

To the attention of:

Ms Izuzquiza
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Sent via electronic Mail only

Vienna, 23 July 2021

Ref.: RMOutgoing-2021-946

Regarding: Your confirmatory application for access to documents pursuant to Regulation No. 1049/2001- Ref: RMIncoming-2021-228

Dear Ms Izuzquiza,

We refer to your confirmatory application registered on 15 June 2021, in which you make a request for access to documents, under the above mentioned reference number.

1) SCOPE OF YOUR CONFIRMATORY APPLICATION

Your confirmatory application concerns your initial application, registered on 07 April 2021 under reference number **Ref: RMIncoming-2021-125**. Based on a list of documents (see attached, Annex I) falling under the scope of your request, FRA released documents to you under a full and partial disclosure pursuant to Articles 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001. The Agency declined disclosure to a number of those documents, for reasons put forward under Articles 4(1)(a), 4(2)(1), 4(3)(2) and 4(5) of Regulation 1049/2001.

2) GROUNDS FOR YOUR CONFIRMATORY APPLICATION

In your confirmatory application, you ask for an internal review of FRA's initial decision, and to gain access to the following documents:

- 1) Document 14a
- 2) Documents 2, 4, 6, 9, 10, 11a, 16, 18, 19, 23, 24, 25, 27, 28, 32, 34, 38, 39, 42, 47, 50, 51, 53, and 55
- 3) Documents 15 and 54
- 4) Document 13d
- 5) Documents 31 and 44



Michael O'Flaherty, Director

3) EXAMINATION AND CONCLUSIONS

Having carefully re-assessed your confirmatory application requested under the provisions of Regulation (EC) No 1049/2001, and following a thorough examination of the documents concerned, please find FRA's response below.

I. Full Disclosure

Fra identified a further document (**document 24a**) that relates to your application and can be disclosed in full as it is already in the public domain, you can find it at the following link: https://ec.europa.eu/homeaffairs/sites/default/files/pdf/03122020_memorandum_of_understanding_en.pdf. Please note that this final document reflects the content of the following non-disclosed documents: **19,20,23,24,25,27,28, and 32**, as preparatory documents of the final Memorandum of Understanding.

II. Partial Disclosure

After a careful re-assessment of **document 14a**, we confirm our initial decision of granting only partial disclosure, as disclosure of the document in full would undermine the public interest and financial policy of a Member State. This is prevented by the exception to the right of access laid down in Article 4(1)(a), of Regulation 1049/2001, as explained below.

In the mission report in question there are opinions for internal use only, on the financial planning linked to the Greek reception system and integration programmes. Being these internal and not finalised opinions, they could create serious confusion about the financial planning and thus seriously undermine the public interest and financial policy of Greece. Furthermore, as regards the interests protected by Article 4(1)(a) of Regulation No 1049/2001, *"it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation"*¹. *"This is corroborated by the fact that the exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms, in that the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist, and there is no need to weigh the protection of the public interest against the protection of other interests"*².

Concerning **documents 38, 38a, and 38c**, after re-assessing the documents and

1. see judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 32

2. see, to that effect, judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 46; of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraphs 44 and 45; and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 44

conducting a third party consultation, we decided to grant a partial disclosure. Some parts need to be blanked out due to the exceptions set out in Article 4(1)(b) (protection of the privacy and the integrity of the individual).

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/ 2001 , partial access to the documents requested can be granted. The expunged parts cannot be disclosed as they would undermine the protection of privacy and the integrity of the individual, in particular in accordance with legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 2018/ 1725 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.

When access is requested to documents containing personal data, Regulation (EC) No 2018 / 1725 becomes fully applicable. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish "(...) that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests. "

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested expunged from this personal data.

If you wish to receive these personal data, we invite you to provide us with arguments showing the necessity for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

Concerning **documents 38b**, after re-assessing the documents and conducting a third party consultation, we decided to grant a partial disclosure. Some parts need to be blanked out due to the exceptions set out in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

These parts contain information related to reporting tools and methods used by law enforcement officials to conduct border control tasks and counter criminal activities. Its disclosure would jeopardize the implementation of ongoing and future operations, and thus facilitate irregular migration and trafficking in human beings as the effectiveness of law enforcement measures would be significantly reduced. As disclosing this information would undermine the protection of the public interest as regards public security, this part is not disclosed pursuant to Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

III. Non-disclosure

Concerning **documents 2, 4, 6, 9, 10, 11a, 16, 18, 19, 23, 24, 25, 27, 28, 32, 34, 39, 42, 47, 50, 51, 53, and 55**, FRA regrets to inform you that our initial decision for non-disclosure of remains. This is prevented by the exception to the right of access laid down in Article 4(3)(2), of Regulation 1049/2001, as explained below.

The concerned documents (internal emails and mission reports) were drawn up for the Director's and Head of Unit's internal use only. They contain informal briefing notes drafted by staff members and reflecting the views of staff members on various topics relevant to meetings and or missions rather than to a final deliverable document. These draft documents can create serious confusion about the discussions that took place during the FRA internal work and thus seriously undermine the future stages of the decision-making process.

It should be underlined that the views and opinions put forward in these documents, which were not intended for public disclosure, reflect solely the author's interpretation of the discussions that would take place during FRA internal work and do not set any official position of the actors involved in the discussions or of the Agency. These views, expressed in the mission reports and internal emails, intend to give all the necessary information to senior management in order to, among other things, prepare exchanges with external stakeholders. These documents allow FRA staff to provide information at their disposal to express their views and give advice to the management team free from external pressure. This information in turn, would allow senior management to adopt the best course of action in order to serve the objectives of the Agency. Consequently, these documents have to be considered as containing opinions for internal use, as part of deliberations and preliminary consultations within the Agency in the sense of Article 4(3), second subparagraph of Regulation (EC) No 1049/ 2001.

Public access to the documents is likely to bring a serious harm to the Agency's decision-making process as it would deter members of the Agency from putting forward their views on the above referred and other related matters in an open and independent way and without being unduly influenced by the prospect of disclosure. Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision making process . Otherwise access to these internal documents would curtail the "space to think". The "space to think" exception covers documents for internal use insofar as they contain opinions for internal use and are part of deliberations and preliminary consultations .

Therefore, public release of the relevant documents is likely to bring a serious harm to the Agency's decision-making process by severely affecting the ability of its members to hold frank internal discussions on issues related to the interaction with representatives of third countries, international organisations and external stakeholders. Given the likelihood of the internal debate being severely impoverished by the disclosure of the internal opinions on the above-referred sensitive topics, the Agency considers that this risk is reasonably foreseeable and non-hypothetical.

Concerning **Documents 15 and 54**, we confirm that disclosure is prevented by the exception laid down in Article 4(2)(1) and additionally by Article 4(1)(a) of Regulation (EC) No 1049 / 2001.

These documents relate to consultations submitted within the framework of a grant application process prior to it being finalised by the Commission. In this context, the commercial interests relate to the grant documents which are not finalised. Hence, it could undermine the protection of commercial interests of the institution preparing those documents. Such disclosure is prevented by the exception laid down in Article 4(2)(1) as it would undermine the protection of commercial interests of the institution.

Furthermore, as the concerned document relates to comments submitted within the framework of a grant application process and sharing them would harm the secrecy of that process (and the public interest of the Commission financial policy) Article 4(1)(a). Moreover, the disclosure of the documents can seriously undermine the future stages of the grand application process which is not finalized and its disclosure is prevented under Article 4(3)(2) of Regulation (EC) No 1049 / 2001.

Concerning **document 13d**, we confirm that disclosure is prevented by the exception laid down in Article 4(1)(a) as the disclosure would undermine the European Union's Institutions financial policy: the concerned document relates to comments submitted within the framework of a grant application process and sharing them would harm the secrecy of that process (and the public interest of the Commission financial policy).

Concerning **documents 31 and 44**, we confirm that the disclosure is prevented by the exception laid down in Article 4(5) which requires the Member States agreement.

As for **document 44**, the Member State that generated this document has been consulted and has refused the disclosure of the document on the basis that the document was a draft that has later been changed and adapted and thus the Member State considered the disclosure "*not necessary or appropriate*". The disclosure of the document can create serious confusion about the content of the document and thus seriously undermine the future stages of the decision-making process of the Member State, its disclosure is prevented under Article 4(3)(2) of Regulation (EC) No 1049 / 2001.

As for **document 31**, the Member State has been consulted and has considered that it is not "*in a position to grant access to the documents (based on Article 4) since they concern the information on migration and asylum which have so far been repeatedly misused and misinterpreted resulting in an unfounded negative perception of (the Member State) and hampering its international relations and legitimate national interests*". The disclosure is therefore prevented under Article 4(1)(a) of Regulation (EC) No 1049 / 2001.

OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions under Article 4(2) and 4(3) of Regulation (EC) No. 1049/ 2001 must be


waived if there is an overriding public interest in disclosure. Such an interest must, first, be a public interest and, second, outweigh the harm caused by disclosure, i.e. outweigh the protected interest.

We regret to inform you that your confirmatory application did not provide arguments that would support existence of overriding public interest. Mere interest in disclosing the documents concerned does not constitute a public interest that overrides the necessity for protection of personal data and decision-making progress.

4) MEANS OF REDRESS

Please take note of means of redress available to you against decisions laid down hereby. You may either bring procedures before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Art. 263 and 228 of the Treaty on the functioning of the European Union, and the Regulation (EC) 1049 / 2001.

Yours sincerely,

pp 

Michael O'Flaherty

Director

Encl.: List of documents

List of documents

1. Aide-Memoire
2. joint EASO and FRA Feedback on the updated proposed masterplans for the RICs of Lesvos and Chios
3. [Initial-reception facilities at external borders: fundamental rights issues to consider](#)
4. Mission report from Lesvos (December 2020),
5. Regular note on FRAs work in Greece (February – March 2021),
6. mission report Chios (February 2021),
7. [Initial-reception facilities at external borders: fundamental rights issues to consider.](#)
8. The agenda of Director's visit to Greece (April 2021), December 2020 mission report from Lesvos.
9. Email shared with COM after visit to Lesvos in December 2020 and mission report from Lesvos (December 2020)
10. Internal email Follow up to yesterday's meeting with [expunged name] for your follow up advise and approval
11. Internal email FOR YOUR KIND APPROVAL FW INVITATION 18 03 2021 15 00-16 30 Virtual From EU 'Hotspots' to 'Multi-Purpose Reception and Identification Centres'
- 11a. attachment: concept note
12. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-initial-reception-facilities-external-borders_en.pdf
13. email FW Ares - Document Letter to the Greek authorities Workshop on the design of the new MPRICs - Ares(2021)1374596
- 13a. email attached to email n.13
- 13b. attachment to 13a
- 13c. attachment to 13a
- 13d. attachment to 13a
- 13e. attachment to 13a
14. email FW Task Force mission report 22 - 28 March
- 14a. attachment to email 14
15. Internal email FW The 130th Evaluation Committee - MPRICs Lesvos Chios
16. email FW Urgent EU-funded new reception and identification centres on the Greek islands
18. Internal email Mission report _Five Years of EU Refugee Response on the Greek islands _18 March 2021
19. email RE CONFIDENTIAL - draft Memorandum of Understanding Joint Pilot Lesbos - for consultation
20. Internal email RE FOR YOUR APPROVAL Task Force Migration Management - Memorandum of Understanding social media post
23. Email Re Migration Management Steering Committee of the Lesvos Task Force
24. Email RE Task Force Migration Management - Memorandum of Understanding Multi-Purpose Reception and Identification Centre on Lesvos

- 24a. https://ec.europa.eu/home-affairs/sites/default/files/pdf/03122020_memorandum_of_understanding_en.pdf
- 25. *Email Re Task Force Migration Management - Memorandum of Understanding*
- 27. *Internal email Draft reply to COM as requested.msg*
- 28. *Email RE CONFIDENTIAL - draft Memorandum of Understanding Joint Pilot Lesbos - for consultation*
- 29. *Internal email Briefing on the situation on the ground covering 24 9-9 10*
- 29a. *attachment to 29*
- 30. *Internal email Briefing situation on the ground 10-24 October 2020 (002) docx*
- 30a. *attachment to 30*
- 31. *email Data for a report on migration for the period between 01 10-31 12 2020 RMIncoming-2021-000009*
- 32. *Internal email Draft reply to COM as requested.msg*
- 33. *Internal email February European Parliament Plenary THB asylum and social media freedom*
- 34. *internal email FOR APPROVAL Draft short summary of your intervention at the Article 17 dialogue meeting*
- 35. [Final Report on the JHA agencies network activities 2020 \(europa.eu\)](#)
- 35a. *SORECARD_COSI_FINAL*
- 36. [jhaan_joint_paper_update_december_2020_final.pdf \(europa.eu\)](#)
- 37. *email FW Ares - Document Letter to the Greek authorities Workshop on the design of the new MPRICs - Ares(2021)1374596*
- 38. *Internal email FW CF letter & annex.msg*
- 38a. *Letter to Frontex FRALO_24 Feb_final*
- 38b. *Annex II FRALO_24 Feb_final*
- 38c. *CF recommendations - TC engagement*
- 39. *Internal email FW Draft PD 2022_2024.msg*
- 42. *Internal email Fwd Detailed comments*
- 44. *email INVITATION 19 11 2020 Athens Conference for children in migration*
- 47. *Internal email Mission report_Meeting of the European Migration Network (EMN) National Contact Points 25 and 26 2 2021*
- 50. *Internal email RE points for LIBE Lopez Aguillar*
- 51. *email RE Ares(2020)275890 - Request for analysis on the fundamental rights in the application of the Schengen acquis ...*
- 52. *Internal email Summary of the European Parliament's Article 17 dialogue meeting 26 January 2021.msg*
- 53. *Internal email YOUR KIND APPROVAL FRA input for the Schengen risk analysis*
- 54. *Email RE FRA input EASO Feedback updated Masterplans Lesbos and Chios_28012021*
- 55. *Email RE Comments on designs*