



European Personnel Selection Office

Director



Brussels, 17 AOUT 2015

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Mr Guido STRACK

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Subject: Your application for access to documents under Regulation (EC) 1049/2001 ref. GestDem 2015/3538

Dear Mr Strack,

I refer to your message of 3 July 2015 whereby you lodged a request for access to documents pursuant to Regulation (CE) No 1049/2001. Your message was registered on 3 July 2015 under the above reference number.

You request access to the following documents:

1. The complete database or, if applicable, databases (as a document within the meaning of Regulation 1049/2001), to which the requests in applications Gestdem 2012/3258 and GestDem 2013/0068 refer.
2. All documents including all annexes, attachments and technical descriptions which describe the databases named under 1., (and if these cannot be identified, all databases available or used by EPSO), the scope of their operations, structure and operating procedures, as well as access to all tender documents, specifications and other documents, also including all annexes, attachments and technical descriptions connected with the external development or planning of such databases.
3. All available documents from the entire Commission (i.e. especially but not only from EPSO, the Legal Service and the Secretariat-General) that are connected with the GestDem 2012/3258 and GestDem 2013/0068 procedures including all annexes, attachments and technical descriptions (regardless of whether these come from Commission services, the applicant or from third parties).

Analysis of your request

1. The databases referred to in the procedures Gestdem 2012/3258 and Gestdem 2013/0068

You request access to each complete database - as one document within the meaning of Regulation (EC) 1049/2001 - as requested in the two above mentioned applications for access.

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EPSO has identified two databases matching your request, namely the following:

- (a) The so-called "item bank" database, managed by EPSO's external contractor, which contains around 50.000 active test questions used in the computer-based reasoning tests of EPSO competitions ('active' meaning that they can currently be deployed for the operational delivery of tests).

This database is used to manage test content (such as editing items, tracking the history of delivery and modifications of the items, defining sets of items to be used in a specific competition, etc.), and to deliver computer-based tests to candidates in proctored test centres.

It contains the full text of the questions - including the answer options - in the 24 EU languages, the question identifiers, question types (i.e. verbal, numerical, abstract, etc.), the expected answers, and the question difficulty levels.

- (b) The Talent database, which is a relational database developed and managed by EPSO in cooperation with the Directorate-General for Informatics (DIGIT). This database is used for the management of entire EPSO competitions, from the publication and application phase until the establishing of the reserve list. It is designed to respond to a certain number of predefined searches corresponding to the specific operational needs of EPSO and the selection boards, and to communicate competition-related information (such as results, test appointment dates, etc.) to candidates.

This database contains, (1) candidates' personal data required for their identification (family name, first name, name at birth, date of birth, gender, number of identification document, email address), (2) personal data required to allow the practical organisation of tests (address, postcode, city, country, gender, telephone and fax number, language for correspondence), (3) if applicable, information referring to candidates' 'special needs', (4) information provided by the candidate to allow appreciation of his/her eligibility against the admission criteria fixed by the notice of competition (citizenship, languages, information relating to their diplomas and professional experience), and finally (5) the results/status of each candidate in a competition, i.e. eligibility status (admitted/non admitted), test/selection scores and overall results (passed/failed), and if applicable the competency passport.

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I regret that I am unable to grant you access (including the possibility of partial access) to the above databases, on the following grounds:

Regulation (EC) No 1049/2001 provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions, and limits defined in the Regulation.

According to Article 2(3), the Regulation "*shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession*". According to Article 3(a), a document is "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*".

Notwithstanding that broad definition, which implies in particular that there is no limitation as to the medium of the content in question, it is necessary, according to well-established case-law, to maintain a distinction between the concept of a document and that of information, for the purposes of applying Regulation No 1049/2001 (T-214/13, *Typke v Commission*, ground 53).

Information may be distinguished from a document, in particular, in so far as it is defined as a data element that may appear in one or more documents. In that respect, since none of the provisions of Regulation (EC) No 1049/2001 deals with the right of access to information as such, it cannot be inferred that the public's right of access to a Commission document, which arises under Article 2(1) of that regulation, implies a duty on the part of the Commission to reply to any request for information from an individual (T-214/13, *Typke v Commission*, ground 54).

As regards databases, anything that can be extracted from them by means of a normal or routine search may be the subject of an application for access made pursuant to Regulation (EC) No 1049/2001 (T-214/13, *Typke v Commission*, ground 59), i.e. may be considered an "existing document".

Conversely, the complete set of information (raw data) contained in a database may not be considered as an "existing document" within the meaning of Regulation No 1049/2001. Indeed, it is not permissible to compel the Commission, in the context of an application for access to documents made under Regulation (EC) No 1049/2001, to communicate to the applicant part or all of the data contained in one of its databases - or in several of them - organised according to a classification scheme not supported by that database. Such an application would require the creation of a new document and would therefore not come within the parameters of Regulation (EC) No 1049/2001 (T-214/13, *Typke v Commission*, ground 58).

It follows that your request for access to the complete databases referred to in the procedures GestDem 2012/3258 and GestDem 2013/0068 does not relate to existing documents, and therefore cannot be granted.

As regards access to those existing documents that most closely correspond to the object of your original request - i.e. data sets that can be extracted from the two abovementioned databases by means of a routine search - I regret that I have to refuse to grant you access, for the following reasons:

1.1. The "item bank" database

As explained above, this database is used to deliver computer-based tests, and to manage test content. It contains test content intended for regular reuse in successive competitions.

Therefore, access to any data subsets extracted from the "item bank" must be denied on the grounds of Article 6 of Annex III to the Staff Regulations.

Indeed, according to case law, the right of access to documents as set out in Regulation (EC) No 1049/2001 may be limited or denied where there are special rules governing specific matters, under the principle that a special rule overrides the general rule (*lex specialis derogat legi generali*). In the context of open competitions, Article 6 of Annex III to the Staff Regulations, which establishes the principle of confidentiality of selection board proceedings, constitutes such a *lex specialis*.

"Article [15(3) TFEU (ex-255(1) EC)], which provides that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with [that paragraph], and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), which was adopted on the basis of Article 255(2) EC in order to determine the general principles governing the exercise of that right of access to documents, constitute general rules which apply to all citizens of the European Union. Those texts themselves place limits on the right of access to the documents of the institutions concerned, in particular for reasons of public interest [...].

Like any general rule, the right of access to [...] documents provided for in the provisions cited above may be limited or excluded - according to the principle that a special rule derogates from the general rule (lex specialis derogat legi generali) - where there are special rules governing specific matters.

In that regard, it should be observed that Article 6 of Annex III to the Staff Regulations, adopted on the basis of Article 283 EC, and which specifically lays down the procedure for competitions, provides that '[t]he proceedings of the Selection Board shall be secret'. [...].

It follows that the applicant cannot validly rely on the concept of transparency in order to call in question the applicability of Article 6 of Annex III to the Staff Regulations [...]." (T-371/03, *Le Voci v Council*, paragraphs 121-124, with further references).

Recent case law has confirmed that test content intended for reuse in subsequent competitions is protected under Article 6 of Annex III SR, and therefore the institutions are entitled to deny access to it (F-127/11, *De Mendoza v Commission*, ground 100).

As a subsidiary argument, it should be noted that even if Regulation (EC) No 1049/2001 was applicable to the part of your request concerning data subsets including reusable test content, *quod non*, I would have to refuse access to such documents on the grounds of the exception provided for in Article 4(3) of Regulation (EC) No 1049/2001.

This Article provides that access "*shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

It should be recalled that any document disclosed under Regulation (EC) No 1049/2001 becomes public. Since the same database of test items is being used in all competitions (and other selection procedures) with computer-based tests, it is clear that any disclosure of its contents would result in a competitive advantage for candidates who could obtain access to them. Therefore, such disclosure would entail a significant risk of compromising the fairness of future selection procedures by seriously undermining the equal treatment of candidates, with damaging consequences for the entire system of open competitions.

You did not indicate any overriding public interest in disclosure, and your request appears to be based entirely on a private rather than public interest. On the other hand, it is in the public interest that the objectivity of the selection procedures and the equal treatment of candidates be fully guaranteed and protected.

1.2. The Talent database

This database is used for the management of EPSO competitions, and contains different categories of candidates' personal data (identification data, results, etc.).

It follows that the data subsets produced by a routine search function of Talent will contain candidates' personal data, and hence will fall under the exception provided for in Article 4(1)b of Regulation (EC) No 1049/2001.

Furthermore, the predefined searches of Talent correspond to the specific operational needs of EPSO and the selection boards in the context of running competitions. This implies that the vast majority of the data subsets produced via these searches will reflect an individual and/or comparative assessment of candidates' merits in a competition by the competent selection board (e.g. rankings of candidates in order of merit based on their test scores, lists of candidates admitted / non admitted to a competition, etc.). They would therefore fall under the principle of secrecy of selection board proceedings established by Article 6 of Annex III SR.

This secrecy was in fact introduced to guarantee the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the EU administration itself, the candidates, or third parties. Observance of this secrecy therefore precludes disclosure of any factors relating to individual or comparative assessments of candidates (89/79, *Bonu v Council*, ground 5; C-254/95 P, *Parliament v Innamorati*, ground 24).

Consequently, access to any of the data subsets produced via routine searches in the latter category could also be denied on the grounds of Article 6 of Annex III SR.

In the light of the above, your request for access to the information / documents referred to in point 1 of your application has to be rejected in its entirety.

2. Tender documentation and technical documentation concerning the databases referred to in point 1 of your application

2.1. Tender documentation

As regards Talent, I confirm that EPSO does not possess any tender documentation concerning this database. The reason for this is that Talent has been developed in-house by EPSO (and as of recently, DIGIT), and therefore it was not subject to any tender procedure.

As regards the "item bank" database, I confirm that it was subject to several tender procedures, namely procedures EPSO/02/PR/2008/104, EPSO/TF/PR/2009/122, EPSO/02/PR/2009/117, EPSO/02/PO/2009/065, EPSO/01/PR2010/104, EPSO/03/PR/2011/025, and 2012/S 247-405270.

I am also pleased to advise you that the non-confidential elements of the tender documentation concerning the "item bank" are already publicly available. You can access these at the following address: http://europa.eu/epso/about/tenders/index_en.htm.

2.2. Technical documentation

I confirm that EPSO holds several documents which contain information pertaining to the functions, structure and operation of the Talent and "item bank" databases.

However, I regret that I am unable to grant you access (including the possibility of partial access) to the above documentation, on the grounds of Article 4(1)(a) of Regulation (EC) No 1049/2001.

Article 4(1)(a), first indent provides that "*[the] institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security*".

The technical documentation of the two databases in question contains sensitive information concerning their design and implementation, and in particular their IT security aspects. Disclosure of this information would therefore pose a real and reasonably foreseeable risk of facilitating illegal activities, namely malicious cyber-attacks against the two databases by third parties.

It follows that the part of your request relating to the technical documentation of the databases must be rejected.

3. Procedural documentation of the procedures Gestdem 2012/3258 and Gestdem 2013/0068

I confirm that EPSO holds several documents pertaining to the two procedures in question. These fall into the following categories:

- (a) correspondence received from the applicant (applications and further exchanges);
- (b) final decisions in the initial and confirmatory application stages;
- (c) internal exchanges about draft versions of the above decisions between the Secretariat-General, the Legal Service and EPSO;
- (d) miscellaneous documentation (acknowledgments of receipt, internal transmission documents, etc.).

As regards access to the documents received from the applicant, EPSO has consulted him about the possibility of disclosure pursuant to Article 4(4) of Regulation (EC) No 1049/2001. The applicant gave his consent to the public disclosure of the documents in question. I am therefore pleased to be able to grant you access.

I am also pleased to grant you access to the final initial and confirmatory decisions, which have been communicated to the applicant and are therefore considered to have been released into the public domain.

However, I regret that I have to refuse access to the internal documentation referred to under (c) above, on the grounds of Article 4(2) of Regulation (EC) No 1049/2001.

Article 4(2), second indent, provides that "*[the] institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice*".

According to the ruling of the General Court in the case T-84/03, *Turco v Council*, "*[the] words 'legal advice', in the second indent of Article 4(2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the [institution]'s legal service in the context of court proceedings but also for any other purpose*".

EPSO considers that the internal legal consultations within the framework of the procedures GestDem 2012/3258 and GestDem 2013/0068 fall within the above category. Consequently, I have to deny access to them.

Finally, I am pleased to grant you access to the documentation in the 'miscellaneous' category mentioned under (d) above (anonymised versions, not including the names and contact details of the EU staff members involved).

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In accordance with Regulation (CE) No 1049/2001, should you wish this decision to be reviewed, you may make a request in writing to the Secretary-General of the Commission at the address below, confirming your initial request. You have 15 days, following receipt of this letter, in which to do so, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within 15 working days from the registration of your request, either by granting you access to the documents in respect of which access has been refused by the present decision, or by confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

The Secretary-General
sg-acc-doc@ec.europa.eu
European Commission
B-1049 Brussels

Yours sincerely,



N.D. BEARFIELD

Annexes:

1. Documentation of procedure GestDem 2012/3258;
2. Documentation of procedure GestDem 2013/0068.