

Reply of the European Commission to the proposal for a solution from the European Ombudsman
- Complaint by Mr [REDACTED] ref. 1279/2019/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 5 October 2018, the complainant (an academic carrying out research into the migration crisis) submitted an initial application¹ for access to ‘any communication (including but not limited to e-mails and attachments, notes and minutes of meetings, reports, etc.) between the European Commission and the management consultancy firm [REDACTED] concerning the Greek asylum system covering the period from 1 October 2016 to 31 January 2017, at all levels, including Cabinet officials and relevant EU Commissioners.’

The application was dealt with by the Structural Reform Support Service.

In its initial reply of 11 December 2018, the Structural Reform Support Service identified seven documents as falling under the request for access. It granted wide partial access to documents 1, 2, 3, 4, 5 and 6 based on the exceptions of Article 4(1), first indent (protection of the public interest as regards public security), Article 4(1), third indent (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests of natural or legal persons, including intellectual property) of Regulation (EC) No 1049/2001. The Structural Reform Support Service refused access to document 7, namely the [REDACTED] Proposal for operationalizing the EU-Turkey Statement on the Greek islands of January 2017, based on the exception laid down in the first indent of Article 4(2) (protection of commercial interests of natural or legal persons, including intellectual property) of Regulation (EC) No 1049/2001.

In the confirmatory decision C(2019)4942 final of 25 June 2019, the European Commission granted wider partial access to the Management summary report of December 2016 (document 6) and the [REDACTED] Proposal for operationalizing the EU-Turkey Statement on the Greek islands of January 2017. The redactions are based on the exceptions of Article 4(2), first indent (protection of commercial interests of natural or legal persons, including intellectual property) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 5 July 2019, the complainant turned to the European Ombudsman.

In his complaint, the applicant considers, apart from the redaction of personal data that the European Commission has failed to duly consider public interest in the disclosure of the requested documents and has applied the exceptions regarding public security, international relations and commercial interests too restrictively and seemingly arbitrarily.

¹ Registered under reference GESTDEM 2018/5252.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

In the course of the inquiry, the European Ombudsman reviewed the requested documents and issued the present proposal for a solution.

In her proposal, the European Ombudsman proposed that the European Commission should grant further partial access to the requested documents in line with the approach described in her proposal for a solution, in particular in paragraphs 26 and 27.

The European Ombudsman does not consider that information in document 7 related to the substance of the funded project, especially the work package and deliverables of the project, is covered by the exception under Article 4(2), first indent of Regulation (EC) No 1049/2001 (protection of commercial interests). Therefore, this document should be disclosed.²

On the other hand, the European Ombudsman explicitly underlined that 'the explanations provided to the applicant by the European Commission regarding the likelihood that disclosure would undermine public security and international relations were as detailed as they could be. Requiring the European Commission to provide more detailed reasons as regards why disclosure would undermine public security and international relations would have involved revealing sensitive information in the documents. This would have rendered the very purpose of the exemptions for the protection of public security and/or international relations void.'³

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

The European Commission welcomes the European Ombudsman's conclusion that the refusal to grant public access to the details of the interactions between those involved in managing the migration crisis, including third countries, highly sensitive information on border cooperation, reception conditions in Greece and Turkey, the relocation and resettlement of migrants, challenges faced when receiving migrants and asylum seekers would undermine public security, as well as international relations with third countries, including the countries of origin of migrants and other international partners, thereby jeopardising the implementation of the EU-Turkey Statement.

Furthermore, the European Ombudsman noted that there is still a significant influx of migrants and the situation on the Greek islands is still precarious. The European Ombudsman therefore concluded that the European Commission was justified in denying public access to the parts of the documents to which it applied those two exceptions.⁴

The European Commission's confirmatory decision C(2019)4942 final contains an extensive reasoning why the European Commission partially granted access to the documents requested. In its detailed reasoning, the European Commission explained why the exceptions defined in Article 4(1), first indent (protection of the public interest as regards public security), Article 4(1), third indent (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests of natural or legal persons, including intellectual property)

² Points 26 and 27 of the European Ombudsman proposal.

³ Points 19-22 of the European Ombudsman proposal.

⁴ Points 23 and 24 of the European Ombudsman proposal.

of Regulation (EC) No 1049/2001 prevented it from granting full access to the documents requested, in particular to document 7. It also explained in detail why it considered that there was no overriding public interest in disclosure and why no further partial access could be granted to the documents.

The European Commission respectfully disagrees with the European Ombudsman's conclusion that 'information related to the substance of the funded project' must be disclosed unless there is a justification based on the need to protect public security or international relations. It reiterates that, in the light of the case-law, it has to conclude that that type of information contains sensitive information on the business strategies and the commercial relations of the company concerned in the meaning of Article 4(2), first indent of Regulation (EC) No 1049/2001.

Therefore, the European Commission maintains its view that, at the relevant time, it correctly invoked and applied the exceptions laid down in Article 4(1), first indent, Article 4(1), third indent, Article 4(1)(b) and Article 4(2), first indent of Regulation (EC) No 1049/2001 in relation to the above-mentioned documents.

In light of this, the European Commission cannot agree that it wrongly refused to disclose the documents requested, in particular document 7.

V. CONCLUSIONS

The European Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the European Union Court, was fully in line with the applicable legislation and the relevant case-law on access to documents at the point in time it was taken.

As to the European Ombudsman's proposal for a solution, namely to grant further access to document 7, the European Commission notes that the withheld parts of document 7, if disclosed, would undermine the protection of commercial interests of the company concerned within the meaning of Article 4(2), first indent of Regulation (EC) No 1049/2001.

For the Commission
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The President