



EUROPEAN COMMISSION
Innovation and Networks Executive Agency

Director

Brussels,
INEA/DB

Mr. Peter Teffer
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BY REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

**Subject: Your Confirmatory Application for Access to Documents under
Regulation no 1049/2001 – INEA 2018/39**

Ref.: Your confirmatory application of 8 August 2018- Ares(2018)4184529

Dear Mr. Teffer,

I refer to your e-mail of 8 August 2018, by which you request, pursuant to Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation 1049/2001'), a review of the position taken by the Innovation and Networks Executive Agency (hereafter 'INEA'), in reply to your initial application.

1. Scope of your request

By your initial application of 12 June 2018, you requested access to all documents - including but not limited to emails, papers, evaluation reports and minutes - created by and/or sent to the European Commission about the Steelanol project (Project ID: 656437, funded under: H2020-EU.3.3.3.1).

INEA identified the following documents as falling under the scope of your request:

- Proposal
- Evaluation Summary Report

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- Invitation letter including the information out of ranking
- Ethics reviews
- Exchange of emails regarding the preparation of the grant agreement
- Grant agreement (GA) and its Annexes
- Pre-financing letter to inform the partner
- Periodic Reports and supporting documents
- Deliverables
- Notifications on the revised version of H2020 Model Grant agreement
- Suspension of the payment deadline.
- Information letters for interim payment
- Notification for review meeting
- Publishable summary reports
- Internal reports for the assessment of the project

Through its reply of 23 July 2018, INEA decided:

- a) to fully disclose the following documents: Annex 4 to the GA –Model Financial statement, Annex 5 to the GA - Model for the certificate on the financial statements, Annex 6 to the GA –Model for the certificate on the methodology), Notifications on the revised version of H2020 Model Grant agreement, some of the deliverables (Steelanol Flyer and Poster), Publishable summary reports
- b) to partially disclose the following documents: Invitation letter including the information out of ranking, Exchange of emails regarding the preparation of the grant agreement, Grant Agreement, Information letter for Interim payments, Notification for review meeting,
- c) to refuse access to the following documents, based on the exceptions of Article 4(2) first indent (protection of commercial interests) and Article 4(1)(b) (protection of the privacy and the integrity of the individuals):
 1. Proposal
 2. Evaluation Summary
 3. Ethics reviews
 4. Grant declarations
 5. Annex 1 to the GA - Description of Action
 6. Annex 2 to the GA – Estimated budget of the action
 7. Annex 3 –Accession Forms,
 8. Documents included in the Periodic reports (except publishable summary reports)
 9. Deliverables (except for Deliverable 29- Leaflets and posters),
 10. Suspension of the payment deadline
 11. Internal reports for the assessment of the project

Through your confirmatory application you request access to the documents that were not disclosed following your initial application for access to documents (as listed above under point c).

You support your request with arguments which I will address in the corresponding sections below.

2. Assessment and conclusion under Regulation 1049/2001 and Aarhus Regulation 1367/2006 ¹ ('Aarhus Regulation')

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, INEA conducts a fresh review of the reply given at the initial stage in the light of the provisions of this Regulation.

Following the review of your confirmatory application, I regret to inform you that I have to confirm the initial decision of INEA to refuse access to the documents listed above under section 1(c). The refusal to disclose these documents is based on the exceptions of Article 4(2) first indent (protection of commercial interests), Article 4(3) (protection of the decisions-making process) and Article 4(1)(b) (protection of the privacy and the integrity of the individual).

As you raised the question of the application of the Aarhus Convention², INEA has equally assessed your application under the provisions of the Aarhus Regulation (Regulation implementing the Aarhus Convention into the European Union law) and I came to the conclusion that the Aarhus Regulation does not apply to your request of access to the documentation of a research project funded under Horizon 2020.

The reasons for the above decision are set out below.

2.1. Protection of commercial interests under Regulation 1049/2001

Article 4(2), first indent of Regulation 1049/2001 provides 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.'*

It should be noted that the research project documentation (mainly proposals and the grant agreements, technical and financial reports) contain technical and financial information such as description of the activities to be taken and their estimated budget, including methodology and know-how available for the project. Additionally, proposals contain elements that relate to the specific expertise of the applicants and contribute to the uniqueness and attractiveness of the latter's application in the context of calls for proposals. Regarding in particular to the competitive context of the call for proposals, the information in question should be treated as of a confidential nature³.

The information included in the **Proposal (Document 1), Annex 1 to the GA – Description of Action (Document 5), Periodic reports (Document 8), Deliverables (Document 9)** concern the specific know-how of the consortium in carrying out the project and its disclosure would enable third parties to make a concrete assessment of the manner in which this entity fulfilled its contractual obligations and, consequently, its reputation. After examining the content of the documents, I believe that there is a

¹ Regulation (EC) n° 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, OJ L 264/13, 25.9.2006, p. 13

² United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters

³ Judgment of the General Court of 21 October 2010 in case T-439/08, Agapiou Joséphidès v Commission and EACEA, para 127

reasonably foreseeable and non-hypothetical risk that the disclosure of these documents would negatively affect the commercial interests of applicants.

In our view, releasing this information into public domain would give the competitors of legal entities forming the consortium an unfair advantage, as the former would be able to use this sensitive commercial information in their favour. Indeed, if this information was disclosed, the competitors would be able to employ their intellectual property, know-how, methodologies, technologies, potential inventions, etc. in order to improve the production of their own competing products or provision of their own competing services. In addition, they would be able to anticipate their strategies and weaknesses, including when competing in calls for tenders and proposals. This would, in turn, adversely affect their competitive position on the market and, thus, seriously undermine their commercial interests, including their intellectual property.

With regard to the budget figures included in **Annex 2 to the GA –estimated budget of the Action (Document 6), Financial Report including in the Periodic Report (Document 8), Suspension of the payment deadline (Document 10)**, it should be recalled that elements relating to the cost structure of an undertaking constitute business secrets the disclosure of which to third parties is likely to affect the commercial interests of the latter⁴.

For the reasons mentioned above, I conclude that, where such information is not already available in the public domain, the disclosure of the documents would harm the commercial interests and/or the interests in the field of intellectual property of the legal entities forming the consortium and must therefore be refused.

2.2. Protection of the decisions-making process under Regulation 1049/2001

Article 4 (3) of Regulation 1049/2001 provides that:

' Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, 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.'

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

In addition to commercial sensitive information about the entities forming the consortium, **Document 2 (Evaluation Summary), Document 3 (Ethics Reviews) and Document 11 (Internal report for the assessment of the project)** contain also internal considerations and opinion for internal use of INEA. Disclosing these documents would seriously undermine the institution's decision-making process especially as the project is still on-going.

⁴ Judgment of 30 January 2008, *Terezakis v Commission*, T-380/04, paragraph 95.

2.3. Protection of the privacy and the integrity of the individual under Regulation 1049/2001

According to Article 4(1) (b) of Regulation 1049/2001, access to a document is refused 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."*

The documents to which you seek access contain the names, the curriculum vitae or description of the profile of the persons primarily responsible for carrying out the proposed activities. These constitute personal data in the meaning of Article 2 (a) of the Data Protection Regulation⁵.

The European Court of Justice has confirmed that, when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁶. This means that the necessity of disclosing 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.

Your confirmatory application does not contain any arguments demonstrating the necessity of disclosing the personal data.

For these reasons, the release of the documents such as **Grant declaration (Document 4), Annex 3 –Accession Forms (Document 7)** is refused as it contains mainly personal data and information that is already public (e.g. name of the legal entities part of the consortium as included in the grant agreement that were already released in the initial application).

I conclude that the release of the documents would also undermine the protection of privacy and integrity of individuals in the sense of Article 4(1) (b) of Regulation 1049/2001.

3. Overriding public interest under Regulation 1049/2001

The exception of Article 4(2) first indent and of Article (3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure.

Firstly, such an interest must be public and secondly, it must offset the harm caused by releasing the documents concerned. This means that it must override the interest protected by Article 4(2) first indent and Article (3) of Regulation 1049/2001.

You substantiated in your confirmatory application the existence of a public interest in the outcome of this research project taking into account as well the fact that the project is being funded from the EU budget, meaning that EU taxpayer money will be involved.

We would like to remind you that the Steelanol project is still on-going and therefore the protection of the commercial interests of the beneficiaries is essential in order to ensure the proper use of the EU funds received in achieving the expected results. As explained

⁵ Regulation (EC) no 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regards the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12/01/2001, p1.

⁶ Judgement of 29 June 2010, European Commission v the Bavarian Lager Co.Ltd.C-28/08 P

above, information related to the project that was not released in the public domain refers in details to the project consortium's methodology, its research approach, its knowhow, the resources to be used, its contacts. Releasing this information will negatively impact the achievement of the expected results, as the competitors of the beneficiaries may unfairly use the research approach of the consortium and anticipate their actions which may put in danger the realization of the project. The general public interest in the topic of the research project cannot justify a restriction of the protection of the commercial interests of the consortium.

Moreover, we consider that the public interest on the results of a Horizon 2020 research project is guaranteed by the legal framework put in place by this Framework Programme. Subject to any restrictions due to the protection of intellectual property, security rules or legitimate interests, beneficiaries have an obligation to disseminate the results of their projects.

In addition to the general information on the EU funded grant that it is mandatory for INEA to make publicity available (identity of the beneficiary of the grant, the nature of the project, and the amount of the grant), information related to the project has been released⁷ in the public domain and will continue to be released as part of the dissemination plan of the consortium (leaflets and posters, project website⁸, events and publications, summary reports). In addition, several documents related to this project were released in the initial application and they became public documents.

It follows that since access to essential information concerning the project has been guaranteed, it cannot be claimed that the public interest on this on-going research project overrides the protection of the commercial interests of the consortium.

As regards documents protected by the exception of Article 4(3) decision-making process, I was not able to identify in your confirmatory application the existence of a public interest that overrides the protection of the decision making process.

I would like to remind you that the documents to which you request access falls within the framework of the award of a grant which is an administrative procedure and does not benefit from the same transparency as a legislative document. Pursuant to recital 6 of Regulation 1049/2001, the Court⁹ confirmed that administrative activities are to be clearly distinguished from legislative procedures, for the latter the Court has acknowledged the existence of wider openness.

Consequently, I have to conclude that in this particular case there is no public interest which would justify a restriction of the protection of the commercial interests of the beneficiaries or a restriction of the protection of the decision-making process.

4. Partial access under Regulation 1049/2001

I have also examined the possibility of granting partial access to the requested documents, in accordance with Article 4(6) of Regulation 1049/2001.

⁷ https://cordis.europa.eu/project/ren/195267_en.html

⁸ <http://www.steelanol.eu/en>

⁹ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63.

Having examined each of these documents, we have found that only a very small part of their content, dispersed throughout these documents, is not protected by the exceptions in Article 4(1), (2) and (3) of Regulation (EC) 1049/2001.

In our view, providing you with heavily redacted documents in which non-sensitive information is dispersed and, thus, provided in a non-transparent manner, would not be of any value to you. It clearly follows from the European Court of Justice case-law¹⁰ that *'in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant'* the institutions are *'entitled to refuse partial access'*. Consequently, we do not provide partial access to these documents; as such access would be meaningless.

In addition to the documents disclosed following your initial access to documents request, I would like to inform you that comprehensive project information (objectives of the projects, report summaries, publishable periodic reporting, some deliverables, conference proceedings, news) is already publicly available on CORDIS at the following link: https://cordis.europa.eu/project/rcn/195267_en.html and on the project website <http://www.steelanol.eu/en>.

Consequently, I have come to the conclusion that the documents cannot be partially disclosed under Regulation 1049/2001. Indeed, the administrative burden engendered by implementing such partial access would not weigh up against your possible interest in obtaining the already public information contained in the parts that would remain unredacted.

5. Application of the Aarhus Regulation to your confirmatory application

In your confirmatory application you mentioned that:

'Additionally, the Aarhus Convention may apply. The 1998 treaty says that everyone has the right to receive environmental information, the definition of which includes article 3(b): "Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making".'

I believe that the documents withheld may fall under this definition, because the funding of the project is a "[programme], affecting or likely to affect the elements of the environment".

The Aarhus Convention¹¹, signed on 25 June 1998 by the European Community (now the European Union) with the United Nations Economic Commission for Europe (UNECE) and approved by the European Council on 17 February 2005¹², was

¹⁰ Mattila v Council and Commission T-204/99, § 69 and Reagens v Commission T-181/10, §161-175

¹¹ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters

¹² Council Decision 2005/370/EC (OJ L 124, 17.5.2005, p.1)

implemented in the European Union's law by Regulation (EC) n° 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Regulation)¹³. This Regulation lays down rules for the EU institutions, EU agencies, EU bodies that comply to a great extent with the rules laid down in the Aarhus Convention.

We would therefore assess hereafter whether the Aarhus Regulation should apply to your request for access to document based on the definition of "environmental information" and "plans and programmes relating to the environment".

The Aarhus Regulation requires that EU institutions and bodies provide for public participation in the preparation, modification or review of "plans and programmes relating to the environment" (Article 1(c)).

Article 2(d)(iii) of the Aarhus Regulation includes in the definition of 'environmental information' *"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements"*.

As regards 'plans and programmes relating to environment', the definition refers to plans and programmes *"(i) which are subject to preparation and, as appropriate, adoption by a Community institution or body; (ii) which are required under legislative, regulatory or administrative provisions; and; (iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme."*

Please note in this regard recital (9) of the Regulation which refers to the definition of plans and programmes in the broader context of environmental policy:

"It is appropriate for this Regulation to provide for a definition of plans and programmes taking into account the provisions of the Aarhus Convention, in parallel with the approach followed in relation to the Member States' obligations under existing EC law. 'Plans and programmes relating to the environment' should be defined in relation to their contribution to the achievement, or to their likely significant effect on the achievement, of the objectives and priorities of Community environmental policy."

Based on the provisions mentioned above, we consider that the notion of "plans and programmes relating to the environment" refers to measures implementing EU environmental rules in the context of ensuring public participation in environmental decision-making (see Article 9 of the Regulation). The technical documentation related to a research project is not a public programme document, but the property of the Consortium of the project. Consequently, in our opinion, the funding of a research project by a public institution does not qualify as "[programme], affecting or likely to affect the elements of the environment" and the Aarhus provisions do not apply.

Based on the above-mentioned elements, I consider that your request to access to the requested documents must be handled and assessed under the Regulation 1049/2001 only.

¹³ OJ L 264/13, 25.9.2006, p. 13

6. Conclusions

For the reasons set out above, I regret to inform you that I have to confirm the initial decision of INEA to refuse access to the other documents requested.

7. Means of redress

Finally, I would like to 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 black ink, appearing to be 'Dirk BECKERS', with a stylized, flowing script.

Dirk BECKERS

