

Reply by the European Commission to the proposal for a solution from the European Ombudsman on the failure by the European Commission to take a final decision within the applicable time limit on a request for public access to documents concerning encryption in law enforcement - Complaint by [REDACTED] ref. 707/2023/NH

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The applicant lodged under Regulation (EC) No 1049/2001¹ a request for public access to documents concerning questionnaires sent by the European Commission to Member States on the topic of encryption in 2021², namely:

- ‘[t]he questionnaire circulated to Member States in 2021 on the topic of encryption;
- [t]he responses of Member States to the questionnaire received by the Directorate-General;
- [t]he compilation of the responses done by the Directorate-General;
- [a]ll presentation material (PowerPoint, etc.) used by the European Commission to present the results and give feedback to Member States at the beginning of 2022;
- [t]he “thorough mapping of how member states deal with encryption” done by the European Commission as mentioned in the European Commission’s Communication on the EU Strategy to tackle Organised Crime 2021-2025’.

In its initial reply, the Secretariat-General of the Commission explained that it does not hold any additional documents concerning the ‘thorough mapping of how member states deal with encryption’, as this mapping is the subject of the other documents requested. The Secretariat-General granted full access to one document (the agenda of the meeting) and refused access to the remaining documents concerned by the applicant’s request based on the exceptions laid down in the first indent (protection of public security) of Article 4(1)(a) and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, the applicant submitted a confirmatory application in January 2023 requesting a review of the initial reply of the Secretariat-General. The applicant subsequently turned to the European Ombudsman against the lack of reply to the confirmatory application.

II. EUROPEAN OMBUDSMAN’S INQUIRY AND PROPOSAL

The Ombudsman opened an inquiry into the Commission’s failure to reply to the confirmatory application by the extended time limit and asked the Commission to provide a copy of the documents requested and the documentation relating to any third-party consultations.

In the course of the inquiry, the Ombudsman received copy of the following documents requested for its inspection:

¹ OJ L 145, 31.5.2001, p. 43.

² Reference 2022/6061.

- questionnaires A and B, reference Ares(2022)8531766 (hereafter ‘document 1’);
- responses of Member States to the questionnaires, reference Ares(2023)7328901, namely:
 - reply from Austria, part A (hereafter ‘document 2.1’);
 - reply from Austria, part B (hereafter ‘document 2.2’);
 - reply from Belgium, part A (hereafter ‘document 2.3’);
 - reply from Belgium, part B (hereafter ‘document 2.4’);
 - reply from Bulgaria, part A (hereafter ‘document 2.5’);
 - reply from Bulgaria, part B (hereafter ‘document 2.6’);
 - reply from Croatia, part A (hereafter ‘document 2.7’);
 - reply from Croatia, part B (hereafter ‘document 2.8’);
 - reply from Cyprus, part A (hereafter ‘document 2.9’);
 - reply from Cyprus, part B (hereafter ‘document 2.10’);
 - reply from Czech Republic, part A (hereafter ‘document 2.11’);
 - reply from Czech Republic, part B (hereafter ‘document 2.12’);
 - reply from Denmark, part A (hereafter ‘document 2.13’);
 - reply from Denmark, part B (hereafter ‘document 2.14’);
 - reply from Estonia, part A (hereafter ‘document 2.15’);
 - reply from Estonia, part B (hereafter ‘document 2.16’);
 - reply from Finland, part A (hereafter ‘document 2.17’);
 - reply from Finland, part B (hereafter ‘document 2.18’);
 - reply from France, part A (hereafter ‘document 2.19’);
 - reply from France, part B (hereafter ‘document 2.20’);
 - reply from Germany, part A (hereafter ‘document 2.21’);
 - reply from Germany, part B (hereafter ‘document 2.22’);
 - reply from Greece, part A (hereafter ‘document 2.23’);
 - reply from Greece, part B (hereafter ‘document 2.24’);

- reply from Hungary, part A (hereafter ‘document 2.25’);
- reply from Hungary, part B (hereafter ‘document 2.26’);
- reply from Ireland, part A (hereafter ‘document 2.27’);
- reply from Ireland, part B (hereafter ‘document 2.28’);
- reply from Italy, part A (hereafter ‘document 2.29’);
- reply from Italy, part B (hereafter ‘document 2.30’);
- reply from Latvia, part A (hereafter ‘document 2.31’);
- reply from Latvia, part B (hereafter ‘document 2.32’);
- reply from Lithuania, part A (hereafter ‘document 2.33’);
- reply from Lithuania, part B (hereafter ‘document 2.34’);
- reply from Luxembourg, part A (hereafter ‘document 2.35’);
- reply from Luxembourg, part B (hereafter ‘document 2.36’);
- reply from Malta, part A (hereafter ‘document 2.37’);
- reply from Malta, part B (hereafter ‘document 2.38’);
- reply from Netherlands, part A (hereafter ‘document 2.39’);
- reply from Netherlands, part B (hereafter ‘document 2.40’);
- reply from Poland, part A (hereafter ‘document 2.41’);
- reply from Poland, part B (hereafter ‘document 2.42’);
- reply from Portugal, part A (hereafter ‘document 2.43’);
- reply from Portugal, part B (hereafter ‘document 2.44’);
- reply from Romania, part A (hereafter ‘document 2.45’);
- reply from Romania, part B (hereafter ‘document 2.46’);
- reply from Slovakia, part A (hereafter ‘document 2.47’);
- reply from Slovakia, part B (hereafter ‘document 2.48’);
- reply from Slovenia, part A (hereafter ‘document 2.49’);
- reply from Slovenia, part B (hereafter ‘document 2.50’);
- reply from Spain, part A (hereafter ‘document 2.51’);

- reply from Spain, part B (hereafter ‘document 2.52’);
- reply from Sweden, part A (hereafter ‘document 2.53’);
- reply from Sweden, part B (hereafter ‘document 2.54’);
- executive summary of the responses received (questionnaire A) reference Ares(2022)8533449 (hereafter ‘document 3.1’);
- executive summary of the responses received (questionnaire B) reference Ares(2022)8533449 (hereafter ‘document 3.2’);
- PowerPoint presentation, reference Ares(2022)8533541 (hereafter ‘document 4’);
- agenda of the technical meeting with Member States of 7th March 2022, reference Ares(2022)8533595 (hereafter ‘document 5’); and
- background discussion paper for the technical meeting of 7th March 2022, reference Ares(2022)8533643 (hereafter ‘document 6’).

The Commission informed the Ombudsman that the assessment of the applicant’s confirmatory request was fully ongoing as it was conducting the necessary consultations with the Member States concerned, in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001. Therefore, the initial reply of the Secretariat-General did not set out the final position of the Commission in relation to the applicant’s request.

Despite these assurances, the Ombudsman issued on 17 November 2023 a proposal ‘for a solution’ in this case. In its proposal, the Ombudsman took the ‘preliminary’ view that the Commission should have granted partial access to the documents, ‘in particular the parts that describe applicable national legislation or case-law’. The Ombudsman argued that the Commission should ‘reconsider its position [...] with a view to granting the widest possible access to the five documents at issue’. More concretely:

- As regards documents 1 and 4, the Ombudsman considered that these documents could be disclosed in full. As far as document 4 is concerned, the Ombudsman argued that ‘[t]he document does not attribute any single response to a specific Member State’ and that ‘[t]he parts of the document relating to the replies to questionnaire B (operational practices) do not appear to present any risk of undermining the public security of any Member State’.
- As regards document 2, the Ombudsman considered that the exception laid down in the first indent (protection of public security) of Article 4(1)(a) of Regulation (EC) No 1049/2001 does not apply to the parts of document 2 related to questionnaire A given that the replies of the Member States ‘simply list the applicable legislation and case-law in each Member State’ and ‘[t]his information is already publicly available’. Moreover, the Ombudsman took the view that the disclosure of the document would not undermine the decision-making process in the sense of the first subparagraph of Article 4(3) of the same Regulation.

- As regards document 3, the Ombudsman considered that the document should be partially disclosed, notably the parts related to questionnaire A.
- As regards document 5, the Ombudsman noted that the document was disclosed to the public and falls therefore outside the scope of its inquiry.
- Finally, as regards document 6, the Ombudsman took the view that ‘the public security exception does not apply to this document’ and pointed out that the applicant had put forward ‘convincing arguments’ that would demonstrate an overriding public interest in disclosure of the document.

III. THE REPLY OF THE COMMISSION TO THE OMBUDSMAN’S PROPOSAL FOR A SOLUTION

The confirmatory decision adopted by the Commission (C(2024) 395), of which the Ombudsman has received a copy:

- grants full access to document 1 (questionnaires A and B sent by the Commission to the Member States) and document 6 (discussion paper);
- grants full access to 16 replies and partial access to five replies to questionnaire A, while protecting six replies in relation to this questionnaire
- grants partial access to 14 replies to questionnaire B and fully protects 13 replies to this questionnaire; and
- grants partial access to document 3 (summary of the responses received in relation to questionnaires A and B) and document 4 (PowerPoint presentation).

The exception applied to the (redacted parts of) documents concerned is the first indent (protection of public security) of Article 4(1)(a) of Regulation (EC) No 1049/2001.

In reaching the above decision, the Commission duly examined the arguments provided by the Member States in response to the consultation of the Commission at the confirmatory level and the arguments provided by the applicant in her application.

In particular, the assessment of the Secretariat-General shows that documents 1 and 6 should be disclosed in full, while limited parts of documents 3 and 4 had to be protected as their disclosure would reveal directly or indirectly (by cross-referencing information with the replies to the questionnaires that Member States agreed to disclose) the content of the replies provided by individual Member States who have not agreed to disclose all or part of their replies and provided legitimate reasons in support of their position.

The Commission’s decision, which takes into consideration the responses of the Member States, concluded that not all replies to questionnaire A are limited only to mentioning applicable legislation or case-law but provide additional information considered by the Member States concerned as sensitive, such as implementation in practice of national legislation, ongoing developments to improve national law enforcement procedures, opinions of Member States on the need for EU action in this field, and other considerations shared by Member States exclusively for the European Commission’s information. Moreover, the

Commission also considered that the answers of all Member States to questions marked as sensitive in questionnaire B (questions 22-29) needed to be redacted, as a large majority of Member States had requested so when being asked about this in question 30 questionnaire B.

As explained in the confirmatory decision, the disclosure of the detailed replies of each Member States, without the prior agreement from the Member State concerned considering the specific circumstances prevailing as regards the protection of public security in that country, would undermine the protection of public security in the sense of the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

Nevertheless, the Commission's confirmatory decision grants substantial further access compared with the Ombudsman's proposal as regards the replies to questionnaires B, as parts of these responses were partially disclosed with the agreement of the Member States concerned.

Consequently, the Commission is of the view that the widest possible access has been granted to the documents requested. The Commission refers to the detailed analysis of the confirmatory decision (document attached), which sets out the final position of the Commission in relation to the applicant's request and is ready to engage further with the Ombudsman on this basis if the latter deems it necessary.

For the Commission
Věra JOUROVÁ
Vice-President