

Reply by the European Commission to the European Ombudsman’s proposal for a solution in the case concerning how the Commission dealt with a request for public access to documents concerning the national plan of the Netherlands under the Recovery and Resilience Facility
Complaint by [REDACTED], ref. 409/2023/OAM

I. BACKGROUND

On 3 June 2022, the complainant requested access to:

‘[a]ll documents held by the Commission on the preparation of a recovery and resilience plan of the Netherlands as part of the European Recovery and Resilience Facility (RRF), from 29 January 2022 until 1 June 2022.

This includes exchanges via e-mail, including attachments, letter, text messages, phone call notes, or meeting notes, between the Commission and the Dutch national government about possible investments and potential projects.’¹

On 6 September 2022, the Commission replied to the complainant’s application, informing him that 205 documents in its possession fell within the scope of his application, 158 of which originated – in full or in part – from a third party, namely the Netherlands.

Following an assessment of the documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter ‘Regulation (EC) No 1049/2001’), which included a consultation of the Netherlands pursuant to Article 4(4) of that regulation, the Commission granted the complainant:

- full access to 10 documents; and
- partial access to 23 documents.

No access to the remaining 172 documents could be granted.

As explained in the Commission’s reply, the protection of the documents against public disclosure was based on the exceptions to the right of access in the following provisions of Regulation (EC) No 1049/2001:

- the first indent (protection of the public interest as regards public security) of Article 4(1)(a);
- the second indent (protection of the public interest as regards defence and military matters) of Article 4(1)(a);
- the fourth indent (protection of the public interest as regards the financial, monetary or

¹ Reference EASE 2022/3170.

² OJ L 145, 31.5.2001, p. 43.

economic policy of the Community or a Member State) of Article 4(1)(a);

- Article 4(1)(b) (protection of privacy and the integrity of the individual);
- the first indent (protection of commercial interests of a natural or legal person) of Article 4(2); and
- the first subparagraph (protection of the ongoing decision-making process) of Article 4(3).

On 3 October 2022, the complainant made a confirmatory application, requesting the Commission to reconsider its position.

On 27 February 2023, the complainant submitted a complaint to the Ombudsman against the Commission's failure to reply to his confirmatory application within the statutory time limit.

II. OMBUDSMAN'S INQUIRY AND PROPOSAL FOR A SOLUTION

On 16 March 2023, the Ombudsman informed the Commission that it had opened an inquiry following the complaint, urging it to reply to the complainant's confirmatory application by 11 April 2023.

In the absence of the Commission's reply to the complainant's confirmatory application by that date, the Ombudsman, in its letter of 7 July 2023, asked the Commission to provide its services, by 17 July 2023, with copies of the documents identified as falling within the scope of the complainant's application to which (full) access was refused and any existing documentation relating to the consultation of the Dutch authorities at initial and confirmatory stages.

On 19 July 2023, the Commission transmitted to the Ombudsman the documents identified as falling within the scope of the complainant's application to which (full) access was refused and the existing documentation relating to the consultation of the Dutch authorities at initial stage. The Commission explained that it was not in a position to do the same with respect to the documentation relating to the consultation of the Dutch authorities at confirmatory stage, as that consultation was still ongoing at the time.

In its letter of 24 November 2023, the Ombudsman proposed that the Commission review its position at initial stage with regard to the 172 documents to which no access was granted, with a view of granting the complainant the widest possible access thereto. The Ombudsman noted that the Dutch authorities were consulted on the disclosure of the documents originating from them (the majority of the documents at issue) and did not identify a risk to the financial, monetary or economic policy of the Netherlands arising from the disclosure of 72 documents. The Ombudsman considered that '[i]t is not clear from the initial decision why, for those documents, the Commission's assessment differed from that of the Dutch authorities'.

As regards the Commission's assessments of the Dutch recovery and resilience plan, the

Ombudsman argued that ‘it is not evident that the exception could be applied to all and/or the entirety of the documents containing the Commission’s assessments and guidance. The documents containing the assessments do not seem to be so sensitive throughout that their (partial) disclosure would undermine the protection of the financial, monetary or economic policy of the Netherlands. In addition, large parts of the meeting minutes seem to be rather general in nature’.

The Ombudsman also questioned the applicability of the exceptions laid down in the first indent (protection of commercial interests) of Article 4(2) and the first subparagraph (protection of the ongoing decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

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

The Commission’s confirmatory decision C(2024)5126 of 12 July 2024, of which the Ombudsman has received a copy, grants the widest possible public access to all the documents requested, namely:

- full access to 76 documents and
- partial access to 72 documents.

No access to the remaining 43 documents could be granted.

As outlined in the confirmatory decision, the full or partial protection against public disclosure of the 115 documents concerned is based on the exceptions to the right of access in the following provisions of Regulation (EC) No 1049/2001:

- the first indent (protection of public security) of Article 4(1)(a);
- the second indent (protection of defence and military matters) of Article 4(1)(a);
- the fourth indent (protection of the financial, monetary or economic policy of the Community or a Member State) of Article 4(1)(a);
- Article 4(1)(b) (protection of privacy and the integrity of the individual);
- Article 4(3) (protection of the decision-making process).

The Commission invoked the above exceptions to the right of access taking into account the reasons and explanations provided by the authorities of the Netherlands, as the originator of 158 documents requested, in several rounds of consultations conducted by the Commission pursuant to Article 4(4) and Article 4(5) of Regulation (EC) No 1049/2001. The Commission encloses the replies of the Member State in a confidential annex to this reply, for the Ombudsman’s consideration.

In particular, the Netherlands objected to disclosure of a number of documents, invoking the exceptions to the right of access in the first, second and fourth indents of Article 4(1)(a) of Regulation (EC) No 1049/2001, justifying it with detailed and extensive argumentation revolving around the domestic security, economic and financial circumstances of the Member State. In its assessment, the Commission found those explanations to be sufficiently specific to enable it to invoke the said exceptions to refuse access to the documents concerned. The Commission's reasoning in that respect is set out to the requisite standard, in section 2.1-2.3 of the confirmatory decision and it reflects the relevant parts of the argumentation provided by the Netherlands.

Therefore, the argument put forward by the Ombudsman that the redaction of documents originating from the Netherlands on the basis of the exception protecting the financial, monetary or economic policy of the Member State (fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001) is not justified insofar as the Dutch authorities did not identify any risk to the protection of this interest and has become obsolete with the Member State's reply to the Commission's consultation at confirmatory level.

Furthermore, in a recent case concerning a request for public access to documents related to the recovery and resilience plan of another Member State, the General Court confirmed that the Commission was entitled to conclude that the disclosure of the documents would undermine, by reason of their preliminary nature and their content, the public interest as regards the financial and economic policy of the Member State in question³. The Commission refers to the detailed considerations regarding the applicable case-law of section 2.3.2 of the confirmatory decision. As explained above, the Commission considered that the Dutch authorities had provided justifications on the link between the documents concerned and the protection of the public interest as regards public security, defence and military matters and the financial, monetary or economic policy of the Union and the Member State.

In relation to its own documents, the Commission did not invoke the exceptions laid down in the fourth indent of Article 4(1)(a) (protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State), nor that in the first indent of Article 4(2) of that Regulation (protection of commercial interest) in order to refuse access.

As regards the exception to the right of access in Article 4(3) of Regulation (EC) No 1049/2001 – to the relevance of which the Ombudsman expressed a doubt in its letter of 14 November 2023 – the Commission invoked that exception in its confirmatory decision to justify the protection of a single document and on its own motion. The rationale behind its application is thoroughly explained in section 2.5 of that decision, which also sets out the very particular and sensitive context of the decision-making process related to the adoption and implementation of national recovery and resilience plans of Member States in cooperation

³ Judgment of the General Court of 15 February 2023, *Asesores Comunitarios v Commission*, T-77/22, EU:T:2023:69.

with the EU institutions, in particular the Commission, as part of the joint effort aimed to implement the Recovery and Resilience Facility.

IV. CONCLUSION

In light of the above, the Commission considers that it has conducted a complete review of its position from initial stage, granting the complainant full or further partial access to a significant number of other documents. In refusing access to a part of the documents, the Commission safeguarded the interests protected by virtue of the first indent (public security) of Article 4(1)(a), the second indent (defence and military matters) of Article 4(1)(a), the fourth indent (the financial, monetary or economic policy of the Community or a Member State) of Article 4(1)(a), Article 4(1)(b) (privacy and the integrity of the individual) and Article 4(3) (decision-making process) of Regulation (EC) No 1049/2001 and ensured that the complainant was granted the widest possible access to the documents requested.

For the Commission
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Vice-President

