

From: SG DOSSIERS ACCES
Sent: 31 May 2012 14:30
To: RTD ACCESS DOCUMENTS
Subject: FW: Your request for documents concerning the audits of research projects --- GESTDEM 2012/2618 - 2620 and 2621

Bonjour,

Je vous prie de bien vouloir traiter la demande d'accès aux documents ci-dessous - **ref. GESTDEM 2012/2620** (à l'exception du point 1. du titre **A. Documents drawn up following a request of the European Data Protection Supervisor** – attribué à l'EDPS). Nous vous suggérons d'associer l'EDPS à votre projet de réponse.

Je me permets de vous rappeler que le délai impératif de réponse est de 15 jours ouvrables à partir de l'enregistrement de la demande (délai : 19/06/2012).

Pour toute information complémentaire, veuillez me contacter.

J'attire votre attention sur les règles à suivre en matière d'accès aux documents. A cet effet, vous trouverez en annexe un guide pratique qui devrait vous aider en la matière.



guide_pratique_... guide_pratique_...

Bonne journée,

BLURIOT-PUEBLA Madeleine
Cellule 'Accès aux documents'



European Commission
SG/B/5 - Transparence

BERL 05/330
B-1049 Brussels/Belgium
+32 2 296 09 97
Madeleine.bluriot-puebla@ec.europa.eu

From: SG ACCES DOCUMENTS
Sent: Thursday, May 31, 2012 2:17 PM
To:
Subject: Your request for documents concerning the audits of research projects --- GESTDEM 2012/2618 - 2620 and 2621

Dear M

I hereby acknowledge receipt of your request for access to documents dated 29/05/2012, registered on 29/05/2012 under the following references :
GESTDEM 2012/2618 (EDPS),

GESTDEM 2012/2620 (DG RTD) and
GESTDEM 2012/2621 (DG INFSO).

In accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, you will receive a response from these Directions general to your request within 15 working days (19/06/2012).

Yours sincerely,

BLURIOT-PUEBLA Madeleine
Cellule 'Accès aux documents'

European Commission
SG/B/5 - Transparence

BERL 05/330
B-1049 Brussels/Belgium
+32 2 296 09 97
Madeleine.bluriot-puebla@ec.europa.eu

From: [i] [i]
Sent: Tuesday, May 29, 2012 4:00 PM
To: SG ACCES DOCUMENTS
Subject: Request for documents concerning the audits of research projects, Regulation 1049/2001,

Dear Madam/Sir,

I refer to a request for documents which was dispatched on the 20th of April 2012 for the attention of Mr. Tholoniati of the Secretariat-General, as well as Ms. Hlouskova.

As you can see below from the exchange of emails I had with Ms. Houskova, it appears that this request has not been properly registered within the Secretariat-General. It also appears that there has been some confusion regarding my requests for documents made on (i) 19 April 2012 and (ii) 20 April 2012. The former were properly acknowledged by DG INFSO; the latter are the subject of this message.

I would therefore kindly request that you consider this message as the initial request for the documents (i.e. not consider this message as a confirmatory application). My requests are set forth in my mail dated 20 April 2012 to Mr. Tholoniati (given at the end of this message). The attached letter concerns my requests under (1).

Yours sincerely,

Dr.

From: **SwordIT Solutions** <[i] [i]>

Date: Thu, May 24, 2012 at 10:58 AM

Subject: Re: Enquires about a request for documents dated 20/4/2012, Regulation 1049/2001

To: Tatiana.HLOUSKOVA@ec.europa.eu

Cc: INFSO-CAD@ec.europa.eu

Dear Ms. Hlouskova,

I refer to your mail dated 23 May 2012 (given at the very end of this message) and my email of the same date.

I was able to open the two emails you attached to your email of yesterday. The attachments (given at the end of this message) are two emails INFSO-CAD@ec.europa.eu dispatched to me on the 24th of April and 14 May 2012 respectively, concerning my request to the DG INFSO Director-Genral dispatched over email on 19 April 2012.

My yesterday's enquiries with you concern my request for documents addressed to SecGen via email dated 20 April 2012. It is evident that the two DG INFSO emails are for another request, and not that addressed to SecGen.

I hope this clarification is useful for SecGen's tracing of the status of my request.

Yours sincerely,

D.

(

From: <INFSO-CAD@ec.europa.eu>

To: <

Subject: Your application for access to documents – Ref GestDem No 2012/2046

Date: 14 May 2012 12:22

Dear Sir,

We refer to your e-mail dated 19/04/2012 in which you make a request for access to documents, registered on 20/04/2012 under the above mentioned reference number.

Your application is currently treated. However, we will not be in a position to complete it within the time-limit of 15 working days, which expires on 15/05/2012.

An extended time limit is needed as large files have to be examined in order to handle your application. Therefore, we have to extend the time-limit with another 15 working days in accordance with Article 7(3) of Regulation (EC) No 1049/2001 regarding public access to documents. The new time-limit expires on 08/06/2012.

We apologise for this delay and for any inconvenience this may cause.

Yours faithfully,

Document Management - Unit S2

From: <INFSO-CAD@ec.europa.eu>
To: <
Subject: Access to documents - Gestdem 2012/2046
Date: 24 April 2012 10:53

Dear Mr Gritsis ,

Thank you for your e-mail dated 19/04/2012 registered on 20/04/2012. I hereby acknowledge receipt of your request for access to documents.

In accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, you will receive a response to your request within 15 working days.

Yours sincerely,

INFSO CAD
Document Management - Unit S2

On Wed, May 23, 2012 at 11:45 AM, <Tatiana.HLOUSKOVA@ec.europa.eu> wrote:
Dear M!

please find enclosed two emails send two you by our services. The answer to your request is under preparation.

Could you please confirm me the reception of this email?

Kind regards

Tatiana Hlouskova
SG - Catherine Day's team
European Commission
BERL 13/165
B-1049 Brussels/Belgium
+32 2 29 91254
tatiana.hlouskova@ec.europa.eu

From: SwordIT Solutions [mailto:_____]
Sent: Wednesday, May 23, 2012 9:56 AM
To: HLOUSKOVA Tatiana (SG)
Subject: Enquires about a request for documents dated 20/4/2012, Regulation 1049/2001

Dear Ms Hlouskova,

I refer to my phone enquirers a short while ago about my requests for the provision of documents, as provided for by Regulation 1049/2001, dated 20 April 2012 dispatched over email.

As it appears from my records, the Commission has not confirmed the receipt of my request within 15 working days, even though this is expressly provided for by the Regulation and the relevant Commission's Decision.

Before sending a confirmatory application, thus enter into the second and final phase of handling my request according to the Regulation,, I would strongly prefer to hear from the Commission its intentions regarding my request.

Yours sincerely,

D _____

----- Forwarded message -----

From: **SwordIT Solutions** <_____>
Date: Fri, Apr 20, 2012 at 1:26 PM
Subject: Request for documents concerning the audits of research projects, Regulation 1049/2001, MISSING ATTACHMENT
To: Luc.THOLONIAT@ec.europa.eu, Tatiana.HLOUSKOVA@ec.europa.eu

Dear Sir,

You will find the attachment referred to in my email I just sent.

I apologise for the inconvenience.

Yours sincerely,

Dr. | _____

(_____

On Fri, Apr 20, 2012 at 1:22 PM, SwordIT Solutions <...> wrote:

Dear Sir,

This message requests the provisions of copies of documents (including emails) under the provisions of Regulation 1049/2001 *regarding public access to European Parliament, Council and Commission documents*.

A. Documents drawn up following a request of the European Data Protection Supervisor - EDPS

I refer to the letter dated 4 October 2011, EDPS Ref. PH/IC/kd/D(2011)1698 C 2011-0387 (attached) addressed to Ms Day, and specifically its last paragraph "*I would be grateful if you could inform me of the measures taken by the Commission to comply with these recommendations mentioned above, within a period of two months from the receipt of this letter.*"

It is common ground that those *measures* are of direct concern, among other Units, to the External Audit Units of DG RTD and DG INFSO.

As provided for by Regulation 1049/2001, I hereby kindly request that you provide me, preferably in electronic form, with copies of:

1. Documents drawn up by the Secretariat-General DG and communicated to the EDPS in connection to *the measures*
2. Documents that the Research DGs, including DG RTD and DG INFSO, have drawn up in connection with their compliance to the EDPS recommendations referred to in the aforementioned letter
3. Documents (or excerpts thereof), if any, in which the Commission Services have assessed their compliance, or/and have taken measures to comply, with Regulation 45/2001 regarding their routine and regular practice during external audits of FP7 beneficiaries to collect time-sheets of the researches who have charged to R&D projects. You may refer to the notifications to the Data Protection Officer DPO-3338 and DPO-3398, where under item 17 there are references to the collection of "*timesheets*" from the staff of FP7 beneficiaries. Therefore, during the field audits time-sheets of researchers charged to the project are indeed collected.
4. Documents (or excerpts thereof), if any, in which the Commission Services have assessed their compliance, or/and have taken measures to comply, with the National Data Protection Laws regarding their routine and regular practice during external audits of FP7 beneficiaries to collect time-sheets of the researches who have been charged to R&D projects. It is noted that during the field audits at the premises of FP7 beneficiaries Commission Officials (as well as Commission's contractors tasked to perform the field audit) must comply with the National Laws.

B. External audits of FP6 contractors and FP7 beneficiaries, audit manual(s)

I understand that the Research DGs have drawn up one or more “*manuals*” which is (are) used by the staff of the External Audit Units of the Research DGs to guide them in assessing the documents and data collected from the field audits, drawing conclusions and drawing up the draft and final audit reports.

It is reasonable to expect that this “*manual(s)*” will have some similarity with the *Performance Audit Manual* of the European Court of Auditors, which is available to general public
<http://eca.europa.eu/portal/page/portal/audit/PerformanceAuditManual>.

As provided for by Regulation 1049/2001, I hereby kindly request that you provide me, preferably in electronic form, with a copy of the aforementioned “*manual(s)*”.

C. Additional observations for the document(s) requested under (B) above

I would like to point out beforehand that any reliance on Article 4.2 “*the purpose of inspections, investigations and audits*” of Regulation 45/2001 for refusing the requested copy will be highly questionable on the following grounds (non-exhaustive list):

1. The request is for a document on how data collected during an audit are assessed, not an audit itself.
2. Overriding public interest (article 4 of the Regulation, last paragraph)
 - Since 2008, DG INFSO alone has carried out over some 800 – 1,000 external audits (it appears this is about 20% of all beneficiaries), collecting a large amount of data
 - Audits are provided for in all Grant Agreements, so every single beneficiary may be audited
 - Good administrative practice suggests that the “*manual(s)*” are to be made available to the public, so that audited organisations are informed about the audit process, their rights and obligations.
 - During the filed work, Commission officials and audited companies (or contractors) do not have any specific rules and guidelines to follow
3. OLAF has made its own manual of operations (the 2011 version is over 100 pages) publicly available. There is no reason for the Research DGs not to make the manual(s) publicly available
4. Case law of the General Court
 - Case T-233/09, §5 6 “Giving the public the widest possible right of access entails, therefore, that the public must have a right to full disclosure of the requested documents, the only means of limiting that right being the strict application of the exceptions provided for in Regulation No 1049/2001. If only one part of a requested document is covered by an exception, the other parts of the document are to be disclosed.”
 - Joined Cases T-391/03 and T-70/04, § 84 “According to settled case-law, those exceptions must be construed and applied restrictively so as not to defeat the general principle enshrined in that regulation”, § 105 “The fact that a document concerns an inspection or investigation cannot in itself justify application of the exception invoked. According to established case-law, any exception to the

right of access to Commission documents must be interpreted and applied strictly”, § 109 “The Court of First Instance has held that the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect ‘the purpose of inspections, investigations and audits’, applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits.”

I am confident that the above arguments will put to rest any reservation the Research DGs may have in providing me with a copy of the "manual(s)"

I remain at your disposal for any additional information or clarification you may require

Yours sincerely,

Dr.

From: STEINER Silke (RTD)
Sent: 08 June 2012 09:53
To:
Subject: Your request for access to documents - Reference: Gestdem 2012-2620
Attachments: financialguide_en (16-01-2012).pdf

Dear M. [REDACTED],

Thank you for your e-mail dated 29/05/2012, registered on 29/05/2012, requesting access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

The manual used by the staff of the External Audit Units of the Research DGs is our financial guide, which you will find in the attachment.

Regarding documents that DG RTD has drawn up in connection with their compliance to the EDPS recommendations and documents in which the Commission Services have assessed their compliance with Regulation 45/2001 regarding their routine and regular practice during external audits of FP7 beneficiaries to collect time-sheets of the researches, we invite you to visit the following link: <http://ec.europa.eu/dpo-register/details.htm?id=26878>. You will find the notification DPO-3398, which documents the compliance of the processing operations of external audit to the Regulation.

Concerning your request for documents in which the Commission Services have assessed their compliance with the National Data Protection Laws, we would like to draw your attention to the fact that neither the Commission, nor the contractors acting on its behalf, are bound by national law in that matter; therefore, such guidelines are not existing.

Yours faithfully,

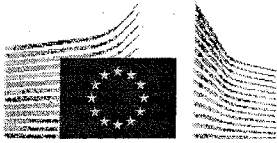
Silvia BOJINOVA
Head of Unit



European Commission
DG Research & Innovation
R5

SDME 04/083
B-1049 Brussels/Belgium
+32 2 29 85891
silvia.bojinova@ec.europa.eu

<http://ec.europa.eu/research>



EUROPEAN COMMISSION
DIRECTORATE GENERAL FOR RESEARCH & INNOVATION

The Director General

Brussels,
RTD/R/TL/SB/TB/ST(2012)
Gestdem registration n°: 2012/2620
To be sent by email only

Subject: Your request for access to documents – Reference: Gestdem 2012-2620

Dear M

Thank you for your e-mail dated 29/05/2012 in which you make a request for access to documents, registered on 29/05/2012 under the above mentioned reference number.

In your e-mail of 29th May you requested access to the manual(s) used by the staff of the External Audit Units of the Research DGs.

Your request is considered to fall within the scope of Regulation No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents.

As the document requested by you sets out the essential rules and practical guidelines on the implementation of audits, its disclosure would undermine the protection of the purposes of the audits; therefore, it falls under the exception of Article 4.2, 3rd indent of Regulation No 1049/2001:

"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, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."

Moreover, the aim of external audits of FP7 beneficiaries is to ensure that public funding, which has been awarded to FP7 beneficiaries in the form of FP7 grants, is properly spent, and to prevent the abuse of public means. A disclosure of the manual and of the methods and procedures set out by it could therefore have a negative impact on the public interest as regards the Union's financial policy; for that reason, the requested document is also covered by the exception of Article 4.1, paragraph a, 4th indent of Regulation No 1049/2001:

¹ OJ L145, 31.05.2001, page 43.

"The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards:... the financial, monetary or economic policy of the Community or a Member State."

Consequently, I regret to inform you that requested manual cannot be provided to you. I have also examined the possibility of granting partial access to the requested information in accordance with Article 4.6 of the Regulation. However, given the exceptions listed under Article 4.1 and 4.2, a further partial access cannot be envisaged either.

Lastly, I have examined to which extent exceptions laid down in Article 4.2 of Regulation No 1049/2001 may be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by the disclosure.

Having analysed your request, I have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in Article 4.2 mentioned above.

Should you wish this position to be reviewed, you should send a confirmatory application to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen working days to do this as from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

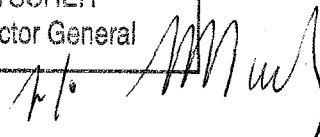
The Secretary-General would then inform you of the result of this review within 15 working days from the date of registration of your request. You would either be given access or your request would be rejected, in which case you would be informed of how you can take further action.

All correspondence should be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS
Email : SG-ACC-DOC@ec.europa.eu

Yours faithfully,

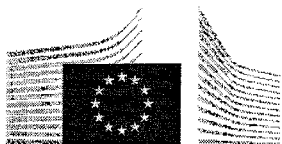
For the Director General absent
W. BURTSCHER
Deputy Director General



x

Cc:

x



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/MKo/psi – sg.dsg1.b.5(2012)1173577

Mr Dimitrios Gritsis
89, Olympou Street
GR-15235 Vrilissia
Greece

By e-mail only:
sworditsolutions@gmail.com

Subject: Confirmatory application for access to documents
Ref: GestDem No 2012/2620 and 2012/2621

Dear Sir,

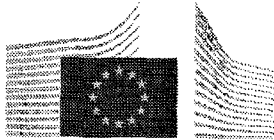
I refer to your letters of 1 August 2012, in which you submit pursuant to Regulation 1049/2001¹, two confirmatory applications requesting a review of the position of the Directorate-General for Communications Networks, Content and technology (hereafter: DG CNECT) and the position of the Directorate-General for Research and Innovation (hereafter: DG RTD) with regard to your initial requests for access to documents.

We are currently handling your applications. Unfortunately, given the volume of the documents requested and the need to conduct internal discussions with the respective services we have not yet been able to complete our analysis of the documents you have requested in order to take a final decision and, therefore, we are not in a position to reply to your confirmatory requests within the prescribed time limit expiring on 27 August 2012. Consequently, we have to extend this period by another 15 working days in accordance with Article 8 § 2 of Regulation 1049/2001. The new deadline regarding both requests shall expire on 17 September 2012. I apologise for any inconvenience this delay may cause.

Yours sincerely,

Gérard Legris
Head of Unit

¹ OJ L145, 31.05.2001, p.43.



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 14.09.2012

SG.B.5/MKo/rc – sg.dsg1.b.5(2012) 1248780

By e-mail only:

Subject: Confirmatory application for access to documents
Ref: GestDem No 2012/2620 and 2012/2621

Dear Sir,

I refer to your letters of 1 August 2012, in which you submit pursuant to Regulation 1049/2001¹, two confirmatory applications requesting a review of the position of the Directorate-General for Communications Networks, Content and technology (hereafter: DG CNECT) and the position of the Directorate-General for Research and Innovation (hereafter: DG RTD) with regard to your initial requests for access to documents.

I also refer to the holding reply dated 27 August 2012, in which the time limit for replying to your confirmatory request was extended by 15 working days, pursuant to Article 8(2) of the Regulation. This extended time limit expires on 17 September 2012.

Unfortunately, we are still not in a position to provide you with a final reply to your request as the internal consultations between various services concerning your application are still ongoing. We are also still analyzing your vast additional information that you have provided us with. I can assure you that we are doing our utmost to provide you with the final reply on your application as soon as possible. I regret this additional delay and sincerely apologise for any inconvenience this may cause.

Yours sincerely,

Marc Maes
Deputy head of Unit

¹ OJ L145, 31.05.2001, p.43.



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Direction B
SG-B-5
Transparency

Brussels, 13/11/2012
SG.B.5/MKo/psi – sg.dsg1.b.5(2012)1556187

By e-mail only:

Subject: Confirmatory application for access to documents
Ref: GestDem No 2012/2390, 2620- 2621.

Dear Mr Gritsis,

I refer to your letter of 8 November 2012 which you sent on 11 November and by which you enquire about the anticipated time frame for handling all your confirmatory requests at reference.

Indeed, as you mention in your recent letter, your request is comprehensive and requires attention of different Commissions' services. Currently, we are approaching the phase of putting draft decisions along with respective material into internal consultations. Shortly after the said draft decision have been agreed they will enter into the internal approval circuit. The final decision will be submitted to you electronically.

Unfortunately, we are still not in a position to state the exact end date of these complex processes. However, I can assure you that we do our utmost to provide you with the final replies on your applications as soon as possible. I regret this additional delay and sincerely apologise for any inconvenience this may cause.

Yours sincerely,

Marc Maes
Deputy Head of Unit



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 22.01.2013

SG.B.5/MK-AM/rc -
sg.dsg1.b.5(2013) 54873

Mr

per email only:

Subject: Confirmatory application for access to documents under Regulation 1049/2001 GestDem numbers 2012/2620 and 2012/2621

Dear M

I am writing in reference to your letters of 1 August 2012 registered on 3 August 2012 in which you requested a review of the positions taken by the Directorate General Communications Networks, Content and Technology (hereafter DG CONNECT) and the Directorate General for Research and Innovation (hereafter DG RTD). This application was made in accordance with Article 7(2) of Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (hereafter Regulation 1049/2001). I have taken account of the additional arguments that you submitted in your correspondence of 2 and 6 September.

As you have submitted several confirmatory applications, I stress that this decision details a response to the confirmatory applications filed on the date above under the GestDem numbers 2012/2620 and 2012/2621. Your other applications are being dealt with separately. Furthermore, I draw your attention to the fact that this decision is taken within the provisions of Regulation 1049/2001 and the related Commission Decision². Your application contains a number of allegations and queries into the legality of certain Commission acts. This is not the appropriate forum to address this matter and so the merits of these matters will not be addressed unless they relate directly to your request for access to documents.

1. CONTEXT OF THE REQUEST

Both DG CONNECT and DG RTD commission projects from outside contractors to undertake research and project management for them. This is crucial to ensure that the Commission and the EU take into account the latest information available when

¹ OJ L145, 31.05.2001, p. 43.

² Commission Decision of 5 December 2001 C(2001) 3714 OJ L345/94 29.12.2001

making proposals. This allows the Commission to make use of technical expertise when necessary rather than relying solely on internal staff.

The value of these contracts can be very high, as you pointed out, and the Commission, as a public administration, must ensure that public funds are put to the best use. Just as the Commission is subject to an audit to ensure that the funds are being used appropriately, the Commission, in turn, subjects its contractors/beneficiaries to audits to ensure appropriate allocation of expenditure.

To provide consistency and efficiency the Commission ensures that all auditors of external and internal entities have proper training. This includes providing audit manuals with specific information relevant to the type of contract; for example FP7 grants. These manuals provide a general guide as to how the audit should be carried out, in compliance with the generally accepted standards. However, they also contain specific information and guidance about where there might be room for flexibility, or independent judgment, to adapt to the specific circumstances. The manual also addresses problems that have been encountered in previous audits and how it may be possible to deal with these problems. The idea for the audit manual was to establish some standard working practices and to harmonise practices among all Research Directorates-General that would ensure equal treatment of beneficiaries that might have projects in the same Framework programme that are however managed by different Directorates-General.

2. SCOPE OF YOUR REQUEST

In both requests you have asked for the same documents from each of the Directorates-General concerned. In your confirmatory request you reiterated your request for access to the following documents:

1. *The "Audit manuals" drawn up by the Research DGs, which is (are) used by the staff of the External Audit Units of the Research DGs to guide them in assessing the documents and data collected from the field audits, drawing conclusions and drawing up the draft and final audit reports.*
2. *Documents that the Research DGs [...] have drawn up in connection with their compliance to the EDPS recommendations referred to above.³*
3. *Documents (or excerpts thereof), if any, in which the Commission Services have assessed their compliance, and/or have taken measures to comply, with Regulation 45/2001 regarding routine and regular practice during external audits of FP7 beneficiaries to collect time sheets of the researche[r]s who have been charged to R&D projects.*
4. *Documents (or excerpts thereof), if any, in which the Commission Services have assessed their compliance, and/or have taken measures to comply with the National Data Protection Laws.*

³ You reference measures mentioned in the letter dated 4 October 2011 EDPS ref. PH/IC/kd/D2011)1698 C 2011-0387

2.1. Documents covered by your request

We have identified two documents that fall within the scope of your request:

1. The FP7 Audit manual; and
2. Notification DPO-3338.

Document 2 relates to items 2 and 3 of your application as mentioned above. It is already available online⁴. In any event I understand you are familiar with the document, given that you have quoted verbatim from this in your applications. Therefore I consider that this part of your application has been satisfied.

Following searches in the services concerned, it appears that no further documents are available that fall within the scope of your request, particularly in relation to your fourth request for assessment of the compliance of the Commission services with national data protection rules. In your confirmatory applications you seem to suggest that the fact that further documents might not exist indicates that the Commission is not complying with relevant provisions of EU or national laws.

Please note that, while defining the scope of a request for access to documents, the Commission takes into account only the existing documents. Therefore it is not obliged to create a document for the purpose of the request. As previously stated, additional documents analysing compliance with Regulation 45/2001 and national data protection rules have not been created by the Commission. To provide you with this information would require the creation of a new document. Therefore your request is devoid of purpose as the document requested does not exist. On the other hand it could be considered as a request for information and would fall under the Commission's Code of good administrative behaviour. The response given to your initial application indicate that DG CONNECT has provided you with a proportionate answer to your particular queries so there is no need to consider these points any further.

3. EXAMINATIONS AND CONCLUSIONS

Following your confirmatory applications, a thorough examination of the document requested in the light of the context of the manual has been carried out. I am pleased to inform you that partial access can be granted to the FP7 Audit Manual. The redacted parts, shown as black marking in the document provided, fall within one or more of the exceptions laid down in Article 4 of Regulation 1049/2001, as detailed below.

3.1. The Protection of the Purpose of on-going Audits

Article 4(2), third indent, of Regulation 1049/2001 provides that "*[t]he institutions shall refuse access to a document where disclosure would*

⁴ <http://ec.europa.eu/dpo-register/details.htm?id=26851>

undermine the protection of: (...) the purpose of inspections, investigations and audits".

As previously stated, this manual forms part of the overall training and instruction process for auditors in this field. It contains general standards and procedures as well as detailing specific problems encountered and how they might be managed.

The redacted parts of Section 2, entitled 'Scope of on-the-spot audits of FP7 indirect actions', explain the procedure for an audit under the grant agreement. This details precise steps that should be performed as well as noting the stages at which there may be a need for flexibility at an on-the-spot audit. On-the-spot audits, as envisaged in this section, are performed at the place of work of the beneficiary without a long period of prior notice. This is designed to leave less time for the beneficiary to adjust any irregularities before an audit. The checks relate to the eligibility of costs declared and the compliance with legal provisions. Disclosure of the procedures adopted in this section of the manual could, therefore, enable a beneficiary to pre-empt the audit by making adaptations to their accounting and supporting documentation. This would lose the potential benefits derived from this type of audit and would undermine the purpose of future audits.

The rest of the redacted sections of the text relate to specific problems that may be encountered, practical advice and specific occasions on which there is an element of flexibility within the guidance to allow for certain circumstances. This information goes into more detail than a standardised practice manual as it is relevant to the particular circumstances. If this were to be disclosed it would leave these areas of flexibility open to abuse. If an audited entity has acted in a fraudulent way or has inappropriately allocated costs, it may try to work within the tolerances given in the manual to increase the likelihood of getting away with their abuse. Even those acting legitimately would be likely to try and push the limits that are given. It is understood that deviations can occur in businesses, and in order to have a fair audit process there needs to be flexibility. However, revelation of this information would push the tolerance too far as people legitimately move to the limits and then the flexibility would need to be extended. This would undermine the audit process as it would open it up to abuse. This would then defeat the primary purpose of current and future audits.

In your confirmatory applications you noted that other organisations have standards for audits publicly available, particularly noting the length of the European Court of Auditor's guidance. It should be stressed that the length of an audit process for an institution as broad and unusual as the European Commission is not comparable to an audit manual for a specific circumstance such as the FP7 beneficiaries. Furthermore, the partial access given allows auditees to have a general overview of the process as shown in the European Anti-Fraud Office (OLAF) and ECA guides.

In your confirmatory application you made substantial references to case law in support of your arguments that the Directorates-General should disclose the audit manual. You made particular reference to the case of *Internationaler Hilfsfonds eV v European Commission* paragraphs 159 and 165-170⁵. I do not believe that direct parallels can be drawn from that case to the case at hand, despite the paragraphs you have mentioned. The documents in question in that case related to reports into implementing a specific audit and terminating a contract. The Court ruled that Article 4(3) second sub-paragraph of Regulation 1049/2001, the protection of a closed decision making process, could not be used in the case in question as there was merely a hypothetical risk that this could undermine the decision making process.

In this instance the exception is the protection of the purpose of inspections, investigations and audits as found in Article 4(2) third indent of Regulation 1049/2001. The facts in question can be distinguished from those in the *Internationaler Hilfsfonds* case above. Furthermore, in the FP7 audit manual, the general '*legal and scientific rules known to professionals since they are taught in the auditors course*', as quoted by you in your confirmatory application from paragraph 166 of the judgment, comprise the parts that are generally disclosed to you here. In this instance access is not being denied to the report on a specific case that has been closed for five years, but to small parts of the up-to-date guidance that is still used for audits of this kind. The likelihood that the audits could be undermined, in this instance, is not purely hypothetical, but real and foreseeable as detailed above. Therefore the information deserves the protection of Article 4(2) third indent of Regulation 1049/2001.

3.2. The Protection of the Union's fiscal or monetary policy

Article 4(1) (a) fourth indent of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) [t]he public interest as regards (...) the financial, monetary or economic policy of the Community".

The financial policy of the Community can be understood as relating to the proper management of the funds of the EU. It is a policy aimed at protecting the financial resources of the Commission by way of audits of beneficiaries of grants and other subcontractors. Indeed, as you have noted in your applications, OLAF was set up to protect the financial policy of the Commission, both internally and externally. Although OLAF was set up with this in mind, it is not the only entity to undertake investigations in this regard. Through the auditing process the Directorates-General can monitor the performance of their projects and where necessary flag any issue with OLAF to be investigated further.

The information withheld in the FP7 Audit Manual in this instance relates directly to the conduct of these audits and as such is one of the means of protecting the financial policy of the EU. As you note, these absolute exceptions, which are not balanced against an overriding public interest, need to be interpreted narrowly. It is for this reason that only specific details of the

⁵ Case T 300/10

manual have been withheld. The disclosure of these parts could result in deliberate attempts of auditees to pre-empt or distort the findings in audits by taking advantage of the guidance in the manual on where there is flexibility.

In your confirmatory applications (emails of 1 August 2012), you argue that this particular exception is not applicable since the Commission is acting as a public administration. On the other hand, in the complementary information sent on 6 September 2012, you submit that the Commission is not acting as a public administration but is party to a contract exclusively governed by contract law. These arguments are contradictory. In any case, it is clear that the Commission acts as a public administration, regardless of whether it engages in contracts governed by private law. It is as a public administration that the Commission carries out audits with a view to protect the financial interests of the EU. The specific guidance was drawn up as part of the policy to ensure a proper allocation of EU funds. As such the protection of these parts of the manual is protection of financial policy of the EU.

4. OVERRIDING PUBLIC INTEREST

Pursuant to Article 4(2), the exceptions to the right of access 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 outweigh the interest protected by virtue of Article 4(2), of Regulation 1049/2001.

In your confirmatory application you state that the public has an interest in being fully informed on the matter, in relation to allegations you have made throughout both applications of unlawful behaviour. Once again I must stress that this is a response to a request for access to documents, which is not the appropriate procedure for making this kind of allegations. These allegations are not relevant as regards the handling of request for disclosure of documents and they should be formulated in a proper complaints procedure.

The claim that the public has an interest in knowing about unlawful behaviour of the Commission it is not relevant in this regard as the documents requested do not reveal any information that would substantiate such a claim.

Furthermore, the public interest is better served by ensuring that the Commission can properly audit contractors and beneficiaries of grants in order to ensure that funds are put to good use. After all it is public funds that are used to finance the European institutions and they should therefore be protected from misuse.

In addition, I draw your attention to paragraph 60 of the judgement in the *Technische Glaswerke Ilmenau case*, where the Court confirmed that in administrative matters, such as the ones at stake, the public interest in transparency does not carry the same weight as in legislative matters.

Consequently, I consider that the prevailing interest in this case is to protect the purpose of the on-going and future audits.

In addition, the exception in Article 4(1) applies to all of the withheld sections, this is an absolute exception not balanced by an overriding interest.

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, appearing to read 'Catherine Day', with a large, stylized 'D' and a checkmark-like flourish at the end.

Catherine Day

Enclosures [1]