

Reply by the European Commission to the proposal for a solution from the European Ombudsman on the failure by the Commission to take a final decision within the applicable time limit on a request for public access to documents related to an agreement between Egypt and the EU on border management [reference EASE 2023/3176] - Complaint by ██████████, reference 1810/2023/ACB

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The applicant lodged under Regulation (EC) No 1049/2001¹ a request for public access to:

- ‘Agreement between the EU and Egypt regarding the first phase of an 80M€ border management programme, signed in October 2022 [...]’;
- [a]ll documents containing information related to the agreement between the EU and Egypt [concerning the] border management programme’.

Given the large number of pages of documents identified as falling within the scope of the request, the Directorate-General for European Neighbourhood and Enlargement Negotiations sent to the applicant a fair solution proposal based on Article 6(3) of Regulation (EC) No 1049/2001 on 21 June 2023, reference Ares(2023)4301287.

In its letter, the Directorate-General for European Neighbourhood and Enlargement Negotiations informed the applicant that it identified 24 documents within the scope of the request, amounting to around 400 pages. It invited the applicant to specify the objective of his application and to narrow down the scope of the request or the timeframe and annexed the full list of documents identified. It also proposed to handle only the contractual documents, as they were the most relevant to the scope of the applicant’s request. In the absence of a reply from the applicant, the Directorate-General for European Neighbourhood and Enlargement Negotiations unilaterally restricted the scope of the application to the documents suggested in its proposal seeking a fair solution.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, the applicant submitted a confirmatory application arguing that ‘while leaving out the most sensitive [documents], [the Commission] could have provided [him] with more documents. [He] would also have agreed to receiving documents whose most sensitive [information] have been deleted.’

The applicant subsequently submitted a complaint to the Ombudsman against the lack of reply to the confirmatory application.

¹ OJ L 145, 31.5.2001, p. 43.

II. EUROPEAN OMBUDSMAN'S INQUIRY AND PROPOSAL

The Ombudsman opened an inquiry into the Commission's failure to reply to the confirmatory application by the extended time limit and asked the Commission to provide a copy of the documents requested.

In the course of the inquiry, the Ombudsman received copy of the following documents requested for its inspection:

- Contribution Agreement NDICI-GEO-NEAR/2022/437-699 'Strengthening the operational capacity of the Egyptian Coast Guard and Egyptian Border Guards to manage migration flows through effective border surveillance and search and rescue at land and sea, reference Ares(2022)7543789, which contains the following documents:
 - Cover_letter (hereafter 'document 1');
 - Special Conditions_EG BM 24_10_22 (002) (002)90 26.10.22 (hereafter 'document 2');
 - Annex I 'Description of the Action' (hereafter 'document 3');
 - Annex II 'General Conditions for Contribution Agreement' (hereafter 'document 4');
 - Annex II.A 'Provisions for multi-partner contribution agreements' (hereafter 'document 5');
 - Annex III 'Budget' (hereafter 'document 6');
 - Annex IV 'Financial Identification Form-IOM' (hereafter 'document 7');
 - Annex V 'Standard Request for Payment' (hereafter 'document 8');
 - Annex VI 'Management Declaration' (hereafter 'document 9');
 - 'Signed Cover Letter' (hereafter 'document 10');
 - 'Signed Special Conditions' (hereafter 'document 11'); and
 - 'Initialized Annexes' (hereafter 'document 12')².

The Commission informed the Ombudsman that the assessment of the applicant's confirmatory request was fully ongoing. Therefore, the initial reply of the Directorate-General for European Neighbourhood and Enlargement Negotiations did not set out the final position of the Commission in relation to the applicant's request.

Despite these assurances, the Ombudsman issued on 18 January 2024 a proposal for a solution in this case. In its proposal, the Ombudsman invited the Commission to review its

² Please note that this document is comprised of documents 3-9 counter-signed by the contacting party.

initial position on the applicant's public access request 'with a view to granting the widest possible access to the documents requested'. More concretely:

- As regards documents 2, 5, 8, 9 and the signed copies included in documents 11 and 12, the Ombudsman considered that it was not clear why the Commission refused access to these contractual documents in their entirety as some documents correspond to standard clauses that are public.
- As regards document 3, the Ombudsman considered that the document should be partially disclosed.
- Finally, as regards document 6, the Ombudsman considered that the institutions have to explain how disclosure would specifically and actually undermine the legitimate commercial interests at stake.

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

The confirmatory decision adopted by the Commission (with reference C(2024) 26) identified 10 documents in addition to the documents identified in the initial reply of the Directorate-General for European Neighbourhood and Enlargement Negotiations, namely:

- Contract signature checklist, reference Ares(2022)7543789 (hereafter 'document 13');
- note to the file on selection of implementing partners, reference Ares(2022)7543789 (hereafter 'document 14');
- note to the file – assessment of entities – IOM, reference Ares(2022)7543789 (hereafter 'document 15');
- note to the file – assessment of entities – CIVIPOL, reference Ares(2022)7543789 (hereafter 'document 16');
- explanatory note, reference Ares(2022)7543789 (hereafter 'document 17');
- letter to CIVIPOL, reference Ares(2023)1830965 (hereafter 'document 18');
- letter to CIVIPOL, reference Ares(2023)1490202 (hereafter 'document 19');
- request for payment checklist, reference Ares(2022)7621466 (hereafter 'document 20');
- email exchanges on the budget, reference Ares(2022)7454350 (hereafter 'document 21');
- countersigned contribution agreement NDICI-GEO-NEAR/2022/437-699, reference Ares(2022)7544341 (hereafter 'document 22')³.

In its decision, the Commission:

³ Please note that this document is comprised of documents 2-9 counter-signed by both implementing partners.

- granted full access to documents 5 (Annex II.A ‘Provisions for multi-partner contribution agreements’), 8 (Annex V ‘Standard Request for Payment’) and 9 (Annex VI ‘Management Declaration’);
- granted wide partial access to documents 2 (special conditions), 11 (signed special conditions), 13 (contract signature checklist), 17 (explanatory note), 18 (letter to CIVIPOL), 19 (letter to CIVIPOL), 20 (request for payment checklist) and 21 (email exchanges on the budget) with redactions based on the exceptions in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- granted partial access to documents 1 (cover letter), 10 (signed cover letter), 12 (initialized annexes) and 22 (countersigned contribution agreement) based on the exceptions in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001;
- granted partial access to document 14 (note on the selection of partners) with redactions based on the exceptions in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the third indent (protection of international relations) of Article 4(1)(a) of Regulation (EC) No 1049/2001;
- granted partial access to documents 15 (assessment of IOM), 16 (assessment of CIVIPOL) based on the exception in the third indent (protection of international relations) of Article 4(1)(a) of Regulation (EC) No 1049/2001.
- refused access to documents 3 (description of the action), 6 (detailed budget) and 7 (financial identification form) based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

The assessment of the Secretariat-General shows that access, whether full or partial, could be granted to 19 documents out of 22.

In particular, the Commission granted full access to documents 5, 8 and 9, and wide partial access, subject only to the redaction of personal data under the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001, to documents 2, 11, 13, 17, 18, 19, 20 and 21.

Documents 1 and 10 contain a limited redaction – the legal entity number – under the exception in the first indent of Article 4(2) of Regulation (EC) No 1049/2001. Public access to this data would undermine the commercial interests of the implementing partner, as the disclosure of bank account details and legal entity numbers of identified organisations could make the accounts concerned a target of cybercrime or malicious attacks.

Documents 14-16 contain limited redactions of details of operational capacities, infrastructure and the internal organisation of the Egyptian authorities, which was shared exclusively for the

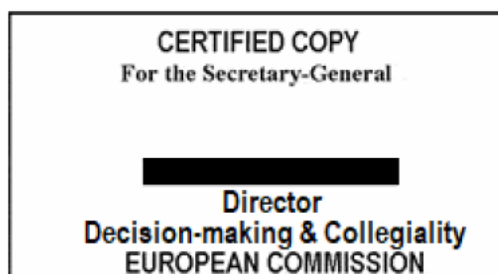
Commission's information. Following the Commission's assessment, their disclosure would harm the international relations of the Commission with the International Organization for Migration (IOM) and the Egyptian authorities and therefore threaten the implementation of the contract. In this respect, the Commission's refers to the detailed argumentation presented in the confirmatory decision.

Last, as explained in the confirmatory decision, the Commission could not grant any access to documents 3, 6 and 7, namely the description of the action, the detailed budget, and the financial identification form. The Commission concluded that the entire content of these documents must be protected under the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001. Documents 3 and 6 reflect the methodology, expertise, cost structure and unique know-how of the implementing partners, which are fully protected in line with the case-law of the Courts⁴. Their disclosure would allow any other competitor to use or copy the information therein to support their own application, thereby undermining the commercial interests of the chosen implementing partners. As regards the financial identification form (document 7), this document contains all the financial details needed for the conclusion of the contract.

While the Commission could not grant partial access to document 3, as assessed by the Ombudsman services, for the reasons mentioned in the paragraphs above and detailed at length in the confirmatory decision, the Commission granted full or wide access to most of the documents requested.

Consequently, the Commission is of the view that the widest possible access has been granted to the documents at stake. The Commission refers to the detailed analysis of the confirmatory decision (document attached), which sets out the final position of the Commission in relation to the applicant's request, and is ready to engage further with the Ombudsman on this basis if the latter deems it necessary.

For the Commission
Věra JOUROVÁ
Vice-President



⁴ Judgment of the General Court of 21 October 2010, *Kalliope Agapiou Joséphidès v European Commission and Education, Audiovisual and Culture Executive Agency (EACEA)*, T-439/08, EU:T:2010:442, paragraph 127; Judgment of the General Court of 22 May 2012, *Sviluppo Globale v Commission*, T-6/10, EU:T:2012:245, paragraph 88; Judgment of the Court of First Instance of 30 January 2008, *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 95.