first report was useful in providing an analytical overview and creating a basis for further work, the Commission deems that a continued succession of similar reports in the future would not necessarily be the best way to proceed. The draft country analyses are also relevant for other policy documents being prepared by the Commission services, most notably in the framework of the European semester of economic governance.⁴ As a core part of the EU's annual cycle of economic policy guidance and surveillance cycle, the European Commission analyses the fiscal and structural reform policies of every Member State, provides recommendations,⁵ and monitors their implementation, while the Member States implement the commonly agreed policies.

The documents falling under category 2 and 3 refer to the steps forward on the anti-corruption policy, on the decision of the Commission to publish further editions of the Anti-Corruption Report and the related communications with Member States on that aspect.

The disclosure of these documents would call into question the freedom of its authors to express their views and opinions. In case of granting access, assessments of those authors would be disclosed to the public, even though it had been their intention to put forward their views only to their addressees. The work of analysis, reflection and criticism was carried out for internal purposes and was not intended to be brought to the attention of the public, because it was designed to be submitted for internal discussions.

The situation is similar to those in the Case T-403/05, MyTravel Group plc. where the European Court of Justice accepted arguments similar to the following ones. Disclosure of the documents in this case would carry the risk not only that the possibly critical opinions of Commission officials might be made public, but also that the content of the draft reports could be compared with the decisions ultimately taken on those points by the Commission and, accordingly, that that institution's internal discussions would be disclosed.

That would risk seriously undermining the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the

⁴ https://ec.europa.eu/info/publications/2017-european-semester-country-reports_en

⁵ https://ec.europa.eu/info/files/2016-european-semester-communication-country-specific-recommendations_en

general interest of the Community, be completely independent in the performance of their duties. Furthermore, if the internal exchanges of views were to be disclosed, it would mean that the authors would take that risk of disclosure into account in the future, to the point when they might be led to practice self-censorship. The authors may cease putting forward any views that might involve the addressee of the report being exposed to risk. The result would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions.

To sum up, aspects contained by these documents reflect an internal opinion, necessary for the Commission to decide freely and adopt the relevant documents. The access to them would curtail the space to think, i.e. the possibility of Commission staff to freely submit uncensored advice. In this manner, public access to such documents would impair the quality of the decision-making process. We have considered whether partial access could be granted to the documents requested and have come to the conclusion that documents 2, 3 and 5 (categories 2 and 3) can be partially disclosed. Some parts of the disclosed documents have been blackened out as their disclosure is prevented by the exceptions to the right of access laid down in Article 4 of this Regulation. However, the six documents in category 1 cannot be disclosed as the remaining parts after expunging the confidential information would be meaningless or illegible.

The exceptions laid down in 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. The Commission has examined whether there could be an overriding public interest in disclosure. For the same reasons as explained above, we are of the opinion that no such overriding interest is present that would justify disclosure.

(c) Some of the documents to which you have requested access contain aspects that are beyond the scope of your request. This applies to document 3. These aspects have therefore been blackened out from the disclosed documents.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review the positions expressed in this letter.

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-B-4
BERL 5/327
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours Sincerely,

Matthias RUETE
[e-Signed]

Enclosures:

- List of documents identified;
- Documents 1 to 5.