

EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR RESEARCH & INNOVATION
The Director-General

Brussels, 18 DEC. 2013

Mr Sifis RAPTIS
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To be sent by email only

Subject: Your Application for Access to Documents – Gestdem Ref. No. 2013/5714

Dear Mr Raptis,

We refer to your email dated 14/11/2013 in which you submit a request for access to documents, registered on 18/11/2013 under the above mentioned reference number.

I. SCOPE OF APPLICATION

Your application concerns the following documents:

1. *The internal preparatory documents – distinct from the specifications of calls for tenders and annexes thereto – according to which the tender specifications of the FP6-FP7 Framework Contracts were to reflect article 57(2).*
2. *The internal documents confirming that the tender specifications, including the description of the tasks of the audit firms, reflected the requirements of article 57(2).*

3. *Following the signature of the Framework Contracts, any amendments laying down additional obligations of the external contractors – audit firms as regards compliance with article 57(2).*
4. *The documents drawn up pursuant to article 40 of Decision 2342/2002 as regards the Subcontractors of the main contractors, such the members of the Polaris Group, KPMG Greece and the subcontractors that have carried out field audits in the non-EU Member States.*

5. *The internal documents according to which the Audit Units of the Research DGs have verified and validated that the draft and final audit reports drawn up by the audit firms have been compliant with article 57(2).*
6. *The internal documents setting out the policy and operational measures of ensuring compliance with article 57(2) by the external contractors – audit firms.*
7. *The documents handed over to the external contractors – audit firms with directions, guidelines and instructions, or equivalent, adherence to which would have ensured that the audit firms would have conducted an audit in compliance with article 57(2) and the national laws.*
8. *The documents handed over to the external contractors – audit firms with directions, guidelines and instructions, or equivalent, about their conduct in the field audit such that article 57(2) would not have been infringed upon. This specifically includes the following recurrent practices of audit firms like KPMG Germany, KPMG Greece, Kypris & Associates, Littlejohn in audits procured by DG INFSO: (i) requesting and collecting copies of documents from the auditee with personal data of third parties to the audited projects (i.e signed time-sheets researchers charged to the audited projects); (ii) requesting to interview researchers; (iii) cross-checking of time booked in different contractors/beneficiaries by a researcher; (iv) disclosure to an auditee about the time a researcher had booked in another – unrelated contractor/beneficiary; (v) classification by the audit firm of unrelated contracts of the auditee with third parties – with the unrelated contracts not charged to the audited projects – as subcontracting; (vi) demands of the audit firm for the handing over a complete copy of the auditee's general ledger and subsequently the intrusive enquiries by the audit firm of unrelated to the audited projects business transactions of the auditee with third parties; (vii) assessing the academic and professional qualifications of researchers against their work in the audited projects; (viii) assessing compliance of the auditee with Annex I of the contracts/agreements, which is not the subject of a financial audit; (ix) requesting specific and individual information on sick leave of auditee's employees in order to calculate the total figure of work-hours in a year; (x) disclosing to an auditee information (i.e. personal data) of service providers charged to the audited projects about their previous service provision history to other, unrelated third parties; (vi) criticising an auditee about its time-keeping in the audited projects and drawing negative conclusions (even reaching the point of rejecting all personnel claimed costs), even though the FP6 contract and FP7 grant agreement has no provision whatsoever about it; (vii) relying in the FP6 & FP7 Guides on Financial Issues to reject claimed costs, even though those documents were never formally approved by the Commission, and in any event such kind of 'guidelines' cannot be imposed to the auditees as contractual obligations, simply because they are extra-contractual.*
9. *The cover letters, or equivalent, accompanying the dispatch of the documents under requests (7) & (8) to the main contractors and subcontractors.*
10. *The legally binding documents with which the main contractors and subcontractors undertook to comply with the directions, guidelines and instructions, or equivalent, referred to in requests under (7) & (8) above.*

Your application is considered to fall within the scope of Regulation No (EC) 1049/2001¹.

II. IDENTIFICATION OF THE RELEVANT DOCUMENTS

1. With regard to points 1, 2, 3, 5, 6, 7, 9 and 10 of your request, we regret to inform you that no corresponding documents exist. Your application is therefore devoid of purpose in relation to these points.

2. As far as point 4 of your request is concerned, we have identified three corresponding documents: namely the Framework Contracts FP 6/2005/1, FP 6/2008/1 and FP 7/2009/1. Please kindly note that these three documents are also relevant for point 8 of your request for which there are no other corresponding documents.

Having examined the three above mentioned Framework Contracts under the provisions of Regulation (EC) No 1049/2001, we have come to the conclusion that they cannot be disclosed as they fall under the exceptions of Article 4 of the said Regulation, as detailed below.

Their disclosure is protected under Article 4(1) (b) of Regulation (EC) No 1049/2001, as these three documents contain personal data.

Pursuant to this provision, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data².

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable³. According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

In the present case, disclosure of the personal data of the persons which were involved in the three framework contracts in question would breach their right to privacy. Moreover, 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.

¹ Regulation (EC) N°1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, page 43 ('Regulation (EC) N°1049/2001')

² OJ L 8 of 12.1.2001, p. 1

³ Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, *Commission v. The Bavarian Lager Co. Ltd*, [2010] ECR I-06055.

Furthermore, the disclosure of the three above mentioned Framework Contracts is precluded under Article 4(2), first indent of Regulation (EC) N°1049/2001. Pursuant to this provision, *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural person or a legal person"*. The undisclosed parts in question concern the contractor tables of prices corresponding to annexes 3 and 5 of Framework Contracts FP 6/2005/1, FP 6/2008/1 and FP 7/2009/1. By granting public access to this information, the Commission would be seriously undermining not only its own commercial interests but also the protection of the commercial interests of its contractors.

We have examined to which extent the exception laid down in Article 4(2), first indent of Regulation (EC) N°1049/2001 may be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by the disclosure.

Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(2), first indent mentioned above.

However, pursuant to Article 4(6) Regulation (EC) No 1049/2001, "[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released". We have therefore decided to grant you partial access to these documents expunged only of personal and commercial data. Please note that these documents cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

If you wish to receive the personal data in question, we invite you to provide us with arguments showing the need 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.

III. MEANS OF REDRESS

You were given partial access to three documents in respect to points 4 and 8 of your request.

In accordance with Article 7(2) of of Regulation (EC) N°1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-5
BERL 5/327
B-1049 Bruxelles

Or by email to: sg-acc-doc@ec.europa.eu

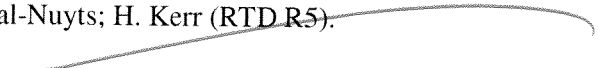
We thank you very much in advance for your kind understanding.

Yours sincerely,

A large, stylized handwritten signature in black ink, consisting of a long horizontal stroke with a loop at the end and a vertical stroke intersecting it.

Robert-Jan Smits

CC: M. Bellens; S. Gruener (RTD M1); S. Bojinova; C. Moal-Nuyts; H. Kerr (RTD R5).

A long, horizontal, slightly wavy handwritten signature in black ink.