

EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, **03 FEB. 2014**
SG.B5/PSc/psc – sg.dsg2.b.4(2014)202159

Mr Sifis RAPTIS

By per e-mail only:
ask+request-671-b76da1dd@asktheeu.org

Subject: Confirmatory application for access to documents under Regulation 1049/2001 - Gestdem 2013/3654

Dear Mr Raptis,

I refer to your e-mail of 26 November 2013, registered on 28 November 2013, in which you request, pursuant to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ ('Regulation 1049/2001'), a review of the position taken by the Directorate-General Research and Innovation ('DG RTD') sent on 7 November 2013 in reply to your initial application of 12 July 2013.

I further refer to the Commission's letters of 16 December 2013 and of 20 January 2014, extending the time-limit for handling your above application. I apologise for the time it took us to handle this request, which was due in particular to the need to reassess whether any further documents could be identified as falling under your request for access.

1. SCOPE OF YOUR REQUEST

a) Initial application

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

- 1. The letter notifying the contractor/beneficiary about the conduct of an external financial audit, including all annexes and the Privacy Statement.*
- 2. The article 25 of Regulation No 45/2001 prior notification applicable at the material time regarding the DG RTD external financial audits.*
- 3. The final audit report, including all annexes thereto.*

¹ OJ L145, 31.05.2001, p.43.

4. *Any single one time-sheet (i.e. only one out of many), if any, held by DG RTD and collected from the field audit.*
5. *The 'statement of content' (within the meaning of Case T-437/08, CDC Hydrogene Peroxide v European Commission) of the file regarding the financial audit, that is to say a list of documents held in the audit file.*
6. *The duly signed Recovery Order corresponding to the Debit Note, as provided by articles 70 to 73 of Regulation No 1065/2002 (Financial Regulation).*
7. *The Debit Note*
8. *Every single different version of the 'audit manual' handed over to the external audit firms. In case the audit manual comprises several different documents, every single constituent document falls under the scope of this request.*
9. *Every single 'guidance paper' handed over to the external audit firms.*
10. *The documents setting out the roles and responsibilities of the Commission audit staff accompanying the external auditors.*
11. *The parts of the framework contracts that lay down the obligations imposed on the external audit firms with regards to the conduct of the field audit and the drawing up of the audit reports.*
12. *The documents draw up regarding the intensification of the 'efforts to ensure that the external audit firms meet all the specific requirements set out in the framework contract for every audit assignment'*
13. *The documents drawn up regarding how those Research family DGs were to carry out the 'reviews of the working papers retained by the external audit firms will be performed'.*
14. *The documents drawn up with some kind of explanation/justification of why exactly 'the Commission does not consider that straightforward application of the Auditing Standards on reliance on work of other auditors is appropriate in this case'.*
15. *The documents drawn up setting out in a generic manner 'a process to provide feedback to the certifying auditors where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings'.*
16. *Any there (3) letters (out of many) addressed to beneficiaries providing feedback 'to the certifying auditors where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings'.*
17. *Any there (3) letters (out of many) addressed to certifying auditors providing feedback to them 'where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings'.*

b) Initial reply

Since the application related to a very large number of documents, DG RTD offered you a fair solution in the meaning of Article 6(3) of Regulation 1049/2001. The deadline for handling your above mentioned application was extended until 30 September 2013.

In its letter sent on 7 November 2013, DG RTD identified 41 documents as falling within the scope of your request.

1. Letter of Announcement
2. Letter of Announcement
3. Letter of Announcement
4. Notification DPO 2382.1
5. Notification DPO 2382.2
6. Notification DPO 2382.3
7. Notification DPO 2382.4
8. Notification DPO 2382.5
9. Notification DPO 978.1
10. Notification DPO 978.2
11. Notification DPO 978.3
12. Notification DPO 978.4
13. Notification DPO 978.5
14. Notification DPO 978.6
15. Audit Report
16. Audit Report
17. Audit Report
18. Recovery Order
19. Recovery Order
20. Recovery Order
21. Debit note
22. Debit note
23. Debit note
24. FP7 Audit Process Manual
25. FP6 Audit Process Manual
26. Annexes of FP6 Audit Process manual
27. Guide to Financial Issues relating to Indirect Actions of the Sixth Framework Programmes
28. Guide to Financial Issues relating to FP7 Indirect Actions
29. Document on *Acceptability criteria for average personnel costs*
30. Guidance Note concerning the Question on remuneration and complementary employment contracts
31. Guidance Note concerning *Fair apportionment of indirect costs*

32. Guidance Note concerning the *Materiality threshold for insignificant errors at the audit reporting stage*
33. Document entitled *Indicative audit program for FP7 average personnel costs*
34. Framework Service Contracts
35. Framework Service Contracts
36. Framework Service Contracts
37. Checklist EAF quality review
38. Certifying Auditors Notification
39. Standard letter to certifying auditors
40. Standard letter to certifying auditors
41. Standard letter to certifying auditors

Full access was granted to documents 4-14, 27-29 and 39-41.

Partial access was given to documents 1-3, 15-26 and 34-37, based on the exceptions of **Article 4(1)(b)** (protection of the privacy and the integrity of the individual), **Article 4(2), first indent** (protection of commercial interests) and **third indent** (protection of the purpose of investigations) of Regulation 1049/2001.

No access was granted to documents 30-33, based on the exceptions of **Article 4(2), third indent** (protection of the purpose of inspections, investigations and audits), as well as on the exceptions laid down in **Article 4(1)a, 4th indent** (protection of the financial, monetary or economic policy of the EU) and **Article 4(3)2** (protection of the decision-making process).

Finally, DG RTD informed you that “[a]s far as points 4, 5, 10, 12, 14, and 16 are concerned there are no corresponding existing documents [...]”.

You were furthermore informed that “[a]s far as point 2 is more specifically concerned, please kindly note that no dedicated notification on external audit existed before 2011. Please find thus attached the versions of the notifications of before 2011 covering the system and allowing DG RTD to monitor the correct implementation of the projects under its responsibility.

More specifically in respect to point 4, please also note for your information, that the underlying audit evidence such as inter alia, time sheets, is specific to every single audit and is subject to confidentiality in line with the provisions of the FP6 contract or FP7 grant agreement.”

c) Confirmatory application

In your confirmatory application, you contest these decisions and request:

- full access to the documents listed under points 6, 7, 8 and 13 of your request. These correspond to documents 18 to 26 and 37 listed in section 1 b) above.

- disclosure of documents requested under point 9 of your request. These documents correspond to documents 30 to 33 listed under section 1 b) above.
- disclosure of documents requested under points 4, 5 and 14 of your request. In this respect, you state that "*DG RTD did not carry out a thorough search for documents*" and you ask "*the Secretariat General [...] to undertake a fresh search for documents [...] and release them*". As no documents have been found, they are not listed under point 1 b) above.

2. DOCUMENTS CONCERNED

Following your confirmatory application, the Commission services undertook a new and extensive search for documents falling within the scope of your request.

On the basis of this extensive search, I am pleased to inform you that one further document – a 2010-version of the FP7 Audit Manual – has been identified (referred to henceforth as "document 42").

Consequently, this decision concerns the following documents, identified as being covered by your confirmatory request:

- 18. Recovery Order
- 19. Recovery Order
- 20. Recovery Order
- 21. Debit note
- 22. Debit note
- 23. Debit note
- 24. FP7 Audit Process Manual
- 25. FP6 Audit Process Manual
- 26. Annexes of FP6 Audit Process manual
- 37. Checklist EAF quality review
- 30. Guidance Note concerning the Question on remuneration and complementary employment contracts
- 31. Guidance Note concerning *Fair apportionment of indirect costs*
- 32. Guidance Note concerning the *Materiality threshold for insignificant errors at the audit reporting stage*
- 33. Document entitled *Indicative audit program for FP7 average personnel costs*
- 42. 2010-version of the FP7 Audit Manual.

3. ASSESSMENT AND CONCLUSIONS

Following an assessment of your request and of the documents concerned, my position is as follows:

1. Partial access is granted to document 42;
2. No further access is granted to documents 18 to 26 and 37;
3. No access is granted to documents 30 to 33.

No further documents were identified as corresponding to “points 4, 5 and 14” of your request. That part of your request is therefore devoid of purpose.

As for your suggestion that the Secretariat General should *perhaps consult other Directorates-General that have managed FP5, FP6 and FP7 projects*, I consider that, given the scope of your request, which only covers documents for which RTD acted as the lead service, consultation of other DGs would not have been relevant for the purpose of replying to your request.

4. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

4.1. Protection of personal data (names of natural persons and other information enabling to identify the latter appearing in documents 18 to 23)

The exception set out in Article 4(1) (b) of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where 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.”

Documents 18 to 23 contain references to the names of natural persons. Such names clearly constitute personal data as defined in Article 2(a) of 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 ('Regulation 45/2001')².

The above-mentioned documents also include the names and addresses of the specific organisations which the natural persons mentioned represent, as well as the payment justifications in the debit notes and in the recovery orders. Given the limited number of persons employed by the organisations concerned, disclosing the names and addresses of these organisations would make the natural persons acting as their representatives easily identifiable.

In its *Bavarian Lager*³ judgment, the Court of Justice has confirmed that “*where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal*

² 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.

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

data, the provisions of Regulation 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof". Therefore, in accordance with Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient, if the latter establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. These two conditions are cumulative.

Nothing in your request demonstrates the necessity of having these personal data transmitted to you.

In addition, there are clear reasons to assume that the privacy and the integrity of the individuals concerned would be prejudiced by release of these personal data as this would expose these individuals to a concrete and specific risk of undue external pressure and harm to their reputation. Indeed, the public disclosure of the names and titles of the firms' representatives would turn them into specific and individual targets of external criticism, allegations and unsolicited external contacts. The fact that the Commission has received many requests for access to documents relating to the FP6 and FP7 audits, demonstrating the external interest in this subject, only reinforces this conclusion.

Consequently, I consider that, in this case, the necessity of disclosing the abovementioned personal data is not demonstrated and its disclosure has to be refused pursuant to Article 4(1)(b) of Regulation 1049/2001.

4.2. 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".

4.2.1. Regarding documents 24 to 26 and 42

The Audit Manuals (documents 24 to 26) are part of the overall training and instruction process for auditors in their work. As such, they contain general standards and procedures as well as examples of specific problems encountered and how they might be addressed.

These Manuals are still used by the auditors. 13 FP6 audit procedures are still ongoing and financial audits on FP7 projects will be performed at least until 2016.

The removed parts of Section 2 of the FP7 Audit Manual, entitled "*Scope of on-the-spot audits of FP7 indirect actions*" and "*Scope on the on-the-spot audit of FP6 indirect RTD actions*" of the FP6 Audit Manual, explain the procedure for an audit under the grant agreement or contract. The redacted parts of the manual give details of the steps that should be performed and notes the stages at which there may be a need for flexibility in an on-the-spot audit. On-the-spot audits, as envisaged in this section, are performed at the place of work of the beneficiary without a long period of prior notice. This is designed to leave less time for the beneficiary to adjust any irregularities before an audit. The checks relate to the eligibility of costs declared and the compliance with legal provisions. Disclosure of the procedures adopted in these sections of the FP7 and FP6 Audit Manuals would, therefore, enable a beneficiary to pre-empt the audit by making adaptations to their accounting and supporting documentation.

This would reduce the potential benefits derived from this type of audit and would, therefore, undermine the purpose of ongoing and future audits.

The rest of the redacted sections of the text in both manuals relate to specific problems that may be encountered during the audits, practical advice and specific occasions on which there is an element of flexibility within the guidance to allow for certain circumstances. This information goes into more detail than a standardised practice manual as it is relevant to the particular circumstances. If these sections were to be disclosed it would leave these areas of flexibility open to abuse. There is a real and non-hypothetical risk that fund beneficiaries, especially those having acted in a fraudulent or irregular way, will try to work within the tolerances provided for in the manual to increase the likelihood of the fraud and irregularities to remain undetected. Release of these sections would therefore enable fund beneficiaries to circumvent the audits. It follows that their disclosure, while FP6 and FP7 audit campaigns are 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.

For this reason, and in accordance with Article 4(2), third indent, of Regulation 1049/2001, I take the view that further public access to documents 24-26 has to be refused. The same reasoning applies to document 42, for which only partial access can be granted.

4.2.2. Regarding documents 30 to 33

The "Guidance Notes" under point 9 of your request (documents 30 to 33) have been drafted for the *internal use* of in-house auditors.

After analysing the above documents, I conclude that no partial access is possible, since the entirety of the information contained therein would, if it were to be released, undermine the efficiency and effectiveness of the audit activities and policy in the research domain, for the same reasons as those explained under point 4.2.a above.

For this reason, and in accordance with Article 4(2), third indent, of Regulation 1049/2001, I take the view that public access to documents 30-33 has to be refused in its entirety, as release of these documents would undermine the purpose of the audits protected by Article 4(2), third indent of Regulation 1049/2001.

4.2.3. Regarding document 37

Document 37 contains a checklist for the review of audit files. Unveiling in detail the audit quality checks carried out by auditors would reveal to the public concrete and operational measures used in the Commission to conduct these operations. This would render such procedures, and in particular their purpose, which is to validate audit reports performed by the external audit firms, meaningless.

In order for the audit policy and strategy to be fully operational and, above all, credible, such policies and strategies cannot unveil the specific way in which they are applied and the criteria used for the means and tools described. Should this happen, the objectives of the audits would

be substantially undermined and its results would make it largely ineffective and even put the entire system into question.

I consider that, in this case, general public access to the referred document would have a negative impact on the Commission services' audit capacity, and in particular the purpose thereof. Therefore, the document requested should remain redacted in order to preserve the Commission's ability to carry out audits.

Consequently, full disclosure of the "audit checklist for the review of audit files" must be refused pursuant to Article 4(2) third indent of Regulation 1049/2001.

4.3. Protection of commercial interests (reflected in documents 18 to 23)

Article 4(2), first indent of Regulation No. 1049/2001 stipulates that:

"The institutions shall refuse access to a document where disclosure would undermine the protection of (...) commercial interests of a natural or legal person, including intellectual property, (...) unless there is an overriding public interest in disclosure."

Use of the exception under Article 4(2), first indent, of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests is justified with respect to the names and addresses of legal entities having received EU funds, as well as payment justifications in the debit notes and in the recovery orders (reflected in documents 18 to 23 listed under point 2 above). Disclosure of these elements would negatively affect the commercial interests of the organisations concerned. Indeed, disclosure of the names and addresses of the legal persons would expose these legal persons to outside criticism and unsolicited contacts.

Documents 18 to 23 consist of debit notes addressed to the legal entities concerned and recovery orders. Revelation of these elements would give external persons insight into the specific payment situation of these legal entities, and in the respect by the latter (or the lack thereof) of the rules and regulations applicable to the implementation of EU-funded programmes and projects.

The entities and natural persons concerned have a legitimate expectation that such sensitive information, which could result in damage to their commercial reputation and would therefore be harmful for their commercial interests, will not be disclosed to external parties.

It follows that access to names and addresses of legal persons and the explanations of such payments as reflected in documents 18 to 23 has to be refused pursuant to Article 4(2), first indent of Regulation 1049/2001, as their disclosure would undermine the commercial interests protected by that provision.

5. OVERRIDING PUBLIC INTEREST

The exceptions under Article 4(2), first and third indents, of Regulation 1049/2001 must be waived if there is an overriding public interest in the disclosure of a document. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure.

You claim that “[i]t is self-evident that there is an overriding public interest for the full release of all documents falling under the scope of the confirmatory application.”

However, in the absence of any more specific reasoning to support this claim,⁴ I have to conclude that the public interest is better served in this case by ensuring that the Commission services can properly audit contractors and beneficiaries of grants and contracts in order to ensure that funds are put to good use.

This conclusion is further supported by paragraph 60 of the judgement of the Court of Justice of the European Union in the *Technische Glaswerke Ilmenau case*⁴, 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 to protect the objective of on-going and future audits.

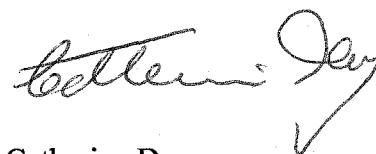
As regards the exception of Article 4(1)(b), you claim that there is an overriding public interest in disclosure, by arguing that “DG RTD has adopted a policy of processing personal data of third parties to the audited projects, in violation of numerous provisions of Regulation 45/2001. That there was no prior notification covering the DG RTD financial audits prior to DPO-3398.1 (April 2011) is in itself highly problematic. The two false statements of DPO-3398.1 and its non-existent legal basis prove that DG RTD went over the top in its financial audits.”

However, the exception laid down in Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which is not balanced against an overriding public interest in disclosure. Consequently, your arguments cannot in any way invalidate the Commission's assessment under point 4.1 above that disclosure of the documents would undermine the privacy and the integrity of the individuals concerned.

6. 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

Annex 1 – Redacted version of FP7 Audit Manual (December 2010)

⁴ Judgment of 29 June 2010 in the case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, [2010] ECR I-05885.