Decision of the Secretary General on behalf of the Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2013/6204

Dear Ms Hogervorst,

I refer to your e-mail of 6 February 2014, registered on the same day, by which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001").

1. Scope of your request

Through your initial application of 6 December 2013, addressed to the Directorate-General for Financial Programming and Budget (DG BUDGET), you requested access to: "any reference to the central exclusion database, including any entities that are within it, reasons for their inclusion, implications of their inclusion, as well as general criteria for inclusion of entities and the general implication of inclusion for entities."

In its initial reply of 19 December 2013, DG BUDG identified the following documents as falling within the scope of your request:

1) Commission Regulation No 1302/2008 of 17 December 2008 on the central exclusion database;


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applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002;


4) Article 34 of the Commission's internal rules for 2013 on the implementation of the general budget of the European Union;

5) DG BUDG Practical guide on the Central Exclusion Database, lastly updated in June 2014.

DG BUDG provided access to all documents identified as falling under the scope of your request with the exception of name of entities included within the Central exclusion database. According to DG BUDG: "this disclosure is prevented by the exception to the right of access laid down in Article 4(1) (b) "privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data". The information contained in the central exclusion database is only accessible to authorised users of entities referred to in Article 108 of the [Financial Regulation]."

Through your confirmatory application you request a review of this position and you ask for access to "the names of companies and individuals included in the database".

2. DOCUMENTS CONCERNED

Your confirmatory request concerns the names of companies and individuals included in the Commission’s Central Exclusion Database.

3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG BUDG to refuse access to the data contained in the Central Exclusion Database, based on the exceptions of Article 4 (1)(b) (privacy of the integrity of the individual), Article 4(2), first indent (protection of commercial interests) and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001, as detailed below.

As explained below, those exceptions must be interpreted taking into account the objectives and the specificities of the Financial Regulation and of Regulation No 1302/2008 of 17 December 2008 on the Central Exclusion Database, adopted on the basis of Article 95 of the
Financial Regulation\(^3\) and in particular the specific provisions which apply to access to information contained in this database.


The data (personal data and names of legal persons) to which you request full access are part of the Commission's Central Exclusion Database. Regulation 1302/2008 of 17 December 2008 on the Central Exclusion Database and the Financial Regulation itself are fully applicable with regard to this database.

Article 5 of Regulation 1302/2008 and Article 108 of the Financial Regulation explicitly limit access to the Central Exclusion Database only to authorised users.

It is the Commission's view that the Central Exclusion Database, with its access limited to authorised users, aims to ensure, primarily, the ability of the EU institutions to protect the Union's financial interests in full respect of the rights of the natural and legal persons mentioned therein. This information system includes the entities that are to be excluded from participation in any procedure for allocating Union funds as they present an obvious risk for the EU budget.

3.2. The articulation between Regulation 1049/2001 on access to documents and the Financial Regulation.

In its recent *TGI* and *Bavarian Lager* judgments,\(^4\) the Court of Justice ruled that the application of Regulation 1049/2001 cannot have the effect of rendering the provisions of another Regulation over which it does not have primacy, ineffective.

The General Court in its recent *Cosepuri*\(^5\) judgement confirmed that *it is common ground that Regulation No 1049/2001 and the Financial Regulation have different objectives and do not contain any provision expressly giving one regulation primacy over the other. Therefore, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them.*

In this context, first of all it must be taken into account that the Financial Regulation (and Regulation 1302/2008 which was adopted on the basis of Article 95 of the Financial Regulation) regulates the allocation of funds from the EU budget, which is part of the Commission's administrative functions.

Furthermore, the right to disclosure of documents under Regulation 1049/2001 shall not apply in contradiction with the above-mentioned access restrictions imposed by the Financial Regulation, as this would result in those restrictions being deprived of their meaningful effect. More particularly, this would undermine the effective protection of the Union's financial interests.

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\(^5\) Judgment of the General Court of 29 January 2013 in case T-339/10, *Cosepuri Soc.Coop. pA vs European Food Safety Agency (EFSA).*
interests in full respect of the rights of the natural and legal persons concerned, which is, *in fine*, the objective of that Regulation.

3.3. **Names of natural persons: privacy and the integrity of the individual**

According to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to documents is refused where disclosure would undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. In its judgment in the Bavarian Lager case⁶, the Court of Justice has ruled that, when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001 (hereafter the Data Protection Regulation) becomes fully applicable⁷.

The names of individuals, including names of company representatives, included in the Central Exclusion Database constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

According to Article 8(b) of the Data Protection Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.⁸

In your confirmatory application, you do not establish the necessity of having the names of the personal data contained in the Central Exclusion Database revealed. I also do not see the necessity of disclosing these personal data.

Furthermore, there are clear risks to the privacy and integrity of the individuals concerned if their names would be revealed to outside parties, having regard to the scope and object of the database.

Under these circumstances, I must conclude that the withheld personal data of the Central Exclusion Database are covered by the exception under Article 4(1)(b) of Regulation (EC) No 1049/2001 as the release of these personal data would undermine the privacy and integrity of the individuals concerned, and the need for obtaining these data has not been established. Consequently, access to these personal data must be refused.

3.4. **Protection of commercial interests**

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.*

As indicated above, your confirmatory request covers solely the names of natural and legal persons included in the Central Exclusion Database.

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⁸ Judgment of the Court of Justice of 29 June 2010, Bavarian Lager, quoted above, paragraphs 77-78.
There is a presumption that release of these data would prejudice the commercial interests of the natural and legal persons concerned. Indeed, by the very nature of the Exclusion Database, such release would negatively affect the reputation of the entities listed therein.

As indicated above, such release would result, *de facto*, in circumvention of the specific restricted access rules defined in Article 5 of Regulation 1302/2008 and Article 108 of the Financial Regulation, and would therefore undermine the commercial interests of the entities concerned protected by those provisions.

Therefore, access to the names of legal and natural persons included in the Central Exclusion Database cannot be granted, as this would undermine the commercial interests of the latter protected by Article 4(2), first indent of Regulation 1049/2001.

### 3.5. Protection of the decision-making process

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.

Access to the Central Exclusion Database is limited to authorised users. The Database is not intended to be public and serves as a consultation tool for the Commission and the other authorised users, in order for them to make well-informed decisions about the allocation of the Union funds. As explained above, the entities that are in the Database are to be excluded from participation to any procedure entailing allocation of Union funds, as it is presumed that they present an obvious risk for the EU budget. Authorised users consult the Database on a regular basis, whenever there is a need to take a decision relevant for the allocation of funds.

The purpose of the Database is therefore to contribute to preliminary deliberations and consultations in the framework of the allocation of EU funds. It is essential that these deliberations and consultations are shielded from external pressure. Indeed, if third entities were to gain access to the database, they could try to exert pressure on the Commission to modify or remove the entries contained therein.

Under these circumstances, disclosure of the name of entities contained in the Central Exclusion Database would seriously undermine the Commission's internal decision-making process protected by Article 4(3), first paragraph of Regulation 1049/2001, as it would harm the ability of the latter to protect the Union's financial interests without any undue external interference. Indeed, the fact that there is an interest from third parties in obtaining access to this database through Regulation 1049/2001 demonstrates that this risk is reasonably foreseeable and not purely hypothetical.
Consequently, the Central Exclusion Database is also covered by the exception provided for in Article 4(3), first paragraph of Regulation 1049/2001, and access has to be refused on that basis.

Alternatively, if it is considered that there is no ongoing decision-making process to which the requested names relate, access thereto must nevertheless be refused pursuant to Article 4(3), second paragraph of Regulation 1049/2001, as they form part of preliminary deliberations and consultations within the Commission, as explained above.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent and Article 4(3) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application you state that: "We feel however, that the public interest in revealing this information is in this case of greater and over-riding value. The commitment to participative democracy within the Union and its institutions is delivered through transparency and the power of public scrutiny. By withholding this information, this core function of the operationality of the Union is being denied.

[.]

The World Bank employs a similar 'blacklist', but makes the names of included individuals and companies public. . . In addition, the EU's anti-fraud office OLAF in 2012 recommended that 54 entities be put in judicial follow-up procedure, meaning that they were suspected of not abiding by the law. Taken together, this not only shows that transparency of black list is the norm rather than the exception, but it also demands further public scrutiny: why have certain organisation been included and not others and what is the due process that led to the eventual debarring?"

With regard to these statements I note that every organisation has its own internal rules and procedures, adopted through democratically established procedures. The way other institutions have organised their functioning does not qualify as an argument capable of demonstrating an overriding public interest in disclosing the documents held by the Commission services in application of the above-mentioned rules and regulations. In addition, I note that access to the names of persons and entities included would not give you any information as regards the criteria that led to the inclusion of certain organisations over others.

As explained above, it is the Commission's view that the Central Exclusion Database, with its limited access to authorised users aims to ensure, primarily, the ability of the EU institutions to protect the Union's financial interests in full respect of the rights of the natural and legal persons included therein. I consider that the public interest is better served by enabling the Commission and the other authorised users to protect these interests without any undue external interference.

Consequently, I consider that the prevailing interest in this case is to protect the commercial interests of the natural and legal persons and the decision-making process.
5. **PARTIAL ACCESS**

I have also examined the possibility of granting further partial access to the requested documents in accordance with Article 4(6) of Regulation 1049/2001. However, further partial access is not possible considering that the data to which you seek access must be protected in their entirety, as explained above.

6. **MEANS OF REDRESS**

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

Catherine Day