



7 November 2023

Case 4/2023

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair and Co-Rapporteur
David Ramos Muñoz, Co-Rapporteur
Marco Lamandini
Helen Louri-Dendrinou

TABLE OF CONTENTS

Background of facts 3
Appellant 6
Board 7
Findings of the Appeal Panel 7
Tenor 11

FINAL DECISION

In Case 4/2023,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

[.], represented by (hereinafter the “Appellant”)

v

the Single Resolution Board (hereinafter the “Board” or “SRB”),

(together referred to as the “parties”),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair and Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur), Marco Lamandini and Helen Louri-Dendrinou,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 30 June 2023, (hereinafter the “**Confirmatory Decision**”) rejecting the Appellant’s confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) SRMR and of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “**Regulation 1049/2001**”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “**Public Access Decision**”).
2. On 17 April 2023, the Appellant requested access to:
 - a. *“all SRB appointing authority decisions or documents deemed by the SRB to meet such definition whereby the SRB does not extend the first contract of its staff member for another contract of definite duration”;*
 - b. *“all SRB appointing authority decisions or documents deemed by the SRB to meet such definition whereby the SRB does not extend a second contract of its staff member for a contract of indefinite duration”;*

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

With regard to this point, the Appellant clarified that [...] did not request the Board's decision regarding [...] case.

c. "any document that would have been prepared by SRB services and presented to internal and/or external stakeholders, containing statistical, descriptive, analytical or any other type of information regarding the case(s) of non-renewal under a and b. Without limiting the type/nature of the documents and in order to facilitate the handling of this request, those documents would for instance include documents presented by the SRB senior management and other SRB services to the SRB Staff Committee, the European Court of Auditors, the SRB discharge authority and other relevant actors".

3. On 11 May 2023 the Board issued its Initial Response. Regarding the requests under points 1) and 2), the Board identified as documents falling within the scope of the request the following:

"Letters notifying the final decision of the SRB Chair not to renew employment contracts for definite duration and, letters notifying the final decision of the SRB Chair not to renew employment contracts for indefinite duration, both addressed to the former staff members concerned"

4. However, the Board indicated that those letters formed part of the personal file of the former staff members concerned, and thus no access could be granted under Article 4 (1) (b) of Regulation 1049/2001 (privacy and integrity of the individual).
5. Regarding the request under point (3) the Board identified as documents falling within the scope of the request:

(i) *"the lists of staff members whose contract ended by end of 2018 (hereafter: "Lists"); and*

(ii) *HR quarterly reports of 2022 (hereafter: "Reports")".*

6. The Board granted partial access to the information on the Lists and full access to the Reports.
7. On 16 May 2023, the Appellant filed its Confirmatory Application, requesting the Board to reconsider its position with respect to the letters notifying the decision by the Board's Chair not to renew employment contracts for indefinite duration addressed to the staff members concerned (hereafter: Non-renewal letters). The Appellant clarified that the Confirmatory Application concerned only the Nonrenewal Letters where the staff members concerned did not agree with the final decision of the Chair not to renew their employment contracts for indefinite duration, and that the Appellant's case fell outside the scope of the Confirmatory Application.
8. On 30 June 2023, the Board issued its Confirmatory Decision, where it included some further detailed reasoning on why, in its view, the Nonrenewal Letters were confidential, pursuant to Article 26 of the Staff Regulations, why they were covered by the exception under Article 4

(1) (b) of Regulation 1049/2001, and why no meaningful partial access could be granted without undermining the confidentiality of the personal files, and without undermining the privacy and integrity of the individual.

9. The Notice of Appeal was submitted to the Appeal Panel on 14 July 2023 and notified to the Board by the Secretariat of the Appeal Panel on 19 July 2023, with a deadline to response of two weeks, until 2 August 2023.
10. On 24 July 2023, the Board submitted a reasoned request for an extension of five weeks for the filing of its response to the appeal, until 6 September 2023. On 26 July 2023, the Appeal Panel granted an extension of four weeks, until 30 August 2023.
11. In order to fully safeguard the integrity and the appearance of integrity of the present proceedings, the Appeal Panel ensured that members of the Secretariat handling this appeal had not had any involvement whatsoever in the handling of the requests of the Appellant which ultimately led to the adoption of the Contested Decision. For this purpose, also a different functional email address was created on 28 August 2023, for all communications pertaining to the present appeal.
12. On 30 August 2023, the Board filed its Response.
13. On 31 August 2023, the Board's Response was forwarded to the Appellant with the deadline to file [...] Rejoinder by 14 September 2023.
14. On 5 September 2023, the Appellant filed [...] Rejoinder. The Appellant reiterated [...] arguments concerning [...] request, under the Access to Documents Regulation 1049/2001, and made some additional considerations regarding the scope of the Appeal.
15. On 7 September 2023, the Appellant's Rejoinder was forwarded to the Board, with the deadline to file [...] Reply by 21 September 2023. Upon request by the Board, the Appeal Panel agreed to extend the deadline by 28 September 2023.
16. On 12 September 2023, as a measure for the efficient handling of the proceedings, the Appeal Panel asked the parties whether they considered it necessary to have a hearing, giving them until 15 September 2023.
17. On 15 September 2023, the Board indicated its intention to waive the hearing.
18. On the same day, the Appellant requested the Appeal Panel an extension to indicate its intention to have a hearing, or waive such hearing. In the Appellant's view, only after having received the Board's Reply, and having had a sufficient time to analyse it could [...] conclude whether a hearing was necessary.
19. On 27 September 2023, the Board filed its Reply.

20. On 29 September 2023, the Appellant indicated its intention to waive the possibility of a hearing, and made some final observations, by way of closing considerations.
21. On 2 October 2023, the Appeal Panel forwarded these final observations to the Board, asking it whether it also wished to offer some final observations by way of closing considerations, giving it until Thursday, 5 October 2023.
22. On 5 October 2023, the Board filed its final closing observations.

Main arguments of the parties

23. The main arguments of the parties are briefly summarised below. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

24. According to the Appellant, the scope of the appeal concerns access to “Non-Renewal Letters” that would have been identified by the Board where a staff member concerned would have expressed his disagreement with a recommendation of his reporting officer not to renew his contract for indefinite duration by having ticked “recommendation rejected” in the template for contract renewal report, which would not include [...] letter.
25. According to the Appellant, in refusing access to the letters, the Board breached the principle of equal treatment, since other EU agencies, such as the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, hereinafter EU LISA, subject to the same legal regime with respect to public access to documents (i.e., Regulation 1049/2001) as the Board, has published decisions on extension of contracts for indefinite duration. Furthermore, the Appellant alleges that the exception for the protection of personal data does not apply, because, with the information published on the official EU-websites (as explained in the confirmatory letter), the public cannot identify the persons allegedly concerned by the non-renewal letters with the release of the elements requested. The fact that this information, combined with information published by the staff members in LinkedIn and other social networks can help third parties identify them should not constrain the Board from releasing the information. As part of [...] appeal, the Appellant also requested clarification of the scope of the Appeal Panel’s decision in a separate case.
26. In [...] Rejoinder, the Appellant argues that the Board fails to properly identify the documents subject to the present appeal, rendering the scope of the appeal unclear, that on other occasions where [...] has requested documents, the Board has supplied *information* to the Appellant, which means that the distinction between “documents” and “information” argued by the Board is inconsistent with the Board’s own practice. The Appellant argues that the Board misconstrues the exception to disclosure applicable to “personal data”, and the “publication” under Regulation 1049/2001 as a “transfer”. The Appellant insists on the similarities between EU LISA and the Board, as two EU agencies, and the different approach they adopt to the

disclosure of the content of the documents. The Appellant challenges the broad construction that the Board applies to the definition of “personal data”, arguing that certain information can be released without the persons concerned being identifiable to the Appellant or third parties. Finally, the Appellant insists that the request for clarification is admissible.

27. In light of all of these considerations the Appellant requests the Appeal Panel to remit the case to the Board.

Board

28. The Board, for its part, alleges that the Non-renewal letters are confidential documents, pursuant to the relevant provisions of the Staff Regulations, and that Regulation 1049/2001 should not be used to circumvent these provisions. In second place, the Board argues that the Appellant had failed to demonstrate a breach of the principle of equal treatment, since the decisions published by EU LISA are not of the same nature as the letters requested. In third place, the Board argues that, in claiming that the exception to public disclosure based on confidentiality, the Appellant (i) misconstrues the definition of personal data, because other elements contained in the letters could help the Appellant or a third party to identify the individual persons addressed in the letter; (ii) tries to characterise as a request for disclosure of documents what is in reality a request for information, and (iii) fails to justify the data transfer. Finally, the Board argues that the request for clarification of the scope of another decision by the Appeal Panel is inadmissible.
29. In its Reply to the Rejoinder, the Board argues that the scope of the appeal is clear. The Board insists in its arguments that the letters are confidential, and that the Appellant has failed to demonstrate a breach of the principle of equal treatment. The Board insists that any examples concerning other Board’s decisions are irrelevant in the present case, which is concerned with the Contested Decision. The Board also insists in its construction of “personal data” and “transfer” as correct, on pointing that the Appellant is making a request for information, and on the inadmissibility of the request for clarification.
30. In light of all these considerations, the Board requests the Appeal Panel to dismiss the appeal.

Findings of the Appeal Panel

Admissibility.

31. The admissibility of the appeal is not contested by the Board, and thus not controversial. The Board only raises one objection, concerning not the entire appeal, but one specific allegation, related to the proper implementation of a separate Appeal Panel’s decision.
32. This request is however a request for clarifications and as such is inadmissible. Regardless of that manifest inadmissibility the Appeal Panel notes moreover that the requested clarification can be drawn from published precedents of the Appeal Panel and refers the Appellant to the

decision of 23 March 2018, in case 2/18, para 14 and 16 and decision of 19 June 2019, in case 18/2018, paras 26-28.

33. *Merits*

34. *1. The characterisation of the documents requested.*

35. The fundamental aspect to frame the present appeal is the characterisation of the documents requested. In this respect, the Appeal Panel sides with the Board's view that the Non-renewal letters are part of the personal file of the staff members, and thus confidential. Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (hereafter: Staff Regulations) states, in its Article 26:

The personal file of an official shall contain:

(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;

(b) any comments by the official on such documents.

[...]

The personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium. It shall, however, be forwarded to the Court of Justice of the European Union if an action concerning the official is brought.

36. This classification is not disputed by the Appellant, who nonetheless argues that the Board should have reported each document with the requisite content to the Appellant, even if it were confidential. This is closely related to the Appellant's request.

2. The Appellant's request of aggregate content of the letters.

37. The Appellant's Initial Application made a two-pronged request: (i) documents containing *individual* decisions or documents concerning concrete instances of Non-renewal (letters a and b) and (ii) documents containing *aggregate* statistical, descriptive information on Non-renewals (letter c).

38. Regulation 1049/2001 applies to requests for access to *documents*. Thus, as regards the request under letter c, the Board is, in principle, obliged to communicate the aggregate information if it has elaborated a document to that effect. The documents identified as fitting that description comprise the HR reports and the Lists of staff members whose contracts ended in 2018.

39. The Appellant's emphasis on accessing the Non-renewal letters in order to assess the number of said letters is a means to obtain aggregate information about those letters. This information

may surely be relevant for different purposes. However, what matters for purposes of Regulation 1049/2001 is whether the information is contained in an existing document.

40. In light of the stabilized case-law of European Courts, once a European institution, body or agency asserts that a document does not exist, it is not obliged to create a document which does not exist (judgment of 11 January 2017, Rainer Typke v. Commission, C-491/15 P, ECLI:EU:C:2017:5 at paragraph 31) and that institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (judgment 23 April 2018, Verein Deutsche Sprache v. Commission, T-468/16, ECLI:EU:T: 2018:207). Thus, the Appellant should provide some evidence that the document requested, containing aggregate information, does exist. Absent this, the Board is not obliged to create a document containing aggregate information of Non-renewals.
41. Thus, the Appeal Panel must consider the request to access the Non-renewal letters subject to the present appeal as a request to access those letters, and not as a request to access aggregate information about those letters.

3) The applicability of the principle of equal treatment in this case.

42. The above considerations help to assess the parties' arguments concerning the application of the principle of equal treatment. The Appellant stated in its appeal that "*In the confirmatory application, I have provided an example of **handling of a same document (i.e., decision on extension of contracts for indefinite duration by the appointing authority) by another EU agency (EU-LISA) subject to the same legal regime with respect to public access to documents***".
43. However, as argued by the Board, the principle of equal treatment applies to situations that are *comparable* (Judgment of 14 July 2022, Commission v VW and Others, joined case C-116/21 P to C-118/21 P, C-138/21 P and C-139/21 P, EU:C:2022:557, para. 96 and the case-law cited). In this case, the document elaborated by EU-LISA is a Note to the Management Board *proposing to renew three contracts*. The documents requested by the Appellant are *individual Non-renewal letters*. The Appellant's argument suggests that the Board could improve its internal procedures by including a proposal of renewal or non-renewal of contracts as a step prior to the Chair's decision, as well as by publishing aggregate information on said renewals or non-renewals. However, even hypothetically assuming that this could be a viable proposal for reform in terms of policy, from this it does not follow that the Appellant can claim to have a *right*, within the existing legal framework that the Board creates a document with the aggregate information on renewals and non-renewals of contracts for indefinite period. The EU LISA chose to follow a procedure where it published some aggregate information on contract renewals. Yet this practice does not bind the SRB nor is mandated by any EU rule. Moreover, and fundamentally for the purposes of the present case, the EU LISA did not publish individual non-renewal letters.

44. It can thus be concluded that there was no breach of the principle of equal treatment in the present case.

4) The application of the exception of privacy of the individual, under Article 4 (1) (b) of Regulation 1049/2001.

45. Points 1) and 2) above helped clarify that the Appellant's request must be considered as a request to access individual Non-renewal letters, and that these letters are part of the personal file of the addressees of those letters, and thus confidential. Thus, the relevant exception to disclosure is that under Article 4 (1) (b) of Regulation 1049/2001, which states that:

(1) The institutions shall refuse access to a document where disclosure would undermine the protection of:

[...]

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

46. It is important to note that the exception under Article 4 (1) (b) is "absolute", i.e., it cannot be overridden by showing that there is a public interest in disclosure. Therefore, considerations of transparency have limited relevance in this context.
47. In this case, the Appeal Panel finds that the Non-renewal letters are covered by the exception of Article 4 (1) (b). These are confidential documents for a reason, as they undoubtedly form part of the personal file of each staff member.
48. Furthermore, in this particular case it is important to note that Non-renewal letters, by their very nature, constitute a sensitive topic. They can appear or be perceived as a form of quasi-dismissal, and thus their disclosure to the public may be intrinsically harmful to their addressees. The Appeal Panel believes indeed that in principle addressees would be concerned if those letters or parts of them were to be made public.
49. The Appellant and the Board have offered competing arguments about the definition of "personal data", and whether, and to what extent, some contents or others of the letters could fit that description. However, it is also important to note that letter b) makes reference to "privacy and integrity of the individual, in particular [...] personal data". Thus, although the disclosure of personal data constitutes the concrete application of the provision, the scope of the exception is broader, and finalistic in nature, as it refers to "privacy and integrity".
50. In this regard, the prospect of the publication of part of those letters without their consent can constitute a threat for privacy and integrity. This is even more so when the number of the persons who have not been renewed is quite limited and this also tends to facilitate the indirect identification of the names of those addresses, especially by a former colleague. The Appellant was very clear in indicating that [...] did not seek access to any Non-renewal letters concerning

[.] in particular, but to the Non-renewal letters of former colleagues, in which case no consent to their transfer or publication was given, nor can it be presumed.

51. The Appellant points that some elements in the letters, such as the SRB's logo or the salutations, do not constitute personal data. However, the Appellant is not seeking public access to the SRB's logo and salutations of certain documents. The Appellant complains that the Board publishes too little aggregate information on staff management, and is trying to compensate this shortage by accessing and putting together information from documents that are confidential. However, considering the nature of the documents at stake and, as such, without the need of any further measures of inquiry, the Appeal Panel does not consider that Regulation 1049/2001 is not suitable for this purpose in this case. In fact, in light of the considerations detailed *supra*, exposing documents as sensitive as Non-renewal letters to partial disclosure is not the mechanism to do so, as even the prospect of access or publication could undermine the privacy and integrity of the individuals affected by said letters.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal.

Helen Louri-Dendrinou
SIGNED

David Ramos Muñoz
Co-Rapporteur

Luis Silva Morais
Vice-Chair and Co-Rapporteur

SIGNED

SIGNED

Marco Lamandini
SIGNED

Christopher Pleister
Chair

SIGNED

For the Secretariat of the Appeal Panel:

[..]

SIGNED