

Acting Director

Brussels, 06/04/2020
EPSO/05/FK/mr Ares(2020)s. 2139982

Ms Zhivka ANGELOVA

Osogovo 21

Plovdiv 4000

BULGARIA

✉ ask+request-7692-781aca8d@asktheeu.org

Subject: Your request for access to documents of 25/02/2020
Ref. GestDem 2020/1285

Dear Ms Angelova,

I refer to your message whereby you lodged a request for access to documents pursuant to Regulation (EC) No 1049/2001. Your message was registered on 25 February 2020 under the above reference number.

Scope of your request

In your message, you request access to the following documents:

“documents which contain the following information: activities of Cvetelina Cholakova within Selection Board during Open Competition EPSO/AD/323/16 reported in the cases T-622/18, T-623/18”.

In reply to a letter of request for clarifications, on 11 March 2020 you provided EPSO with the clarification that *“activities reported in the cases T-622/18, T-623/18”* refer to the job-specific interview of the two candidates, mentioned in the aforementioned court cases, conducted by Cvetelina Cholakova, Selection Board member in Open Competition EPSO/AD/323/16.

Identification of documents

Following your request and in light of the clarifications received, I have been able to identify the following documents as falling within the scope of your request:

- Documents used by the assessor, Mrs Cvetelina Cholakova, for the Interview in the field of those specific candidates in Open Competition EPSO/AD/323/16.

The identified documents contain the candidate's name and candidate number, the name of the assessor, the questions asked, the anchors used for the marking, the comments of the assessor and the marks attributed to each question.

I furthermore confirm that EPSO does not know of the existence of any other documents drafted or received by EPSO which would fall within the scope of your request for access, other than the ones specified above.

Analysis of your request

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 audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"*.

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Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that EPSO cannot give you access to the requested documents as they are fully covered by the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 (*Protection of privacy and the integrity of the individual*) and also by the exception of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 (*Protection of decision making process*).

i) Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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'*.

As already mentioned above, the identified documents contain the names, surnames, candidate numbers and marks of the candidates, who took the job-specific interview at the Assessment Centre stage in Open Competition EPSO/AD/323/16. They also contain the handwritten comments and signature of the assessor.

This information undoubtedly constitutes personal data within the meaning of Article 3, sub (a), of Regulation (EU) 2018/1725, *"'personal data' means any information relating to an identified or identifiable natural (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"*.

Public disclosure of these personal data would consequently constitute processing (transfer) of personal data within the meaning of Article 9(1) (b) of Regulation (EU) 2018/1725.

Pursuant to this provision, '*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.

In the *ClientEarth*¹ judgment, the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient. I also refer to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data².

According to Article 9(1)(b) of Regulation (EU) 2018/1725, EPSO has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that EPSO 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 have not established the necessity of disclosing the personal data included in the requested documents.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in the above-mentioned Documents cannot be considered as fulfilling the requirements of Regulation (EU) 2018/1725. Consequently, I conclude that pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data included in the requested documents.

ii) Protection of decision making process

EPSO considers the identified Documents to be fully covered by the exception of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 (Protection of decision making process).

¹ Judgment of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

² Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

More specifically, Article 4(3), first subparagraph of Regulation 1049/2001 provide that *'[a]ccess 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.*

As already mentioned above, these documents contain also the questions asked, the anchors used for the marking, the comments of the assessor and the individual marks attributed to the candidates by the assessor.

I consider that their disclosure would undoubtedly and severely undermine the decision-making process of selection boards in open competitions concerning ongoing and future competitions. In addition, such a disclosure would be a breach of the protection of the secrecy of selection board proceedings required by the Staff Regulations. Article 6 of Annex III states that *"[t]he proceedings of the Selection Board shall be secret".*

The case-law of the EU Courts has confirmed that *"... that secrecy was introduced with a view to guaranteeing 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 Community administration itself or the candidates concerned or third parties."* and that *"observance of that secrecy runs counter to divulging the attitudes adopted by individual members of Selection Boards and also to revealing all the factors relating to individual or comparative assessment of candidates"* (T-371/03, *Le Voci v Council*, paragraph 123 with further references).

In the *Le Voci* judgment, the General Court held that *the applicant cannot validly rely on the concept of transparency in order to call into question the applicability of Article 6 of Annex III to the Staff Regulations*³. The General Court further confirmed that *[...] secrecy was introduced with a view to guaranteeing the independence of the Selection Boards and the objectivity of their proceedings, by protecting them from all external interference and pressures whether these come from the Community administration itself or the candidates concerned or third parties and observance of that secrecy runs counter to divulging the attitudes adopted by individual member of Selection Boards and also to revealing all the factors relating to individual or comparative assessment of candidates*⁴.

In its Judgment in the *Alexandrou* case, the General Court reaffirmed that the general principle of transparency resulting from article 15(3) of the TFEU and article 42 of the Charter of Fundamental Rights could not be validly invoked in order to justify a circumvention of Article 6 of Annex III of the Staff Regulations⁵. Indeed, neither Regulation 1049/2001 nor the Staff Regulations 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 the consistent application of each of them⁶.

³ Case T-371/03, ECLI:EU:T:2005:290, paragraph 124.

⁴ *Ibid*, paragraph 123.

⁵ Judgment of 12 November 2015 in case T-515/14 and T-516/14, ECLI:EU:T:2015:844, paragraph 71.

⁶ *Ibid*, paragraph 69.

The confidentiality of the selection board proceedings is inextricably linked to the protection of the internal decision-making process of the selection boards within the meaning of Article 4(3) of Regulation 1049/2001. Indeed, disclosure of the marking details would seriously undermine the decision-making process even after the decision has been taken, since it would expose Selection Board members, markers, and EPSO staff to the risk of undue external pressure.

Moreover, disclosure of the correction methods and scoring criteria relevant to test material or methodology intended for repeated use (such as the Assessment Centre tests) would provide a competitive advantage to candidates who could obtain access to them, thereby seriously undermining the equal treatment of candidates and compromising the fairness of future selection procedures.

With regard to the questions asked, they are also covered by the protection of decision-making process. As they may be used in future competitions, they cannot be disclosed to candidates or the public.

Last but not least, it should be pointed out that such a disclosure would deprive the tests used in ongoing and future selection procedures of any efficiency, as it would mean that the methodology of the test used for staff selection would be made public. This would render all budget, human and logistic resources dedicated to staff selection pointless and ultimately, would mean that it would be impossible for EPSO to carry out its duties.

Therefore, disclosure is refused in order to safeguard the methodology and contents of tests to be used in future selection procedures and to prevent any external interference and pressure to be exercised on Selection Board members, markers, or EPSO staff.

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The exception laid down in Article 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be in the public interest and secondly, outweigh the harm caused by disclosure.

You do not however put forward any reasons pointing to an overriding public interest in disclosing the documents requested. Nor have I been able to identify any elements which indicate the existence of an overriding public interest in the sense of the Regulation (EC) No 1049/2001 which would justify disregarding any harm caused to the institutions' decision-making process in the area of selection and recruitment by disclosing the document requested, and which would outweigh the interests in protecting the secrecy of testing methodology and the selection boards' deliberations in general.

Consequently, I hereby inform you that said documents are covered by the exception provided for in Article 4(3) of Regulation (EC) No 1049/2001, and that access thereto must be refused on that basis.

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In light of the above, EPSO cannot give you access to the Documents identified above.

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In accordance with Regulation (EC) 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,

Sari LEHKONEN