



EUROPEAN COMMISSION

SECRETARIAT-GENERAL

The Secretary General

Brussels, 01.12.2015  
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*By registered letter  
with acknowledgement  
of receipt:*

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**DECISION OF THE SECRETARY GENERAL 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 2015/4566**

Dear Ms Motet,

I refer to your email of 13 October 2015, registered on 14 October 2015, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> ('Regulation 1049/2001').

**1. SCOPE OF THE REQUEST**

In your initial request of 28 August 2015, you requested access to the documents concerning the following contracts:

- MORIS SLOVAKIA SRO [Ref. SCR.CTR.351573.01.1(BGUE)]; and
- MORIS SLOVAKIA SRO [Ref. SCR.CTR.351605.01.1(BGUE)].

In its initial reply of 9 October 2015, the Directorate-General for Neighbourhood and Enlargement Negotiations ('DG NEAR') indicated that only one single contract between the Commission and *Moris Slovakia s.r.o.* was identified as relevant to your request: the supply contract for European Union external actions, entitled *Supply of mobility equipment for the State border guards service Ukraine*, including four annexes.

That contract was signed by the Commission and the contractor *Moris Slovakia s.r.o.* on 28 October 2014 and 30 October 2014 respectively. This single contract was split in the Commission's accounting system into two registered contracts (respectively ENPI/2014/351-573 and ENPI/2014/351-605) for technical reasons.

DG NEAR refused access to the contract and its annexes III and IV, on the basis of the exception for the protection of commercial interests provided in Article 4(2), first indent of Regulation 1049/2001. It granted full access to Annexes I and II to the contract.

Through your confirmatory application, you request a review of this position and the full disclosure of the contract, including its annexes.

## **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 assessment, I am pleased to inform you that access is granted to the contract, subject to the redaction of personal data only. Partial access is also granted to Annex IV to the contract.

As regards Annex III to the contract, I regret to inform you that the Commission confirms the refusal of DG NEAR to disclose Annex III to the contract on the basis of the exceptions for the protection of international relations and commercial interests provided for respectively in Article 4(1)(a), third indent and Article 4(2), first indent of Regulation 1049/2001.

The disclosure of the redacted parts of Annex IV is also prevented under the exception for the protection of commercial interests, as explained below.

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

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

## **2.1 Protection of international relations**

Article 4(1)(a), third indent provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations.*

The contract in question concerns the *Supply of mobility equipment for the State Border Guards Service in Ukraine* within the framework of the Project for *Support for border management sector policy in Ukraine (ENPI/2010/022369) and joint Border Patrolling on the green and blue border between Republic of Moldova and Ukraine.*

The public disclosure of the requested Annex III to the contract would seriously undermine the EU's relations with the Republic of Moldova and Ukraine.

There is indeed a real and non-hypothetical risk that public disclosure of Annex III to the contract, which contains the technical offer of the contractor, would endanger the proper implementation of border controls, as it would reveal confidential information pertaining to the deployed equipment and the underlying organisation and strategy of the border controls in question.

Against this background, I consider that there is a foreseeable risk that the disclosure of Annex III of the contract would seriously undermine the interest of international relations within the meaning of Article 4(1)(a), third indent of Regulation 1049/2001.

## **2.2 Protection of the commercial interests**

Article 4(2), first indent of Regulation 1049/2001 provides that *[t]he 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.*

The requested release of Annex III to the contract would entail the public disclosure of the specific know-how and expertise implemented by the contractor within the *MORIS SLOVAKIA SRO* contract. The contractor's technical offer indeed contains a thorough project description regarding all the technical elements related to its implementation, including details of the specific quantities of the equipment used. This type of information is by its nature commercially sensitive, as it reflects aspects of the contractor's commercial methodology and strategy which are not in the public domain. Its public disclosure could be exploited by the limited number of competing entities on this very specific market, thereby affecting its competitive position.

There is therefore a real and non-hypothetical risk that public access to the information contained in Annex III to the contract would undermine the commercial interests of the successful tenderer, including its intellectual property.

Annex IV is a summary of the breakdown of the Budget after a 25 percent increase in quantities.

In its ruling in case *Terezakis v Commission*, the General Court held that *in principle, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests*<sup>3</sup>.

In this instance, whereas, the Commission can disclose the offered quantities, specifications (including the brand and models of the vehicles) and the total amount of the budget attributed for the implementation of the contract in question; it cannot publicly disclose the remaining elements of Annex IV, concerning the breakdown of the costs and the respective amounts of the budget allocated per type of vehicle, without seriously undermining the commercial interests of the contractor. The release of this non-aggregated data would indeed reflect the know-how of the contractor, and provide information which is not in the public domain regarding its costs components, organisation and strategy underlying its implementation of the contract. Such a public disclosure could distort the competition in the market in which the contractor operates insofar as the released financial data could be used by tenderers in future calls for tenders in the same sector to submit manipulated offers.

Against this background, I consider therefore that there is a real and non-hypothetical risk that disclosure of the technical and detailed financial information contained respectively in Annex III and the redacted parts of Annex IV of the contract be used by competitors in future similar tender procedures, to the detriment of the contractor.

Please note also that the Financial Regulation and its rules for application<sup>4</sup>, contain guarantees of confidentiality and limit the information to be provided upon request in respect to public tenders, even to interested parties under privileged access.

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<sup>3</sup> Case T-380/04, paragraph 95.

<sup>4</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298 of 26.10.2012, p. 1) as amended; and Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1) as amended.

In its judgment in case *Cosepuri v EFSA*, the General Court stressed that *it is common ground that Regulation No 1049/2001 and the Financial Regulation have different objectives and do not contain any provision expressly giving one regulation primacy over the other. Therefore, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them*<sup>5</sup>.

In its *Sviluppo Globale v Commission* judgment, the General Court further clarified that *the transparent conduct of public tenders procedures, which aims to make possible the monitoring of compliance with the relevant rules and principles does not require the publication of documents or information relating to the know-how, methodology or business relationships of the tenderers*<sup>6</sup>.

In light of the above, I conclude that Annex III of the contract and the redacted parts of Annex IV are protected against disclosure under the exception for the protection of the commercial interests provided under Article 4(2), first indent.

### **2.3 Protection of the privacy and integrity of the individual**

As indicated above, personal data have been redacted from the contract in order to protect the privacy and the integrity of the individuals concerned.

According to Article 4(1)(b) of Regulation 1049/2001, access to a document or a part of it must be refused *where 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*.

According to Article 2(a) of Regulation (EC) No 45/2001<sup>7</sup>, 'personal data' means 'any information relating to an identified or identifiable natural person' [...]. As was stated by the Court of Justice in case C-465/00, *there is no reason of principle to justify excluding activities of a professional nature from the notion of "private life"*.<sup>8</sup>

Article 5 of Regulation 45/2001 provides that personal data may be processed only under specific conditions. The transfer of personal data in the framework of an application under Regulation 1049/2001 is a form of data processing. Furthermore, according to Article 8(b) of Regulation 45/2001, recipients of personal data have to establish the necessity of having personal data transferred to them, and there must be no reason to assume that the data subject's legitimate interests might be prejudiced.

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<sup>5</sup> Case T-339/10, paragraph 85.

<sup>6</sup> Case T-6/10, paragraph 88.

<sup>7</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, 12.1.2001, p. 1.

<sup>8</sup> Judgment of 20 May 2003 in the joined cases C-465/00, C-138/01 und C-139/0, Court of Auditors versus ÖRF, paragraph 73.

In its judgment in the Bavarian Lager case<sup>9</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable. This means that the necessity to disclose the personal data must be established and that there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. These conditions are cumulative.

I consider in the present case 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.

Consequently, public access is granted to the requested contract, subject only to the redaction of personal data contained therein.

### **3. PARTIAL ACCESS TO THE REQUESTED DOCUMENT**

In accordance with Article 4(6) of Regulation 1049/2001, partial access is herewith granted to the requested Contract and its Annex IV. It is not possible to grant wider access, as the redacted parts of the documents are fully covered by the exceptions of respectively Article 4(1)(b) and Article 4(2), first indent, as explained above.

As regards Annex III of the Contract, partial access is not possible given the fact that this document is entirely covered by the exceptions provided by Articles 4(1)(a) third indent, and 4(2), first indent, as detailed above. Consequently, I have come to the conclusion that access to this document should be withheld in its entirety.

### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions provided for under Article 4(2), must be waived if there is an overriding public interest in disclosure. For such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. it must in this case outweigh the interest protected by virtue of Article 4(2), first indent of Regulation 1049/2001.

In your confirmatory application you argue that you were not *asked (...) why* [you were] *asking this information*. You also indicate that you are a journalist working on an investigation *directly concerning the budget spent by the EC on the strengthening of its borders*. According to you [t]his investigation constitutes an overriding public interest.

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<sup>9</sup> Judgment of 29 June 2010, C-28/08 P.

In this respect, I would like to draw your attention to the fact that, Regulation 1049/2001 applies *erga omnes*, irrespectively of the applicant's identity or reasons for requesting the documents. Indeed, Article 6(1) provides that [t]he applicant is not obliged to state reasons for the application.

Therefore, contrary to your allegations, the Commission did not have to enquire about the reasons behind your application. To the contrary, it was bound to handle your request without any further justification from your part, regardless of your identity or profession.

Moreover, I would like to stress that pursuant to settled case-law, general references to 'transparency' are not sufficient to substantiate an overriding public interest<sup>10</sup>

In this instance, I must conclude that neither have you established arguments that would present an overriding public interest in disclosure, nor have I been able to identify any overriding public interest in disclosure in the sense of Regulation 1049/2001.

The fact that the investigations to which the documents relate are of an administrative nature and do not relate to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>11</sup>, provides further support to this conclusion.

Consequently, I take the view that the prevailing interest in this instance is the protection of commercial interests as protected by the exception provided under Article 4(2), first indent of Regulation 1049/2001.

Please note also that Regulation 1049/2001 does not include a possibility for the exceptions provided for under Article 4(1) of Regulation 1049/2001 to be set aside by an overriding public interest in disclosure.

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<sup>10</sup> See *inter alia* Case C-612/13 P, *ClientEarth v Commission*, paragraph 93.

<sup>11</sup> Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraph 58.

## **5. 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,

A handwritten signature in black ink, consisting of a long horizontal stroke with a loop and a vertical stroke crossing it.

Alexander Italianer

*Enclosures: 2*