

Valletta Harbour, 03 October 2024
EUAA/ED/2024/327

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 Greek migration management facilities (case 687/2024/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 at confirmatory stage on the public 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.

In your letter, you make a number of 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 the remarks in the general considerations section of your letter (paragraphs 17-21), 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 133 documents, 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 Regulation (EC) 1049/2001. 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"*.¹ In this case, the extensive scope of the documents in question, covering many locations and different types of activities, meant that an in-depth analysis of the information contained within them was ultimately required, in a process that necessitated 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

¹ Judgment of 13 April 2005, Verein für Konsumenteninformation v Commission of the European Communities, Case T-2/03, para 111.



laid down in Regulation (EC) No 1049/2001. As noted in my letter of 17 May in which I provided some additional observations in relation to this case following your request to inspect the file, 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 132 non-disclosed 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 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 20 of your letter, i.e.:

- i. Documents offering a general overview of reception conditions. This category includes two quarterly country reports, as well as 35 reports from Field Support Officers.
- ii. Activity reports from individual staff members. This category includes nine individual reports from staff located in the headquarters, as well as 82 individual reports from staff operating in Eastern Aegean facilities, mostly assistants.
- iii. EUAA email exchanges [REDACTED].
- iv. EUAA-Commission email exchanges. This category includes two email exchanges between the EUAA and the European Commission in relation to a 'Touch base' meeting that took place in June 2023.

In this regard, we wish to stress that each of the 132 documents identified was subject to an individual assessment. The categorisation into four groupings is being utilised solely for practical purposes in the presentation of our reply.

Finally, in terms of preliminary remarks, the Agency wishes to note that, following receipt of your proposal for a solution, renewed consultations were undertaken with the 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. The following parties were consulted: DG HOME, FRONTEX, Europol, FRA, and the relevant Greek authorities. Concrete proposals for (wide) partial access were also in some cases made.

II. INDIVIDUAL ASSESSMENT OF DOCUMENTS

Public interest as regards public security

In your letter, you take the view that the EUAA has applied the exception on public security too broadly and that it should be possible to disentangle sensitive operational information from information about reception conditions, identify non-sensitive operational information, single out information that is already in the public domain and therefore provide partial access to the documents accordingly.

In this respect, by way of introduction, the EUAA reiterates that the concerned documents include information that 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 embedded within those national authorities or not, within the framework of the cooperation which has been established and on the basis of the mutual trust built throughout the years of the EUAA's operational presence in Greece. This information, referring to the internal proceedings of the Greek authorities, was shared with the EUAA personnel in a collaborative spirit and in the context of the performance of their duties. It has not necessarily been provided with the level of scrutiny that would have been exercised if the authorities would have the understanding that this information would be communicated to external parties. The disclosure of information shared by the authorities in this context 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 Greece. In turn, this would further negatively affect the efforts made by the Hellenic Republic in implementing the Common European Asylum System (CEAS), which are currently supported by the EUAA through the provision of technical and operational assistance, and ultimately have an adverse impact on public security.

After re-assessing again in detail the 132 documents, we are of the opinion that specific information and data that have been shared in confidence with the EUAA within the framework of the established cooperation, without being officially published by the national authorities, should not be disclosed. The latter may refer either to information not generally made known to the public – at least not in such level of detail – (e.g., results of verification exercises conducted, population analysis per specific location, number of cases managed per location), or information that has been provisionally shared and reported in the documents concerned prior to its official verification or through provisional internal exchanges, meaning that the respective parts of the documents may include inaccuracies (e.g., figures referring to arrivals, population accommodated and transfers per location). Equally, access to information related to specific aspects of the collaboration between the Agency and the national authorities, including issues of communication and coordination of purely internal nature affecting the modalities of task assignments and impacting the outcome of certain projects, should be refused. As mentioned above, the disclosure of such information would seriously undermine the cooperation between the national authorities and the EUAA, adversely affecting public security.

Finally, insofar as concerns the two documents in Category IV (documents 131 and 132), it is to be noted that these contain sensitive operational information as regards Europol's partners as well as operational *modus operandi*. The disclosure of such information to the public might jeopardise present and future investigations and operational activities of the law enforcement authorities of the Member States in their fight against organised crime and other forms of serious crime. The disclosure of such information to the public could also jeopardise 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. Hence, full disclosure of these two documents would also undermine the protection of the public interest as regards public security.

Public interest as regards international relations



In accordance with Article 4(1)(a) third indent of Regulation (EC) No 1049/2001, access to a document must be refused if its disclosure would undermine the public interest as regards international relations.

This exception applies to specific parts of Category IV documents (documents 131 and 132) with reference to the working practices of another EU agency (i.e., Europol), disclosure of which would reveal sensitive information about the cooperation of the said agency with certain third countries.

Decision-making process

In your letter you argue 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, as in your view this exception would only apply to limited parts of the documents. Moreover, you claim that the internal or preliminary nature of the documents as such is not sufficient to demonstrate that there is a foreseeable risk that the decision-making process would be seriously undermined and that in some cases the explanations provided by the EUAA are not tangible enough to demonstrate that disclosure would increase the external pressure to which the Agency is presumably exposed so as to substantially affect the decision to be taken.

Following a careful re-examination of the documents concerned, the Agency notes that sections of the documents contain individual opinions and observations shared by the Agency's personnel, as well as their suggestions and recommendations for future action, as part of internal consultations. It is worth noting that these suggestions and recommendations are addressed to the EUAA coordination office in Athens, as these are documents intended for internal use, however they may refer to actions required by either the latter or the competent national authorities. The disclosure of such information would reduce the space to think and limit the possibility of the Agency's personnel to engage in free and frank exchanges with the coordination office. Since embedded EUAA personnel ultimately work alongside the Greek authorities on a day-to-day basis, there is a real risk that full disclosure of the relevant documents to the wider public would expose them to negative repercussions within their working environment. This would be a result of personal opinions which were expressed in a confidential manner being made publicly available. There is therefore a clear and real risk that disclosure of the relevant documents in full would result in self-censoring, limiting the Agency's possibility to receive frank views and suggestions on the part of the deployed personnel, and thus negatively affecting the Agency's ability to make decisions in a most informed manner. Disclosure of the said parts of the documents in question would also seriously undermine the mutual trust and cooperation between the EUAA and the national authorities, negatively affecting the frank exchange of views between personnel involved from both sides, while also raising concerns of public pressure from interest groups in terms of follow-up to suggestions and recommendations expressed solely as individual opinions during internal consultations, which might not have ultimately been endorsed by the EUAA.

Certain parts of the identified documents contain information on risks and issues identified and assessed by the Agency as potential factors that could affect the achievement of its operational objectives. For such risks and issues, mitigation actions are still ongoing. The risk management procedure lies at the core of the decision-making of the Agency, referring not only to the local operational environment, but also to general considerations of the Agency regarding its operational activities. Therefore, disclosure of the relevant information would have a substantial impact on the Agency's decision-making process and access should be refused pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

Finally, insofar as concerns the two documents in Category IV (documents 131 and 132), it is to be noted that these both constitute internal, non-finalised (draft) exchanges between colleagues who seek to verify the information shared in a meeting and decide on the optimal way of drafting its final conclusions. As such, the documents present their personal reflections on the possible options and suggestions. Disclosure of the documents would reveal preliminary and non-final views and information. If the documents were to be disclosed, the authors of such an internal, informal kind of document would always have to account for a potential future risk of disclosure, to the point where they might be led to practice self-censorship and to be reluctant to exchange constructive views between them. The result would be that the EU institutions and bodies could no longer benefit from the frankly expressed and complete views required of its civil servants, who would no longer benefit from a free space to think.

The disclosure of the relevant information in these documents would therefore have a substantial impact on the Agency's decision-making process and access should be refused pursuant to Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

Overriding public interest in disclosure

In your letter you observe that the EUAA's confirmatory decision merely states that an overriding public interest could not be identified. In your view the Agency did not explain why that is the case nor has it engaged with the argumentation put forward by the complainant, which emphasised the importance of transparency about reception conditions in EU-funded migration facilities in light of concerns raised over potential rights violations. Therefore – you observed – should the EUAA consider, when replying to this solution proposal, that some redactions are required to protect its decision-making process, the Ombudsman urges the Agency to thoroughly balance this interest against the public interest mentioned above.

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, i.e. the 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

Last, although not contested by the complainant in their confirmatory application, nor included in your recommendations in your letter, the EUAA would 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 personal data related to names of the EUAA's and other stakeholders' personnel, professional profiles and emails, personal HR issues, security incidents and case management of applicants' individual cases.



III. PARTIAL ACCESS

Having carefully considered the various points raised in your letter, the Agency made additional efforts to re-examine whether partial access could be granted to the documents.

Insofar as concerns Category IV documents (documents 131 and 132), the EUAA maintains that these two documents 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. documents 1-130), however, the EUAA is pleased to be able to inform you that it can provide wide partial access, since only limited parts of these documents are covered by the exceptions.

Insofar as concerns the protection of the public interest as regards public security under Article 4(1)(a) first indent of Regulation (EC) No 1049/2001, the EUAA has made a concerted effort to disentangle sensitive operational information from information about reception conditions, and to identify parts of the documents that could be released without jeopardising the relationship of mutual trust with the Greek authorities, and, as a consequence, public security. Taking into consideration the suggestions under paragraphs 24-26 of your letter, the EUAA also made an effort to check and verify whether information and data within the documents is publicly available, as officially published by the competent national authorities. In case they have been officially published by the national authorities, the said information and data are indeed to be disclosed.

We also recall that, following consultation under Article 4(4) of Regulation 1049/2021, the relevant Greek Authorities had originally indicated their opposition to the disclosure of the relevant documents. This opposition was taken into consideration by the Agency in reaching its decision to refuse access to the documents up to the confirmatory stage. After your proposal was received and carefully considered, however, the Agency re-consulted the Greek Authorities, 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 and the duty of Member States to cooperate with the Agency in applying Regulation 1049/2021 in an effective manner. On this occasion, the Greek authorities agreed with the EUAA's proposal to grant partial access.

In light of the above considerations, the EUAA has applied redactions to the minimum extent possible pursuant to the exception under Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 on the following documents:

- o Category I: documents 1, 12, 20, 25, 29, 35, 43, 46, 49, 52, 55, 58, 60, 62, 64, 65, 68, 69, 74, 77, 83, 87, 89, 91, 94, 96, 100, 101, 106, 107, 111, 112, 117, 120, 123, 128.
- o Category II: documents 9, 15, 17, 18, 19, 22, 24, 28, 31, 32, 33, 34, 36, 40, 41, 42, 53, 70, 75, 78, 81, 84, 99, 103, 114, 115, 118, 119, 121, 122, 125, 126, 127, 129, 130.
- o Category III: document 86.

Insofar as concerns the protection of the decision-making process under Article 4(3) of Regulation (EC) No 1049/2001, the Agency has duly considered your suggestions and, following an individual assessment of all concerned documents, has made an effort to identify in more detail those parts of the documents disclosure of which would not negatively impact the Agency's decision-making process. Additionally, there are parts where we consider that even though there is a need to protect the decision-making process, this is outweighed by the public interest in disclosure.



In light of the above considerations, the EUAA has applied redactions to the minimum extent possible pursuant to the exception under Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 on the following documents:

- o Category I: documents 1, 12, 20, 25, 29, 35, 43, 46, 49, 52, 55, 58, 60, 62, 64, 65, 68, 69, 74, 77, 83, 87, 89, 91, 94, 96, 100, 101, 106, 107, 111, 112, 117, 120, 123, 128,
- o Category II: documents 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 21, 22, 23, 26, 27, 30, 32, 36, 37, 40, 42, 44, 45, 47, 48, 50, 51, 53, 57, 59, 66, 67, 70, 73, 75, 76, 79, 84, 93, 99, 105, 108, 110,
- o Category III: documents 85, 86,

Redactions have also been applied to the minimum extent possible pursuant to the exception under Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 on the following document:

- o Category I: document 2

Finally, insofar as concerns the protection of privacy and the integrity of the individual pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, as noted above the EUAA has decided that relevant redactions should be applied to all identified documents, with reference to personal data related to names of the EUAA's and other stakeholders' personnel, professional profiles and emails, personal HR issues, security incidents and case management of applicants' individual cases.

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. documents 1-130. It is only in relation to documents 131 and 132 that the Agency considers it necessary to refrain from granting access, and this for the reasons outlined in detail above.

The EUAA has no objection to the solution proposal or to the present letter of reply being shared with the complainant. The documents identified as part of the public access request, with the EUAA's redactions indicatively marked in red, should be considered as confidential and should not be shared with the complainant before they are properly redacted and processed by the EUAA.

In conclusion, the EUAA would like to thank you for your constructive and detailed recommendations in relation to this access to documents request. As will be evident to you from the new proposal for redactions, 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 public interest as regards public security and international relations, the decision-making process, and the protection of privacy and the integrity of the individual, in accordance with the exceptions of the Regulation.



Yours sincerely,

Nina Gregori
Executive Director
European Union Agency for Asylum