



EUROPEAN COMMISSION

Brussels, 26.7.2019  
C(2019) 5776 final

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United Kingdom

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/129**

Dear [REDACTED]

I refer to your email of 5 March 2019, registered on 6 March 2019, by 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 documents<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’). Please accept our apologies for the delayed answer to your application.

**1. SCOPE OF YOUR REQUEST**

On 8 January 2019, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001, in which you requested access to ‘[European] Commission Implementing Decision regarding the Schengen evaluations of Switzerland in 2018 (including any annexes)’.

The European Commission attributed the above-mentioned application to the Directorate-General for Migration and Home Affairs, for handling and reply.

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

- Commission Implementing Decision in accordance with Article 14(5) of Regulation (EU) No 1053/2013 of 7 October 2013, establishing the report of the

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

2018 evaluation of Switzerland on the application of Schengen ‘acquis’ in the field of police cooperation, reference: C(2018)4150 (hereafter ‘document 1’),

- Commission Implementing Decision in accordance with Article 14(5) of Regulation (EU) No 1053/2013 of 7 October 2013, establishing the report of the 2018 evaluation of Switzerland on the application of Schengen ‘acquis’ in the field of the Schengen Information System, reference: C(2018)5500 (hereafter ‘document 2’),
- Commission Implementing Decision in accordance with Article 14(5) of Regulation (EU) No 1053/2013 of 7 October 2013, establishing the report of the 2018 evaluation of Switzerland on the application of Schengen ‘acquis’ in the field of management of external borders, reference: C(2018)6000 (hereafter ‘document 3’),
- Commission Implementing Decision in accordance with Article 14(5) of Regulation (EU) No 1053/2013 of 7 October 2013, establishing the report of the 2018 evaluation of Switzerland on the application of Schengen ‘acquis’ in the field of data protection, reference: C(2019)200 (hereafter ‘document 4’).

On 26 February 2019, the Directorate-General for Migration and Home Affairs refused access to the above-mentioned documents, based on the exception protecting the public interest as regards public security, laid down in the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

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

## **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 or service concerned at the initial stage.

Following that review, I can inform you that partial access is now granted to documents 1, 2 and 4. The undisclosed parts of the above-mentioned documents are withheld, based on the exception protecting the public interest as regards public security, laid down in the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

With regard to document 3, I regret to inform you that I have to confirm the position of the Directorate-General for Migration and Home Affairs to refuse access to the entirety of that document concerned, based on the above-mentioned exception in the first indent of Article 4(1)(a) of the said regulation.

In this assessment, the European Commission took into account the position of the authorities of Switzerland, consulted in line with the provisions of Article 17 of Regulation (EU) No 1053/2013<sup>3</sup>.

The detailed reasons are set out below.

## **2.1 Protection of the public interest as regards public security**

Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security'.

The concept of the public security protected by virtue of the above-mentioned exception is not limited to the public security of (in) the EU Member States. Indeed, it encompasses aspects of the public security in general and therefore applies also to the third countries, and in particular to Schengen Associated countries, as in the case at hand.

The requested documents relate to and were prepared in the context of the procedures envisaged in Regulation (EU) No 1053/2013. That Regulation establishes an evaluation and monitoring mechanism aimed at verifying the application of the Schengen legislation in the Member States and third countries that are the members of the Schengen area.

The process includes preparation by the services of the European Commission of the evaluation reports listing and describing weaknesses and deficiencies in the application of various aspects of the above-mentioned legislation, identified with regard to (in the case at hand) a Schengen Associated Country. The level of detail of information included in the reports is very high, as they contain very precise factual information, describing in full detail technical and factual deficiencies relating to the police cooperation (document 1), weaknesses relating to technical and operational aspects of the Schengen Information System, (document 2), issues identified at specific, named, border check points (document 3) and weaknesses related to the security of data in the Schengen Information System and the Visa Information System as well as to the functioning of the data protection authority (document 4)

The reports constitute annexes to the implementing decisions 1 – 4, by means of which the reports are 'adopted' by the European Commission.

Public disclosure of the above-mentioned information included in the undisclosed parts of documents 1, 2 and 4, as well as in document 3, would undermine the public interest as regards public security. Indeed, such information, if publically disclosed, could be

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<sup>3</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, Official Journal L 295 of 6.11.2013.

instrumentally used to compromise the border control system and the Schengen Information System, security of data (including personal data) in the Schengen and Visa Information Systems and the exchange of information in the context of police cooperation, especially taking into account that, as explained above, the very detailed information concerning the deficiencies and weaknesses reported.

Furthermore, it needs to be emphasised that the evaluation reports in question, in line with the provisions of Article 17 of Regulation (EU) No 1053/2013, are classified as ‘EU Restricted’. The provisions of the same article also require the European Commission to consult the Member State concerned (in the case at hand, the Schengen Associated country) before deciding which parts of the evaluation reports can be made public.

Documents disclosed under Regulation (EC) No 1049/2001, legally speaking, become public documents. In line with the case law of the EU Court<sup>4</sup>, the institution that disclosed documents under the above-mentioned regulation may not refuse access thereto if other applicants asked for it.

Consequently, the obligation to consult the Member State concerned (or the Schengen Associated country) applies also in case of their public disclosure under Regulation (EC) No 1049/2001.

Indeed, the European Commission consulted the authorities of Switzerland in line with the above-mentioned Article 17 of Regulation (EU) No 1053/2013.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001 is justified concerning the relevant undisclosed information included in documents 1, 2 and 4, as well as the entirety of document 3 and that access to them must be refused on that basis.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 do not need to be balanced against overriding public interest in disclosure.

### **4. PARTIAL ACCESS**

Partial access is hereby granted to documents 1, 2 and 4. With regard to document 3, no partial access is possible, as the entirety of the contents of that document is covered by the exception in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001. As a consequence of the partial release of documents 1, 2, 4, the partially released elements of the reports have been declassified.

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<sup>4</sup> Judgment of the General Court of 21 October 2010, *Agapiou Joséphidès v Commission and EACEA*, T-439/08, EU:T:2010:442, paragraph 116.

## 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*



CERTIFIED COPY  
For the Secretary-General,



EUROPEAN COMMISSION

Enclosures: (3)