



EUROPEAN COMMISSION  
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The acting Director-General

Brussels

**Subject: Your application for access to documents**

**Ref. GestDem No 2021/5454**

Dear Ms Rončević,

I refer to your e-mail dated 13 September 2021 in which you made a request for access to documents, registered on the same day<sup>1</sup> under the above mentioned reference number. You requested access to:

*“minutes of the High Level Dialogues that were facilitated by then European Commissioner for Enlargement and European Neighbourhood Policy, Mr Štefan Füle. The meetings were held on the following dates:*

*1. 27.6.2012 in Brussels (High Level Dialogue on the Accession Process with Bosnia and Hercegovina and the Road Map for BiH's EU membership application) 2. 27.11.2012 in Sarajevo (High Level Dialogue on the Accession Process with Bosnia and Herzegovina) 3. 1.10.2013 in Brussels (High Level Dialogue on the Accession Process) 4. 10.10.2013 in Brussels (High Level Dialogue on the Accession Process)”*

We have identified five documents that fall within the scope of your application:

1. Annex II Joint Conclusions from the High Level Dialogue on the Accession Process of 27 June 2012, Ref. elarg.c.1(2012)927933.
2. Information Note of Commissioner Füle to the College, High Level Dialogue on the Accession Process with Bosnia and Herzegovina Brussels, 27 June 2012, Ref. elarg.c.1(2012)913383.

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<sup>1</sup> Ares(2021)5628552

Margareta Rončević  
Ive Senjanina 12a  
23000 Zadar  
Croatia

By email only:  
ask+request-9932-951a546d@asktheeu.org

3. Conclusions 2<sup>nd</sup> High-level Dialogue on the Accession Process, 27 November 2012, Ref. elarg.c.1.dir(2013)624454.
4. Communication of Commissioner Füle to the College - High Level Dialogue on the Accession Process with Bosnia and Herzegovina, Sarajevo 27 November 2012, Ref. elarg.c.1(2012)1676859.
5. Report to AFET on the Second Meeting of the High Level Dialogue on the Accession Process of Bosnia and Herzegovina to the European Union, Sarajevo 27 November 2012, Ref. elarg.c.1(2012)1677306.

These five documents are not minutes but, by analogy, they are relevant to this request.

Having examined these documents under the provisions of Regulation (EC) No 1049/2001<sup>2</sup>, I have decided that no access can be granted to them 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.

The justifications are as follows:

### **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 [...]'.<sup>3</sup>

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'<sup>3</sup>.

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'<sup>4</sup>.

The full public disclosure of the documents identified as falling under the scope of the request would severely affect the international relations between the EU and the Bosnia and Herzegovina authorities, given the content of the documents which provide insight into relevant actors' involvement and decision-making on the ground, and could thereby undermine the process of electoral and constitutional reform in Bosnia and Herzegovina which is still ongoing.

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<sup>2</sup> Official Journal L 145 of 31 May 2001, p. 43.

<sup>3</sup> Judgment of 3 July 2014 in case C-350/12, *Council v In 't Veld*, paragraph 63.

<sup>4</sup> Judgment of 25 April 2007 in case T-264/04, *WWF European Policy Programme v Council*, paragraph 40.

Moreover, disclosure of documents under Regulation (EC) No 1049/2001 has an *erga omnes* effect, preventing the institution from opposing communication of the disclosed documents to other applicants<sup>5</sup>. As the General Court has stated, *disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union*<sup>6</sup>.

Against this background, there is a risk that full disclosure of these documents, or parts thereof, 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 the issue and the relevance of the above-referred information in the current context in Bosnia and Herzegovina.

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 ‘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’.

The disclosure of the listed documents would reveal internal opinions and internal follow up points of documents designed for internal purposes and not for external communications. This could potentially cause confusion to the public, by placing in the public domain preliminary statements of staff members of the European Commission, which do not necessarily reflect the final position of the Union.

In addition, there is a real and non-hypothetical risk of self-censorship by the European Commission services. The 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.

Indeed, as the General Court has held, ‘the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process’<sup>7</sup>. In this sense, it is important for the quality of the Commission's decision-making process that documents drawn up for internal use and opinions exchanged during internal deliberations are protected, so as to ensure an adequate analysis and discussion within the Commission services.

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<sup>5</sup> Judgment of 21 October 2010 in case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, paragraph 116.

<sup>6</sup> Judgment of 19 March 2013 in case T-301/10, *In 't Veld v Commission*, paragraph 125.

<sup>7</sup> Judgment of 15 September 2016 in case T-18/15, *Phillip Morris v Commission*, paragraph 87.

Unfortunately it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing their content and, thereby, depriving the exception of its very purpose<sup>8</sup>.

In light of the above, the five documents should be protected in accordance with Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

### **Partial Access**

We have considered whether partial access could be granted to one or more of the five documents but this was deemed impossible, as the sensitive elements are integral to all of 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.

### **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.

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.

### **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  
Secretariat-General

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<sup>8</sup> Judgment of 24 May 2011 in case T-109/05, *NLG v Commission*, paragraph 82. Judgment of 8 February 2018 in case T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, paragraph 71.

Transparency, Document Management & Access to Documents (SG.C.1)  
BERL 7/076  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

[e-signed]

Maciej Popowski