

EUROPEAN COMMISSION  
SECRETARIAT-GENERAL

The Secretary General

Brussels,  
SG.B.5/MF/psi - sg.dsg1.b.5(2013)4042519

Mr Kostas VITSOS

*By e-mail only:*  
*Ask+request-581-6fecdf0a@asktheeu.org*

**Decision of the Secretary General on behalf of the Commission pursuant to Article 4 of the  
Implementing Rules to Regulation (EC) N° 1049/2001<sup>1</sup>**

**Subject: Confirmatory application for access to documents under Regulation  
1049/2001 - Gestdem 2013/3349**

Dear Mr Vitsos,

I refer to your e-mail of 16 October 2013, registered on 17 October 2013, in which you request, pursuant to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> ("Regulation 1049/2001"), a review of the position taken by the Directorate-General Research and Innovation ("DG RTD") on 25 September 2013 in reply to your initial application of 20 June 2013.

I note that your confirmatory application contains a number of allegations and queries into the legality of certain operations, such as the external audits into the implementation of the Sixth and Seventh Framework Programmes covering Community activities in the field of research, technological development and demonstration (respectively, "FP6" and "FP7"), and related prior notifications under Data Protection Regulation 45/2001<sup>3</sup>.

I would like to inform you that the present decision is taken based on Regulation 1049/2001. Therefore, this is not the appropriate forum to address your above allegations and therefore, the merits of these matters will not be addressed, unless they relate directly to your request for access to documents.

---

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L145, 31.05.2001, p.43.

<sup>3</sup> 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 data, Official Journal L 8 of 12.1.2001.

## 1. SCOPE OF YOUR REQUEST

Through your initial application you requested access to the following documents:

- 1. The FP6 Audit Manuals, including all annexes, as dispatched to the 'external auditors' for guidance and reference purposes;*
- 2. The FP7 Audit Process Handbook, including all annexes, as dispatched to the 'external auditors' for guidance and reference purposes;*
- 3. The documents DG RTD dispatched to the 'external auditors' with 'Guidelines', or equivalent about the content of the 'FP6 flash reports' and their counterpart "FP7 'flash' report;*
- 4. The documents fully describing the 'quality check on audit report for coherence, completeness, correctness, compliance with the Audit Handbook' regarding FP7 audits. One or more DG WTD Units have been using such documents to verify and validate the 'audits of 'external contractors';*
- 5. The documents describing how in particular a 'contractor' was singled out for either a 'risk-based audit' or an 'audit for continued dissuasive effect' which are mentioned in the 2010 Annual Activity Report of DG RTD.*
- 6. The template of the letter in use in 2011, with which DG RTD notified a 'contractor' about a 'normal' financial audit, and all annexes thereto;*
- 7. The template of the letter in use in 2011, with which DG RTD notified a 'contractor' about a 'risk-based audit', and all annexes thereto.*
- 8. The template of the letter in use in 2011, with which DG RTD notified a 'contractor' about an 'audit for continued dissuasive effect' and all annexes thereto."*

The Commission has identified the following documents as falling under the scope of the respective parts of your request:

- Ad 1) FP6 Audit Manual, including its annex, 15 September 2006 ("document 1");
- Ad 4) Draft Report Control Checklist, 18 January 2013 ("document 2");
- Ad 5) Outcome of 2007 Risk Questionnaire, 8 November 2007 ("document 3");
- 7<sup>th</sup> Framework Programme RTD Risk-Based Audit Approach, 19 June 2012 ("document 4");
- Ad 6) Template for Letters of Announcement for FP6 Audit, including its annex, 1 February 2013<sup>4</sup> ("document 5");
- Ad 7) Template for Letters of Announcement for FP7 Audit, including its annex, 1 February 2013 ("document 6");
- Ad 8) Template for Letters of Announcement for FP7 External Audit, including its annex, 12 September 2013 ("document 7").

---

<sup>4</sup> Please refer to the initial reply of DG RTD for further explanations about the use and scope of documents 7, 8 and 9.

Contrary to what you allege, the Commission has, despite a thorough search, not been able to identify any other documents as falling under the scope of your request than the ones listed above.<sup>5</sup> Furthermore, no *FP7 Audit Process Handbook* was dispatched to external auditors, as this document was dispatched only to internal auditors. Therefore, no document has been identified as falling under the scope of point 2 of your initial application.

In its initial reply, DG RTD:

- granted full access to documents 2, 3, 5, 6 and 7;
- partially disclosed document 1 and refused access to document 4, based on the exceptions of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) and 4(1)(a), fourth indent (protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State) of Regulation 1049/2001;
- provided partial access to the FP 7 Audit Manual, including its annex, even though this document did not fall under the scope of your initial application.

Through your confirmatory application you request a review of DG RTD's position as regards those (parts of the) documents to which you had requested access at the initial stage, but to which access was refused.

However, you specify that a full copy of the FP6 Audit Manual is already in your possession, following the transmission to you by a third party which received the document in a lawful manner from the Commission. From the text quoted in your application, I deduce that the document is authentic. I therefore consider that document 1 falls outside the scope of your confirmatory application.

You specify furthermore that:

- the FP7 Audit Manual, which was partially disclosed to you at the initial stage even though it fell outside the scope of your application, is immaterial to your request under point 2, since that request only concerns the *Audit Process Handbook* as *dispatched to external auditors* (as indicated above, such a document has not been identified);
- your confirmatory application does not cover point 3 of your initial application<sup>6</sup>.

Consequently, I consider your confirmatory application to cover only document 4 (*7<sup>th</sup> Framework Programme RTD Risk-Based Audit Approach*).

---

<sup>5</sup> With regard to the templates for Letters of Announcement, please note that these templates are evolving documents which are being adapted over time to take account of new developments. The templates are by nature only indicative documents which have to be customised to the individual audits. The successive versions of the templates are not kept. Only the latest versions are stored on the shared drive so that the auditors of the different Research DGs always have the latest version at their disposal. As regards the Draft Report Control Checklist, it should be noted that the external contractors (i.e. External Audit Firms) have their own internal quality control procedures, of which the Commission does not hold any copies.

<sup>6</sup> Concerning point 3 of your initial application, DG RTD clarified in its initial reply that it was unable to identify any document which would correspond to the description provided in your application. However, under the Code of Good Administrative Behaviour DG RTD provided you a copy of the Template of the FP6 Flash Report<sup>6</sup>. In your confirmatory application, you confirm that that your application does not cover point 3 of your initial application.

## 2. ASSESSMENT UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG RTD to refuse access to document 4, based on the exception of Article 4(2), third indent of Regulation 1049/2001 (protection of the purpose of investigations). The detailed reasoning is set out below.

### 2.1. Protection of the purpose of audits

Article 4(2), third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits".

Document 4, entitled 7<sup>th</sup> *Framework Programme RTD Risk-Based Approach*, contributes to the definition of the risk-based pillar within DG RTD's FP7 Ex-Post Audit Strategy 2009-2016. It lists and analyses potential risks that could be taken into account for the implementation of the FP7 Audit Strategy. The document was drafted for use by the auditors only. It describes in detail a range of potential risks that were identified on the basis of previous audit experience. The specific risks identified, which are further assessed and ranked in order of priority in the document, will serve as a basis for the selection of risk-based audits. Disclosure of these risk assessments will seriously undermine the efficiency and effectiveness of DG RTD's risk-based audit approach, as it will give indications to potentially audited entities as regards the scope and focus of future audits, and thus enable the latter to circumvent these audits. Its disclosure while the FP7 audit campaign is still underway would therefore seriously undermine the purpose of the ongoing audits, which is to assess the degree of compliance with the applicable rules and procedures, and ultimately to ensure the correct implementation of EU funds.

Contrary to what you allege, Article 4(2), third indent of Regulation 1049/2001 provides explicitly that the scope of its protection is not limited to *concrete audits* as such, but that it extends instead to the *purpose* of audits. The preceding paragraph substantiates how disclosure of document 4 would undermine the purpose of DG RTD's FP7 ex-post audits.

Consequently, document 4 cannot be disclosed by you pursuant to Article 4(2), third indent of Regulation 1049/2001, as such disclosure would undermine the purpose of the audits protected by that provision.

Contrary to what you allege, the fact that *Audit Manuals* may have been disclosed to external auditors performing audits under the auspices of the Commission under a specific contracting or sub-contracting arrangement, does not invalidate this conclusion. To the contrary, to the extent that document 4 has indeed been provided to external auditors (which has not been substantiated), this would have been done so solely for the purpose of enabling the latter to implement the contract concluded with the Commission. Such privileged and circumscribed access cannot, in any way, be assimilated with public access under Regulation 1049/2001. Nor can the practice of other Commission Directorates-General and services as regards the release of documents setting out the latter's respective audit strategies serve as a justification for releasing the document requested to you.

## 2.2. No overriding public interest

The exception laid down in Article 4(2), third indent of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you allege, *inter alia*, that *DG RTD has been caught red-handed in flagrantly infringing Regulation 1049/2001 for the sake of protecting the private interests of the Research DGs (i.e. prevent a disclosure of a policy of illegal personal data processing in a colossal scale)*. Once again I must stress that this is a response to a request for access to documents, which is not the appropriate procedure for making this kind of allegations.

I also consider that your general allegation - *that the public interest has manifested itself by the need to scrutinise in depth the conceal policies of the Research DGs, which have culminated in two false statements in Europa* - is not relevant in this regard either, as the document withheld does not reveal any information that would substantiate such an allegation.

In any case, I consider in this case that the public interest is better served by ensuring that the Commission can properly audit contractors and beneficiaries of grants and contracts in order to ensure that funds are protected against misuse. In addition, I draw your attention to the Court of Justice's ruling in the *Technische Glaswerke Ilmenau case*<sup>7</sup>, where the Court confirmed that in administrative matters, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters.

Consequently, I consider that the prevailing interest in this case is the public interest to protect the purpose of the on-going and future audits.

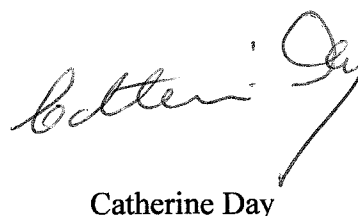
## 3. NO PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001, I have also examined the possibility of granting partial access to document 4. However, partial access is not possible given that the document is entirely covered by the exception under Article 4(2), third indent of Regulation 1049/2001, as indicated above.

## 4. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 TFEU.

Yours sincerely,



Catherine Day

---

<sup>7</sup> Paragraph 60.