



Valletta Harbour, 25 November 2024
EUAA/ED/2024/359

Ms Emily O'Reilly
European Ombudsman
Rue Froissart 87
B-1000 Bruxelles

Subject: European Ombudsman's proposal for a solution on how the European Union Agency for Asylum dealt with a request for public access to documents related to reception conditions in several migration management facilities in Cyprus (case 724/2024/AML)

Dear Ms O'Reilly,

Thank you for your letter of 3 July 2024 in which you propose that the EUAA should reconsider its decision on the access to documents request with EUAA reference number 003070, dated 9 January 2024, with a view to giving significantly increased public access to the documents at issue.

Firstly, we would like to thank the Ombudsman's office for accommodating our two requests for a deferment of the deadline indicated in your above-mentioned letter. Given the volume of documents at hand, the complexity of the matter concerned, as well as the extensive third-party consultations that needed to be carried out, the EUAA is particularly appreciative of the flexibility shown by your office in this regard.

In your letter, you outline several general and specific considerations with regard to the approach adopted by the EUAA in the context of the above-mentioned request and you provide a list of suggestions as to how the EUAA could reconsider its position with the aim to increase the level of access given to the concerned documents.

In this letter, the EUAA would like to reply to your proposal, addressing your suggestions and offering an overview of how and to what extent the Agency is able and intends to implement your proposed solution.

I. PRELIMINARY REMARKS

Having taken careful note of, in particular, the observations in 'the Ombudsman's assessment' section of your letter (paragraphs 18-42), the Agency considers it necessary, by way of preliminary remarks, to provide additional context in terms of the background against which the request for access to documents was dealt with by the EUAA. It is important to note, in this regard, that the request was wide in its scope, and following a thorough administrative process, led the Agency to identify 76 documents¹, with each document requiring an individual assessment, during a period when the Agency was experiencing a considerable surge in applications for access to documents under

¹ However, it should be noted that in the context of the inspection of documents carried out in case 724/2024/AML, an additional 14 documents were identified. Therefore, the Agency wrote to the applicant on 1 July 2024 asking whether she would like the EUAA to consider the potential disclosure of these 14 additional documents in the context of a new request for public access to documents. Given her positive reply thereto, the EUAA registered this new request on 9 July 2024, and was completed by 21 August 2024 by providing partial access to certain documents. The complainant has not submitted any confirmatory application in response thereto. Hence, the afore-mentioned 14 additional documents do not form part of the subject of this present letter in response to the Ombudsman's fair solution proposal.





Regulation (EC) No 1049/2001². Additionally, and as also recognised by case-law, “*the amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature [...] the amount of work also depends on the required depth of that examination*”.³ In this case, the non-homogenous nature of the documents in question meant that an in-depth analysis of the information contained within them was ultimately required, in a process that necessitated considerable internal and external consultations to be undertaken. A balance therefore needed to be struck between the need to conduct this in-depth analysis and carry out the necessary consultations, while at the same time respecting the deadlines laid down in Regulation (EC) No 1049/2001. In this sense, agencies cannot be compared to institutions in terms of the administrative burden that the handling of wide-scope access to documents requests place upon them.

We also note that, in your letter, there are several references to information (contained within some of the 76 documents) that is indicated as being already publicly available, for instance in the publications of other organisations/civil society, or in the wider media. While thanking your office for the thorough assessment made in this regard and for drawing the EUAA’s attention to publicly available information, it is important to highlight in this regard that the Agency is not always aware of exactly what is in the public domain. Additionally, in the case of a wide-scope request for access to documents that needs to be replied to within set (and tight) timeframes, the Agency is not always in a position, due to its limited resources, to undertake extensive research to cross-check all the relevant information contained in the relevant documents to ascertain whether and in what way the information was already released into the public domain by sources other than the EUAA.

The above being said, given that the Agency has now had additional time to undertake an even more detailed analysis of the matter, we are pleased to share our thoughts on the different points raised in your letter, while providing an overview of how we propose to implement your proposed fair solution with a view to giving significantly increased access to the documents at issue.

In presenting our approach, this letter utilises the same categorisation of documents as that which was adopted by the inquiry team and described in paragraph 5 of your letter, i.e.:

- i. nine EUAA/European Commission email exchanges on reception (Category I);
- ii. two EUAA/European Commission exchanges on a Commission visit (Category II);
- iii. three other email communications (Category III);
- iv. 29 emails received from the European Commission (Category IV);
- v. 33 emails sent to the European Commission (Category V).

In this regard, we wish to emphasise that each of the 76 documents identified was subject to an individual assessment. The categorisation into five groupings is being maintained solely for practical purposes in the presentation of our reply. Whereas it should be reiterated that the EUAA has already previously granted access to the complainant, in the context of her request for public access to documents with reference No 002325 & 003155, to the following two documents:

- document 20: ‘re Delegation from Dutch Reception Services (COA)’;
- document 34: ‘RE Pournara FRC - Watershed WASH intervention Proposal’.

² 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, (OJ L 145, 31.5.2001, p. 43).

³ Judgment of 13 April 2005, Verein für Konsumenteninformation v Commission of the European Communities, Case T-2/03, para 111.



Finally, in terms of preliminary remarks, the Agency wishes to note that, following receipt of your proposal for a fair solution, extensive (additional) consultations were undertaken with a variety of relevant third parties, who were informed of the EUAA's intention, after it conducted its own preliminary re-assessment of each individual document, to grant increased access to the relevant documents. Specifically, the following parties were consulted: the European Commission, the European Border and Coast Guard Agency (Frontex), Europol, One Foundation, as well as the Permanent Representation to the EU of Cyprus. In this context, the EUAA has constructively deliberated with its external stakeholders in order to reach an outcome which is as transparent as possible, while still preserving any interests under Article 4 of Regulation (EC) No 1049/2001. As a result, the Agency is grateful for the cooperation demonstrated in this regard. Nevertheless, the final decision as regards the disclosure of the documents concerned remained vested solely in the EUAA.

II. INDIVIDUAL ASSESSMENT OF DOCUMENTS

Public interest as regards public security

In your letter, you seem to take the view that the EUAA has applied the exception on public security too broadly and it is unclear how giving public access to certain documents could pose a risk to public security, *inter alia*, given that some of the information concerned is already in the public domain.

In this respect, by way of introduction, the EUAA reiterates that during the course of its initial assessment, and in particular following consultations with the relevant stakeholders, it reached the conclusion that the concerned documents include sensitive operational information. That information is either related to sensitive aspects of the collaboration between the Agency and the national authorities, or has been made available to the Agency's personnel, whether assigned to work at the premises of those national authorities or not, within the framework of a cooperation which has been established and on the basis of the mutual trust built throughout the years of the EUAA's operational presence in Cyprus. Certain information, referring to the internal proceedings of the Cypriot authorities, was shared with the EUAA personnel in a collaborative spirit and within a framework of trust. It therefore concluded that the disclosure of such information would seriously undermine the trust placed by the national authorities on the cooperation with the EUAA, allowing for open and sincere exchanges, and therefore hamper the Agency's ongoing and future operations in Cyprus. In turn, this would further negatively affect the efforts made by Cyprus in implementing the Common European Asylum System (CEAS), which are supported by the EUAA through the provision of technical and operational assistance, and ultimately have an adverse impact on public security.

The Agency was therefore of the opinion that information and data that have been shared in confidence with the EUAA within the framework of the established cooperation, should not be disclosed without the explicit agreement of Cyprus. Nevertheless, following additional consultations with the relevant Cypriot authorities, the Agency has now reassessed its initial position and has come to the conclusion that only two remaining documents (documents no 13 and 18) are covered by the exception in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

As regards document No 13, this contains information regarding the number and profiles of officers deployed by the European Border and Coast Guard Agency (Frontex) in the respective operational area. Disclosing such information would be tantamount to disclosing the weaknesses and strengths of Frontex operations and pose a risk to their effectiveness. As a result, the course of ongoing and future similar operations would be hampered, ultimately defeating their purpose to counter and prevent cross-border crime and unauthorized border crossings. Consequently, the disclosure of such



information would undermine the protection of the public interest as regards public security as laid down Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

Furthermore, as regards document No 18, the e-mail exchange concerned pertains to regular meetings attended by Europol on the topic of the re-construction of a First Reception Centre in Cyprus. According to Europol, their contributions to these meetings may include sensitive information, such as details about security checks and forensic extractions, operational meetings, senior or specialized Europol staff meetings, logistics, and other related developments. The public disclosure of information and correspondence concerning these meetings may jeopardize the trust and mutual cooperation between Europol and its partners, which is essential to Europol's activities, consequently hindering Europol's ability to effectively perform its tasks. Consequently, the disclosure of such information would undermine the protection of the public interest as regards public security as laid down Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

Decision-making process

In your letter you seem to take the view that you do not find the extent of the EUAA's application of the exception on the protection of the decision-making process to be reasonable. Moreover, you claim that the internal or preliminary nature of certain documents is not sufficient to demonstrate that there is a foreseeable risk that the decision-making process would be seriously undermined, in case these documents were to be disclosed.

Following a careful re-examination of the documents concerned, the Agency notes that (parts of) certain documents⁴ contain individual opinions and observations shared by, *inter alia*, the Agency's personnel, as well as their suggestions and recommendations for future action, as part of internal consultations. The disclosure of such information would reduce the space to think and limit the possibility of the Agency to engage in free and frank exchanges with the external stakeholders concerned. Since the EUAA closely works alongside various external stakeholders (including, *inter alia*, the relevant Cypriot authorities and European Commissions' DG HOME), there is a real, tangible and foreseeable risk that the disclosure of certain documents by the EUAA would lead to a practice of self-censorship and ceasing of putting forward any views from those stakeholders to the Agency, due to the possibility of subsequent disclosure by the EUAA under a request for public access to documents under Regulation (EC) No 1049/2001. Moreover, there would be a similarly real, tangible and foreseeable risk in terms of the EUAA being excluded from wider information flows related to the implementation of the Asylum and Migration Pact, thereby diminishing the Agency's information position. Such would (seriously) negatively affect the functioning of the EUAA overall and hamper the achievement of its objectives. Moreover, this would lead to an accompanying breakdown of trust and communication between the EUAA and the afore-mentioned stakeholders. We hereby wish to emphasise that this is not merely a hypothetical risk which may - potentially - arise. Instead, this risk was explicitly raised as being tangible and foreseeable in the context of the Agency's external consultations carried out in accordance with Article 4(4) of Regulation (EC) No 1049/2001, as well as in the context of the Ombudsman's present inquiry.

Moreover, as regards documents No 19, 25 and 26, these documents provide details on an assessment carried out by the European Commission concerning a final report submitted by a beneficiary under a grant agreement (aimed at facilitating payment of the balance). According to Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, access to a document drawn up by an institution for

⁴ Including, *inter alia*, documents No 16, 36, 37, 39 and 75.



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. Pursuant to the second paragraph of the same article *“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.”*

Documents No 19, 25, and 26 are clearly used for internal purposes both within the European Commission itself, as well as between the European Commission and EUAA as part of ongoing deliberations. The public release thereof would impede the confidentiality of the assessment concerned and would deprive the European Commission of a ‘free space to think’ in order to properly carry out its assessment of the final report concerned. Moreover, such a release would allow persons who are not part of the deliberations, to exert external interference and pressure regarding this assessment (even after the procedure has been concluded). Furthermore, the considerations expressed in the documents concerned may become relevant again in one form or another during future assessments of final reports under other grant agreements. Therefore, those considerations should not be disseminated in a public manner.

In the Agency's assessment, the disclosure of documents No 16, 19, 25, 26, 36, 37, 39 and 75 would seriously undermine the decision-making process of the European Commission and/or EUAA. Therefore, access should be refused pursuant to Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

Overriding public interest in disclosure

In paragraphs 37-42 of your letter, you seem to urge the Agency to thoroughly balance its invoked interests under Article 4 of Regulation (EC) No 1049/2001, against the public interest in issues related to fundamental rights, migration management and reception conditions – specifically concerning Cyprus.

In this respect, the Agency has duly taken into consideration the Ombudsman's suggestions as to how to provide increased transparency also in the light of a possible overriding public interest in disclosure. The Agency acknowledges that whenever EU funding is involved, there is an increased public interest in disclosure. However, the Agency maintains that the public interest in disclosure needs to be weighed against the harm that would be occasioned by disclosure, e.g. the afore-mentioned risk of self-censorship, which would have specific and foreseeable repercussions on how decisions are taken by the EUAA and therefore on operational conditions and on cooperation on the ground.

Protection of personal data

The EUAA would further like to clarify that the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 has been maintained in the current renewed review of the documents, and that access to specific parts of the documents in question is refused, as their disclosure would undermine the protection of privacy and integrity of individuals, in particular in accordance with EU legislation regarding the protection of personal data. Specifically, the EUAA has decided that relevant redactions should be applied to all identified documents pursuant to the exception provided for in Article 4(1)(b)



of Regulation (EC) No 1049/2001, with reference to all personal data of the EUAA's and other stakeholders' personnel.

III. PARTIAL ACCESS

Having carefully considered the various points raised in your letter, the Agency made significant additional efforts to re-examine whether partial access could be granted to the documents concerned. We also recall that, following previous external consultations in accordance with Article 4(4) of Regulation 1049/2001, the relevant Cypriot authorities, as well as the European Commission had originally indicated their opposition to the disclosure of the relevant documents. These objections were duly taken into consideration by the Agency in reaching its decision to refuse access to the documents, in the context of the complainant's request for public access to documents with reference No 002325 & 003155. After your proposal for a fair solution was received and carefully considered, however, the Agency re-consulted the relevant Cypriot authorities, European Commission and the International Organisation for Migration (IOM), this time making clear the EUAA's view that partial access should be granted to the documents in question, as well as emphasising the importance of the principle of transparency. The Agency also reiterated that the final decision as regards disclosure remained with the EUAA.

Insofar as concerns documents No 16, 18, 19, 25, 26, 36, 37, 39 and 75, the EUAA maintains that these are covered by the exceptions under Article 4 of Regulation (EC) No 1049/2001, as detailed above, in their entirety.

As to the rest of the documents (i.e. 67 out of 76 documents) however, the EUAA is pleased to inform you that following the consultations with the relevant external stakeholders and its own reassessment, it can provide wide partial access, since only limited parts of these documents are covered by the exception concerning the protection of privacy and the integrity of the individual pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001. Whereas concerning document No 13 specifically, the EUAA has further redacted the number of officers deployed by Frontex in the respective operational area, since this information is covered by the exception concerning the protection of the public interest as regards public security as laid down Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

IV. CONCLUDING REMARKS

In conclusion, the EUAA has favourably considered your proposal to grant significantly increased public access to the documents and is willing to provide partial access to the absolute majority of the identified documents, i.e. 67 out of 76 documents. It is only in relation to 9 remaining documents that the Agency considers it necessary to refrain from granting access, and this for the reasons outlined in detail above.

The EUAA would like to thank you and the Ombudsman's office for the constructive and detailed recommendations in relation to this access to documents request. As will be evident to you from the new proposal for disclosure, the Agency dedicated considerable time and resources to carefully consider your office's recommendations and to thoroughly review the documents and redact them accordingly. The outcome is a substantially wider access to the identified documents, with a minimum of redactions considered as necessary to safeguard the interests under Article 4 of Regulation (EC) No 1049/2001.



Yours sincerely,



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