

**Reply by the European Commission to the proposal for a solution from the European Ombudsman on the Commission's failure to take a final decision within the applicable time limit on a request for public access to documents concerning a project in Senegal funded under the EU Trust Fund for Africa**

**- Complaint by M[REDACTED], ref. 1249/2023/RM**

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## **I. BACKGROUND/SUMMARY OF THE MAIN FACTS/HISTORY**

On 9 December 2022, the complainant submitted a request for access to the following documents<sup>1</sup> regarding the project N° T05-EUTF-SAH-SN-07 (“Programme d'appui au renforcement du système d'information de l'état civil et à la création d'un fichier national d'identité biométrique”), implemented by Civipol in Senegal:

- ‘In-depth Guidelines/minutes of meetings on how to carry out the activities.
- Any agreement signed between the EU and the project managing partner Civipol.
- Monitoring reports on performed activities.
- Minutes of the meetings of the Operational Committee, as the body responsible for reviewing and approving the actions financed by the EUTF and evaluating reports of the impact of this project on migrants' and refugees' privacy.
- Any legal framework concerning data protection and data management of the projects.
- Financial reports detailing the expenditure items of the budget so far invested in the project’.

The application was handled at initial stage by the Directorate-General for International Partnerships (hereafter ‘DG INTPA’). In its reply of 9 March 2023, DG INTPA identified eight categories of documents as falling under the scope of the request (33 documents in total) and:

- explained that one document is publicly available on the EU Trust Fund for Africa (‘EUTF’) website and provided the link to it;
- disclosed in full six documents;
- partially disclosed six documents, with only the personal data redacted therein, based on the exception set out in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001<sup>2</sup>;
- partially disclosed five documents, the applied redactions being due, on the one hand, to the application of the exception provided in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 and, on the other hand, because some of these documents’ content is out of the scope of the request;
- partially disclosed two documents, due to the application of the exceptions provided in Article 4(1)(b) (protection of privacy and the integrity of the individual) and in the first indent (protection of the commercial interests of a legal entity) of Article 4(2) of Regulation (EC) No 1049/2001;

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<sup>1</sup> Registered under the reference number EASE 2022/7144.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

- refused to disclose two documents based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- refused to disclose 11 documents based on the exception laid down in the first indent (protection of commercial interests of a legal entity) of Article 4(2) of Regulation (EC) No 1049/2001.

On 3 May 2023, the complainant submitted a confirmatory application in which she requested a review of the initial reply of DG INTPA and requested, in particular, the ‘release of the Narrative Reports (Documents 5.2, 5.3, 5.4 and 5.5)’. With regard to the applicability of the exception laid down in the first indent (protection of the commercial interests of a legal entity) Article 4(2) of Regulation (EC) No 1049/2001, the complainant argued that there is an overriding public interest in the disclosure of the documents requested and asserted that ‘civil registration is a question with considerable public interest, especially for individuals in Senegal. Civil registration has, for instance, implications for governance, inclusion, and access to crucial public services such as education. Understanding at least the general strategy for improving civil registration of Senegal is certainly of public interest, even if the financial details might be considered, as [DG INTPA] argue[d], “business secrets”’.

On 4 July 2023, in the absence of a reply to the above-mentioned confirmatory application within the extended deadline expiring on 19 June 2023, the complainant turned to the European Ombudsman. In her complaint to the Ombudsman, the complainant mentions that she requests ‘an answer to [her] confirmatory application and that the withheld files be released in light of the public interest in disclosure’.

On 24 September 2024, the European Commission adopted its final decision, with reference number C(2024)6785, in relation to the confirmatory application.

## **II. EUROPEAN OMBUDSMAN’S INQUIRY AND PROPOSAL FOR A SOLUTION**

The Ombudsman requested the Commission to provide its services with ‘(i) a list of documents identified as falling within the scope of the complainant’s access request, (ii) copies of documents 5.2, 5.3, 5.4 and 5.5, as identified at initial stage, and any further Narrative Reports that may have been identified at confirmatory stage, along with (iii) any documentation relating to the potential consultation of third parties (to the extent that it already exists) (...)’.

The Ombudsman’s services reviewed Documents 5.2, 5.3, 5.4 and 5.5, as identified at initial stage by DG INTPA and on 16 February 2024, issued a proposal for a solution in this case.

In its proposal, the Ombudsman invited the Commission to review ‘its initial position on the complainant’s public access request with a view to granting the widest possible access to the documents [5.2, 5.3, 5.4 and 5.5] requested’.

The Ombudsman also noted that the ‘solution proposal (...) only concerns the documents which the Commission identified at initial stage’ and requested the institution to ‘provide [its] Office

with any new documents as soon as these are identified as well as any documentations in relation to the potential consultation of third parties’.

### **III. THE REPLY OF THE EUROPEAN COMMISSION TO THE EUROPEAN OMBUDSMAN’S PROPOSAL FOR A SOLUTION**

The Commission regrets the delay in providing the complainant with the reply to her confirmatory request of 3 May 2023 and the Ombudsman with the reply to its proposal for a solution. The Commission would like to submit the following comments in relation to the latter.

#### **➤ On the material scope of the confirmatory application**

Regarding the scope of the confirmatory application in the present case, it should be noted that the Secretariat-General’s review was not in fact limited to the possible disclosure solely of Documents 5.2, 5.3, 5.4 and 5.5. In her confirmatory request, the complainant mentioned that it concerns the ‘refusal to grant access to all documents identified’ and mentioned that ‘[i]n particular, [she] request[s] that the release of the Narrative Reports (Documents 5.2, 5.3, 5.4 and 5.5) be reconsidered’. In any event, it must be noted that Documents 5.3 and 5.4 are not ‘narrative reports’ – the former is a financial report and the latter is an audit report. The Secretariat-General conducted in fact a full review of the reply given by DG INTPA at the initial stage, as such unilateral restriction of scope could not be inferred from the formulation in the confirmatory request.

In the context of this review, the Commission has identified the following four additional documents as falling within the scope of the request EASE 2022/7144:

- narrative report, June 2018 - May 2019, Formulation Phase (Document 9.1).
- narrative report of activities, June 2018 - May 2019 (Document 9.2).
- financial report, June 2018 - May 2019 (Document 9.3).
- expenditure verification report in project T05-EUTF-SAH-SN-07, October 2019 (Document 9.4).

#### **➤ On the final assessment of the Commission**

On the substance of the case, the Commission’s confirmatory decision C(2024)6785:

1. grants partial access to six documents to which access was denied at initial stage, i.e. Document 1.6 (Annexe V – Budget ventilé), Document 2.4 (Annexe V – Avenant au Budget), Document 3.3 (Annexe V – Avenant au Budget), Document 4.3 (Annexe V – Avenant au Budget), Document 5.2 (Narrative report) and Document 5.5 (Narrative report);
2. grants wider access to Document 5.1 (Signed Contract with Annexes), more specifically to Annex 1 – Description of the action therein;
3. grants partial access to two documents identified as falling within the scope of the request at confirmatory stage, i.e. to Document 9.1 (Rapport narratif, Juin 2018 - Mai 2019) and Document 9.2 (Rapport narratif des activités, Juin 2018 - Mai 2019).;

4. confirms that the partial access or refusal to disclose the other documents falling within the scope of the request.

Detailed reasons are set out in the respective confirmatory decision, C(2024)6785, of which the Ombudsman has received a copy.

➤ On the narrative reports

As can be seen from the text of the decision C(2024)6785 and the documents attached to it, the Commission granted partial access to all such ‘narrative reports’ requested by the complainant. The parts which were redacted had to be protected based on the exceptions provided in Article 4(1)(b) (protection of privacy and the integrity of the individual) and in the first indent (protection of the commercial interests of a legal entity) of Article 4(2) of Regulation (EC) No 1049/2001. As can be seen from the limited number of redactions, they concern, apart from certain personal data therein, content which shows very specific information on the know-how, methodology, or strategy employed by Civipol.

➤ On the financial reports

Regarding the financial reports in Documents 5.3, 5.6 and 9.3, which were drafted by Civipol, they are documents that contain commercially sensitive information, as they reflect the detailed cost structure and budgetary estimations (foreseen and executed during a reference period). They were the basis for interim payments. Public disclosure of these documents could undermine the commercial interests of the legal entity as it would give other potential grant applicants in future similar calls the possibility to copy from these documents and use this information to support their own applications.

Indeed, pursuant to the requirements set out in the Financial Regulation<sup>3</sup>, the Commission makes public the total amount and budgets for such projects, as can be seen in the ‘Action Document’ referred to in the Ombudsman’s proposal for a solution and in the Transparency Financial System<sup>4</sup>, which effectively allows searching for all beneficiaries of funding from the EU budget. This however does not equate with an obligation on the part of the Commission to disclose detailed cost structures or the amounts of interim payments. The disclosure of such information must take into account the legitimate interests of the parties to a contract/agreement that information reflecting the detailed repartition of costs and strategy in implementing the respective project is not revealed to the public at large.

On this point, please note that recital 33 of the Financial Regulation effectively provides that the publication of relevant information concerning all recipients of funds financed from the budget should take into account those recipients’ legitimate interests of confidentiality and security (...). Union institutions should therefore adopt a selective approach in the publication of information, in accordance with the principle of proportionality. Decisions to publish should be based on relevant criteria in order to provide meaningful information’.

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<sup>3</sup> OJ L, 2024/2509, 26.9.2024.

<sup>4</sup> <https://ec.europa.eu/budget/financial-transparency-system/index.html>.

As can also be seen from Document 1.6 (Annexe V – Budget ventilé), Document 2 (in particular Annexe V – Avenant au Budget), Document 3 (in particular Annexe V – Avenant au Budget), Document 4 (in particular Annexe V – Avenant au Budget), and Annex III in Document 5.1 (Signed contract and annexes), the Commission has effectively disclosed the overall value of the projects. A more granular disclosure of information on the structure of the overall costs, as provided by the contractor/beneficiary, is however not possible for the reasons mentioned above.

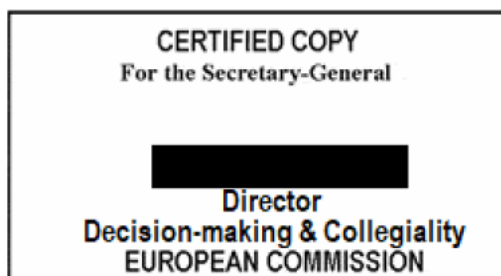
➤ On the audit reports

As regards the disclosure of the expenditure verification reports, please note that detailing possible instances of non-conformity can undermine that entity's reputation, which qualifies as commercial interest in the sense of the first indent of Article 4(2) of Regulation (EC) No 1049/2001. This was recognised by the General Court in its Judgment in Case T-875/16, *Falcon Technologies v Commission*<sup>5</sup>, in which the Court furthermore held that that document (such as a final report) detailing possible instances of non-conformity, by a notified entity, with EU law can undermine that entity's reputation<sup>6</sup>.

[REDACTED]

To conclude, the Commission considers that, with its final reply as set out in the confirmatory decision C(2024)6785, it has provided the widest possible access to the documents requested.

*For the Commission*  
*Věra JOUROVÁ*  
*Vice-President*



<sup>5</sup> Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v Commission*, Case T-875/16, ECLI:EU:T:2018:877, paragraph 51.

<sup>6</sup> *Idem*, paragraph 52.