



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, **18 FEB. 2014**
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Mr Sifis Raptis

per email only:
ask+request-610-a73a6621@asktheeu.org

Subject: Confirmatory application for access to documents – Gestdem 2013/3573

Dear Mr Raptis,

I refer to your email of 22 August 2013, registered on 13 September 2013, in which you request, pursuant to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation 1049/2001'), a review of the position taken by the Directorate-General Research and Innovation (hereafter 'DG RTD') sent on 5 August 2013 in reply to your initial application of 29 June 2013.

I further refer to the Commission services' replies dated 4 and 25 October 2013, extending the time-limit for handling your above application. I would like to apologise for the delay in answering your request and for any inconvenience this may have caused.

1. SCOPE OF YOUR REQUEST

a) Initial application

In your initial application you requested the following documents:

“On 22-24 June 2011 the European Commission and the U.S. National Science Foundation co-hosted an international workshop on managing risks and accountability challenged, “International workshop on accountability in science and research funding”

The summary report is found at

<http://www.nsf.gov/oig/brussels2011/summaryreport.pdf>. Page 10 reads:

[...] External Auditor, European Commission, DG Research and Innovation Presentation of a Case [...] presented a hypothetical fraud case, based on elements from an ongoing actual fraud case with the European Commission.

Copies of the following documents held by the Commission services are kindly requested:

- 1. The presentation of the hypothetical fraud case made at the workshop.*
- 2. Referring to the 'actual fraud case', the documents setting out the detailed analysis and reasoning that lead the Commission services to form the view that it was indeed a 'fraud' case, that it to say it had or risked having a detrimental effect to the Union's budget.*

[...]

- 3. The letter with which DG RTD announced to the 'contractor' the external financial audit, including every single annex and the Privacy Statement.*
- 4. The final audit report dispatched to the 'contractor', including in particular Annex II.*
- 5. Every single time-sheet in the possession of DG RTD originating from the audit.*
- 6. The DG RTD letters/notes/emails/telephone conversations pursuant to article 12(1) of Regulation No 45/2001 with which data subjects were informed about the collection and processing of their personal data from the audited 'contractor'.*
- 7. The prior notification of article 25 of Regulation No 45/2001 covering the audit at the time the field audit was conducted. It is noted that DG RTD DPO-3398.1 was filed in mid-April 2011, and therefore it is nearly certain that DPO-3398.1 did not cover the external financial audit in question.*
- 8. The documents drawn up by the DG RTD Data Protection Coordinator setting out a reasoning why the predecessor prior notification (i.e. the one applicable prior to DPO-3398) was not 'adequate' for the DG RTD external financial audits and a brand new one were to be registered in the register of article 26 of Regulation No 45/2001 (i.e. DPO-3398).*
- 9. The documents drawn up by the DPO-3398 data controller setting out a reasoning why the predecessor prior notification (i.e. the one applicable prior to DPO-3398) was not 'adequate' for the DG RTD external financial audits and a brand new one were to be registered in the register of article 26 of Regulation No 45/2001.*
- 10. Every single document drawn up by the data controller of the predecessor prior notification(s) (i.e. that covering external financial audits prior to 13/4/2011) about the said notification(s), regardless of whether or not external financial audits are expressly dealt with.*
- 11. The Debit Note(s) dispatched to the 'contractor', including the cover letters accompanying the Debit Note(s). This request also includes any Debit Notes imposing liquidated damages.*
- 12. The copy of the duly signed Recovery Order on the basis of which the authorising officer or the accounting officer, as the case may be, drew up the Debit Note.*

II. DOUBLE FUNDING OF FP7 BENEFICIARIES

DG RTD considers that FP7 beneficiaries may receive double-funding in cases where an FP7 beneficiary also receives funds from other funding agencies or other third party funding organisations (e.g. trusts, foundations, industry sponsors ...).

[...]

Copies of the following documents held by the Commission services are kindly requested:

13. The document(s) setting out the analysis and reasoning of the Research family DGs about the risks of double funding of a FP7 beneficiary, regardless of the sources of funding, and their impact to the Union budget.

14. The document(s) setting out some kind of a legal analysis of whether it is lawful to 'poke' into the private affairs of a FP7 beneficiary and seek to establish whether or not a FP7 beneficiary receives additional funding, especially in the light of the fact that the FP7 grant agreement is a private law contract and that, apparently, there is no a provision of Union law whatsoever duly empowering DG RTD to carry out interference with the private affairs of a FP7 beneficiary.

III. PLAGIARISM IN FRAUD AGENDA

[...]

Copies of the following documents held by the Commission services are kindly requested:

15. The document(s) setting out the analysis why plagiarism is to be considered as indicator for double funding.

16. The document(s) setting out the analysis why liberal 'copy-paste' of one's own work, or work of the consortium partners, or the material referred to in P5 above is an indication of double funding.

17. Every single document concerned mainly with the DAISY tool."

b) Initial reply

In its letter sent on 5 August 2013, DG RTD informed you that:

- No access can be granted to documents falling under the scope of **point 1** of your request, based on the exceptions of Article 4(1)(a) 4th indent (protection of the financial, monetary and economic policy of the Community or a Member State) and Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation 1049/2001.
- No documents have been found in relation to **parts 2 to 6 and 8 to 14** of your request.

- Regarding **point 7**, access was granted to the following document:
 - o DPO-3398-1 – RTD: External audit and control
- In respect to **points 15 and 16**, two documents were fully disclosed:
 - o The European Charter for Researchers – The Code of conduct for the Recruitments of Researchers
 - o The European Code of conduct for Research Integrity – European Science Foundation.
- Regarding **point 17**, DG RTD provided you with a weblink to information on their IT tools.

You were furthermore informed that:

- *"in respect of points 3 to 5 and 11 to 12, [...] no documents exist because the cases referred to in the presentation were not triggered by an external audit";*
- *"in respect to point 6, please note that telephone conversations are not registered [...]".*

2. EXAMINATION AND CONCLUSIONS

In your application dated 22 August 2013, you made a confirmatory request for documents falling under **points 1, 2 and 7 to 17** of your initial request.

2.1. Document falling under point 1 of your initial application

Concerning point 1 of your initial request, you reiterate your request for access to the presentation by an official of the European Commission in the framework of an International workshop on Accountability in Science and Research Funding that took place on 22-24 June 2011 in Brussels. This workshop was co-hosted by the Commission and the U.S. National Science Foundation (hereafter NSF). You specify that the items covered by your request are:

1. *The slide presentation;*
2. *The speaker notes, if any.*

The Commission has identified one *Powerpoint* presentation as falling under the scope of this part of your request. Following a thorough examination of the document, I regret to inform you that it cannot be disclosed as it falls within the scope of the exception laid down in Article 4(2) third indent of Regulation 1049/2001, as detailed below in section 3.

2.2. Documents falling under points 2, 7 and 8-17 of your initial application

In your confirmatory application, you insist on the existence of documents corresponding to **points 2 and 8 to 17** of your initial request.

Following confirmation by DG RTD and further verification, I confirm that no other documents have been identified as corresponding to that part of your request.

Under these circumstances, I consider that this part of your confirmatory application is devoid of purpose. Indeed, a confirmatory application is a request to review a position by which access to one or more documents has been fully or partially denied. This is obviously not the case with regard to this part of your request.

As regards the document corresponding to **point 7** of your initial application, for which you also reiterate your interest, I note that DG RTD provided you already with the requested document. In your confirmative request you ask to receive earlier versions of that document. However, as you had not expressed an interest in receiving such earlier versions at the initial stage, this part of your request is also considered to fall outside the scope of your confirmatory request.

3. ASSESSMENT UNDER REGULATION 1049/2001

3.1. Protection of the purpose of on-going audits

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

As DG RTD explained in its initial decision, the documents requested under point 1 of your initial application (i.e. slides and related notes) were based on real cases of alleged fraud. Those cases were being handled by DG RTD, OLAF and by judicial authorities. DG RTD has reconfirmed that there are still judicial proceedings ongoing in a Member State and that an OLAF investigation remains in progress.

Disclosure of the presentation would reveal details about these cases which would make the concerned organisations easily identifiable due to their specific characteristics and the structure of their underlying fraud schemes.

Thus, to be fully operational and, above all, credible, the Commission's services cannot unveil the way they apply their audit strategy and the specific means they use. Should this information be unveiled, the purpose of the audits and investigations and their result would be substantially affected and, in global terms, they would be largely ineffective, as they would enable beneficiaries of EU funds to circumvent these audits and investigations.

Indeed, it is essential that the Commission's services can properly carry out audits and investigations to guarantee that public money is put to good use and that improper practices are not disclosed in a way that could lead to further cases of ill-management.

Under these circumstances, public access to the referred document would have a detrimental impact on the audit and investigation capacity of the Commission.

Consequently, disclosure of the document mentioned in your request under point 1 has to be refused pursuant to Article 4(2) third indent of Regulation 1049/2001.

3.2. Examination of partial access

I have examined the possibility of granting partial access to the document falling under point 1 of your initial application, in accordance with Article 4(6) of Regulation No 1049/2001. However, partial access is not possible given the fact that the document concerned is entirely covered by the exception under Article 4(2), third indent of Regulation 1049/2001, as explained above.

In particular, no element of the document can be disclosed without revealing the specific problems encountered under the aforementioned audit and investigation procedures and thereby undermining their purpose.

4. 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, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), third indent of Regulation 1049/2001.

In your confirmatory application you claim that the public has an interest in knowing about "*[t]he manifestly unlawful conduct of DG RTD[...], the [...] grave infringements of Regulation No 45/2001 and the false declarations*". This allegation is not relevant as the document requested do not reveal any information that would substantiate such a claim. Furthermore, disclosure of the document without any contextual explanations and before the audits and investigations are completed would lead the public to draw erroneous and premature conclusions about the results of these audits and investigations.

I understand from your message that you are critical of the way the Commission services might have acted in relation with the disclosure of such audit procedure in the framework of an international seminar. If this is the case, I must draw your attention to the fact that this is an issue which, in substance, cannot be addressed and dealt with within the scope and procedure of Regulation 1049/2001. This Regulation only relates to public access to documents held by the institution which has received the application.

If, as a data subject, you wish to activate a procedure related to the processing itself of your personal data by the Commission, I need to refer you to the remedies foreseen by article 32 of Regulation (EC) 45/2001 (OJ L8/6 of 12.1.2001) according to which "*every data subject may lodge a complaint with the European Data protection Supervisor if he or she considers that his or her rights under article 286 of the Treaty have been infringed as a result of the processing of his or her personal data by a community institution or body*". The Regulation also states that "*the Court of Justice shall have jurisdiction to hear all disputes which relate to the provision of this regulation*". These means of redress would be the appropriate routes to take and they are fully available to you as a data subject.

Furthermore, the public interest is better served by ensuring that the Commission can properly audit contractors and beneficiaries of grants in order to ensure that funds are put to good use. Considering that the funds that are used to finance the European institutions are public, they should above all be protected from misuse.

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

5. MEANS OF REDRESS

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

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Catherine Day', written in dark ink.

Catherine Day