



EUROPEAN COMMISSION
NEIGHBOURHOOD AND ENLARGEMENT NEGOTIATIONS

The Director-General

Brussels,

By registered letter

Subject: Your application for access to documents – Ref GestDem 2019/2226

Dear Mr Mirilović,

I refer to your application dated 6 April 2019¹, registered under reference number GestDem 2019/2226², in which you make a request for access to:

- *‘Contract no. 14SER01/36/81, CRIS no 392-704;*
- *Addendum no1 of Contract no. 14SER01/36/81, CRIS no 392-704;*
- *Any additional addendums or annexes to Contract no. 14SER01/36/81, CRIS no 392-704’.*

Your application concerns the following documents:

- Service Contract for European Union External Actions No 392-704 and Special Conditions;
- Addendum No 1 to Service Contract No 392-704;
- Annex I: General Conditions for Service Contracts for External Actions Financed by the European Union or by the European Development Fund;

¹ Ref. Ares(2019)2500044

² Ref. Ares(2019)2500238

Mr. Mladen Mirilović
Kneza Miloša 3/13
11450 Sopot
Serbia

Advance copy by email:
ask+request-6778-e2133d8f@asktheeu.org

- Annex II: Terms of Reference;
- Annex III: Organization and Methodology;
- Annex IV: Key experts;
- Annex V: Financial proposal;
- Annex VI: Specified forms and other relevant documents;
- Annex VII: Terms of reference for an expenditure verification of a service contract.

Having examined the documents that you requested under the provisions of Regulation (EC) No 1049/2001³, I have come to the following conclusions:

- Annexes I and VII can be fully disclosed;
- The Contract with the Special Conditions and Annex II can be disclosed subject to redaction of personal data based on Article 4(1)(b) (protection of the privacy and integrity of the individual) and Article 4(6) (partial access) of the Regulation;
- Access must be fully refused to Annex IV and VI based on Article 4(1)(b) (protection of the privacy and integrity of the individual) of the Regulation. Unlike the documents mentioned previously, no meaningful partial access is possible herein without undermining the interest in question;
- Access must be fully refused to Addendum No 1, Annex III and Annex V based on Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of the Regulation and no meaningful partial access is possible.

The justifications are as follows.

1. Protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that *‘the 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.’* The applicable legislation in this field is Regulation (EU) 2018/1725⁴.

Some of the documents to which you request access contain personal data, in particular names of individuals, signatures, contact details and financial and legal identification details.

Indeed, Article 3(1) of Regulation (EU) 2018/1725 provides that personal data *‘means any information relating to an identified or identifiable natural person [...]’*. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁵

³ 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, Official Journal L 145 of 31 May 2001, p. 43.

⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision 1247/2002/EC, Official Journal L 295 of 21 November 2018 p. 39.

⁵ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Nowak v Data Protection Commissioner, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:C:2017:994.

In its judgment in Case C-28/08 P (Bavarian Lager)⁶, 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.⁷

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, *‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’*.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

⁶ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁷ Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation (EU) 2018/1725.

2. Protection of the commercial interests of a natural or legal person, including intellectual property

Article 4(2), first indent, of Regulation (EC) No 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’*.

The withheld Annex III describes in detail the actions to be conducted through the project, the project’s logical framework, organisation and methodology. It contains information on detailed operational aspects of the implementation of the proposed actions such as the scope and description of actions.

Annex V contains the financial proposal of the contractor and Addendum No 1 constitutes an updated version of it. Together with Annex III, these documents have to be considered as elements reflecting the specific know-how and experience belonging to the contractor. The public disclosure of such information would undermine the commercial interests of the contractor, as it would give other potential tenderers in future calls the possibility to copy for that application and use it to support their own application.

In this context, I would also like to bring your attention to case T-339/10, *Cosepuri v EFSA*⁸, where the General Court ruled that *‘[i]t follows from all the foregoing that EFSA did not err in considering, in essence, that there was a general presumption that access to the bids submitted by the other tenderers would, in principle, undermine the interest protected. The applicant has not put forward any evidence to justify the conclusion that, in the present case, that presumption did not apply to the documents disclosure of which was requested.’*

Furthermore, in case T-439/08, *Agapiou Josephides v Commission*⁹, the General Court ruled that *‘methodology and expertise [...] highlighted as part of the grant application, [...] relate to the specific know-how [...] and contribute to the uniqueness and attractiveness of applications in the context of calls for proposals such as that at issue, which was intended to select one or more applications, following in particular a comparative review of proposed projects.’* I consider this conclusion to apply in analogy to descriptions of projects which reflect the content of tenders as well as detailed (proposed) budgets, like the documents in question.

Thus, particularly given the competitive environment in which the contractor operates, it is necessary to consider that the information in question is confidential.

Finally, the exception of Article 4(2), first indent, of Regulation (EC) No 1049/2001 has to be read in light of the Article 339 of the Treaty on the Functioning of the European Union, which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

In consequence, there is a real and non-hypothetical risk that public access to the abovementioned information would undermine the commercial interests of the contractor awarded the service contract.

⁸ Paragraph 101.

⁹ Paragraphs 127 and 128.

3. No overriding public interest in disclosure

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exceptions to the right of access defined therein must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest first has to be public and, secondly, overriding, i.e. in this case it must outweigh the commercial interests of a natural or legal person protected under Article 4(2) first indent of Regulation (EC) No 1049/2001.

In your request, you do not put forward any arguments demonstrating the existence of an overriding public interest in disclosure. Similarly, the Commission has not identified any public interest that would override the interests protected by Article 4(2) first indent of Regulation (EC) No 1049/2001.

4. Means of redress

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review its position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-C-1
BERL 7/076
B-1049 Bruxelles/Brussel

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[e-signed by Acting DG
Mark Johnston]

Christian Danielsson