

Reply of the European Commission to the proposal for a solution from the European Ombudsman regarding the European Commission's refusal to give public access to the 'pillar assessment' of an international organisation that is implementing EU funds in the area of migration

- Complaint by Mr [REDACTED], cases 1731/2022/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 8 October 2021, the complainant, [REDACTED], a journalist, submitted an initial application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')¹. The complainant's request was registered under reference GESTDEM 2021/6406.

In his initial application, handled by the European Commission's Directorate-General for International Partnerships, the complainant requested access to all documents and correspondence related to the pillar assessment of the International Centre for Migration Policy Development.

In its initial reply of 14 December 2021², the Directorate-General for International Partnerships identified 16 documents as falling under the scope of this request. It granted full access to five documents, namely documents 2.1, 2.2, 2.3, 2.4 and 7.1 and wide partial access to documents 2, 3, 5, 7, 8 and 9 with only personal data being redacted based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. Furthermore, taking into account the reply of the International Centre for Migration Policy Development, it refused access to documents 1, 4, 4.1, 6 and 6.1 based on Article 4(1)(b) (protection of privacy and the integrity of the individual) and first indent of Article 4(2) (protection of commercial interests, including intellectual property rights) of the same Regulation.

On 26 December 2021, the complainant submitted a confirmatory application against the reply of the Directorate-General for International Partnerships, alleging the existence of an overriding public interest in disclosure and arguing that the documents refused should be disclose.

At the confirmatory stage, the European Commission re-consulted the International Centre for Migration Policy Development and examined the arguments provided by the third party.

¹ OJ L 145 of 31.5.2001, p. 43.

² Ares(2021)7734699.

Following this assessment:

- wide partial access was granted to documents 1 (Document entitled ‘Indirect Delegated management with International Organisations’ sent from the ICMPD to the European Commission on 8 September 2014), document 4 (Email from the European Commission (DG NEAR) to the ICMPD dated 2 March 2015 entitled ‘Pillar assessment of the ICMPD’) and document 6 (Email correspondence between the European Commission and the ICMPD between July – November 2020). The limited undisclosed information requires protection under the exception in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- access to documents 4.1 (Final Report of 3 December 2014 entitled ‘Pillar Assessment of International Centre for Migration Policy Development’) and document 6.1 (Final Pillar Assessment Report dated 5 October 2020) was refused, based on the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests, including intellectual property) of the same Regulation.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The complainant lodged a complaint with the European Ombudsman in relation to the documents to which the European Commission refused access.

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

The European Ombudsman opened an inquiry into the complaint. The Ombudsman’s inquiry concerned only two pillar assessment reports of an international organisation, referred to as documents ‘4.1’ and ‘6.1’ in the Commission’s confirmatory decision of 22 August 2022. It did not concern the documents to which partial access was granted by the European Commission subject only to the redaction of personal data.

In the course of the European Ombudsman’s inquiry, the European Commission provided the latter with a copy of the documents concerned, as well as the European Commission’s exchanges with the international organisation concerned.

The European Ombudsman considers that the European Commission should review its position with a view to granting the widest possible public access to the two pillar assessment reports.

IV. THE EUROPEAN COMMISSION'S POSITION ON THE PROPOSAL FOR A SOLUTION

The European Commission noted the arguments of the European Ombudsman and, after careful assessment of all the elements in the case, considers that the confirmatory decision it took was in line with the Regulation (EC) No 2001/1049 and the relevant case-law on access to documents at the point in time it was taken.

The European Commission hereby submits the following comments regarding the European Ombudsman's proposal for a solution.

The two documents requested relate to a pillar assessment of the International Centre for Migration Policy Development. The objective of the assessment was to provide reasonable assurance to the European Commission as to whether the entity fulfils the requirements set out in points (a) to (f) of Article 154(4) of the Financial Regulation applicable to the General Budget of the European Commission³ and Article 29.1 of the Financial Regulation applicable to the European Development Fund⁴ with regard to several pillars.

The information contained in the documents originates from a third party and is more detailed than publicly available information about the assessment and the new Terms of Reference for the pillar assessment methodology⁵ published on Europa website⁶.

The two final reports requested notably related to an assessment covering the design and operating effectiveness of the relevant systems, controls, procedures and rules of the entity and applied analysis qualify as an original work and that copyright claim by the third party is legitimate in this case.

The European Ombudsman acknowledges that she is not convinced that the European Commission's arguments are such as to justify the non-disclosure of the reports in their entirety. Furthermore, the European Ombudsman considered that only limited parts of the reports can reasonably be regarded as containing business secrets that deserve protection under Article 4(2), first indent, of Regulation 1049/2001. For example, this could be the case as regards the information under the first two headings on page 30 of the 2014 report.

Consequently, in the case at stake, the European Commission analysed each document based on the legal framework and the opinion of the author.

³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1–222.

⁴ Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, OJ L 58, 3.3.2015, p. 17–38.

⁵ Commission Decision of 17 April 2019 on establishing new terms of reference for the pillar assessment methodology to be used under Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, OJ C 191, 6.6.2019, p. 2-136.

⁶ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0606\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0606(01)&from=EN)

The refused documents contain an assessment covering the design and operating effectiveness of the relevant systems, controls, procedures and rules of the entity and applied analysis qualify as an original work and that copyright claim by the third party is legitimate in this case. In addition, both reports are intended solely for the information and use of the International Centre for Migration Policy Development and the European Commission. The documents must be analysed in light of the confidentiality requirements and the applicable legal framework.

Additionally, as the European Commission noted in its confirmatory decision, the reports contain information which could harm the competitive position of the ICMPD, in particular, commercially sensitive information relating to specific methodology and know-how, expertise gained as a result of the organisation's investment in operational experience, training, research and development, as well as findings and recommendations about the organisation aimed at achieving greater effectiveness and efficiency.

Consequently, there is a real and not hypothetical risk that public access to the above-mentioned documents would undermine the commercial interests of the author of these documents as well as those of the contracting entity.

Furthermore, as the European Commission noted in its confirmatory decision, the European Commission already considered the possibility of granting partial access to the two pillar assessment reports pursuant to Article 4(6) of Regulation (EC) No 1049/2001, as it did with regards the other three documents, namely documents 1, 4 and 6, falling within the scope of the complainant's request. However, the European Commission concluded that no partial access is possible without undermining the interests described above.

Taking into account the obligation of confidentiality, the position of the third party, and the content of the documents, the European Commission considers that there were not enough elements to overrule the objections of the author to the disclosure of the documents that have been protected under Article 4 of Regulation (EC) No 1049/2001.

Moreover, as the European Commission noted in its confirmatory decision, the complainant did not put forward specific arguments as to demonstrate, on one hand the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal⁷. This was also confirmed by the European Ombudsman in her proposal for a solution. Nonetheless, the European Commission is committed to fostering transparency across all policy areas, within the boundaries of case-law. In case new and precise elements of public interest are brought to the European Commission attention, it can reconsider the

⁷ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

possibility to grant access to both documents following a new request.

Consequently, the European Commission maintains its view that it interpreted Regulation (EU) No 1049/2001 in a compatible and consistent way by refusing access to the two pillar assessment reports concerned by the inquiry of the European Ombudsman. Public access to the documents at this stage is not justified in view of any alleged overriding public interest in the disclosure of the refused documents.

IV. CONCLUSIONS

For the reasons set out above, the European Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the Union courts, was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken.

For the Commission

Věra JOUROVÁ

Vice-President