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 2014/276

Dear Mr Gerloff,

I refer to your letter of 19 March 2014, registered on 20 March 2014, in 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

Following your initial application of 17 January 2014 and the further exchanges with the Commission's Directorate-General for Informatics (hereafter 'DIGIT'), the latter identified the following three groups of documents as falling under the scope of your request. These documents were drafted in the context of the two on-going negotiated procurement procedures with Microsoft: DIGIT/R2/PN/2013/065 and DIGIT/R2/PN/2013/068.

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(1) The Orientation Document for negotiated procurement procedures with Microsoft (DIGIT/R2/PN/2013/065 and DIGIT/R2/PN/2013/068), dated 24 September 2013;

(2)-(6) Five documents containing exchanges between DIGIT and Microsoft in the context of the said two on-going procurement procedures;

(7)-(8) Two documents related to formal steps in these procurement procedures such as the appointment of an Opening Committee and an Evaluation Committee.

In its initial reply of 3 March 2014, DIGIT:

- refused access to documents (2)-(8) based on the exceptions of Article 4(3) (protection of decision-making process) and Article 4(1)(b) (protection of personal data) of Regulation 1049/2001;

- provided partial access to document (1). The refusal of the redacted parts was based on the above-mentioned two exceptions and on the exceptions pertaining to the protection of public security and the protection of commercial interests as laid down respectively in Article 4(1)(a), first indent and Article 4(2), first indent of Regulation 1049/2001.

Through your confirmatory application you challenge only certain aspects of the initial decision. You request a review of the position taken by DIGIT as regards the following documents:


Documents (7) and (8):
- Amendment to the appointment of Evaluation Committee, dated 7/01/2013.

You back up your request with arguments concerning the product coverage, the Commission's rationale for engaging in a negotiated procedure and the names of the Commission's staff acting in their official capacity. I will address these arguments in the corresponding sections thereafter.
2. 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 a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that wider partial access is provided to document 1. Moreover, partial access to the remaining documents covered by your request (documents 2, 7 and 8) is also granted, subject to certain redactions pertaining to personal data only.

My above conclusion is based on the application of exceptions of Article 4(1)(b) (protection of the privacy and the integrity of the individual), Article 4(2), first indent (protection of commercial interests) and Article 4(3) (protection of the decision-making process) of Regulation 1049/2001. For the sake of completeness, I note that you have not contested the limited redactions made in document 1 on the basis of the exception pertaining to the protection of public security. I will, therefore, not review this aspect of the initial decision.

2.1. Protection of the decision-making process

Article 4(3) of Regulation 1049/2001 provides that 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 your confirmatory application, you argue that "the rationale for the negotiated procedure should be public in order to protect the interests of Microsoft's competitors". You add that the publication of the Commission's rationale to engage in a negotiated procedure could in no way upset the decision-making process, as this decision has already been taken.

Your above argument concerns only document 1, as only the Orientation Document contains information on the Commission's rationale for using the negotiated procedures. Documents 2 (invitation to submit an offer), 7 and 8 (appointment of opening board and evaluation committee members) are of a procedural nature and they do not contain any elements on the rationale for the negotiated procedure.
As regards the requested access to the full Commission’s rationale underpinning the said two negotiated procedures, I would like to inform you that the relevant explanations are provided only on page 17 of the Orientation Document, which should be read in conjunction to other parts of the document to which you have already been provided access, such as Annex 10. The other parts of the document 1 which were redacted in the version you received following your initial application do not contain any elements or reference as regards the choice of the negotiated procedures and the justification for this choice.

I recall that the negotiated procedures under Article 134 of the Rules of Application represent derogation from the usual award procedures, whereby the publication of the contract notice is compulsory. In this respect, in its initial reply to your present access to documents request, DIGIT went beyond its strict obligations, as it disclosed the fact that the negotiations were ongoing and provided access to large parts of the Orientation Document, in spite of the fact that it was not required to publish a contract notice.

Nevertheless, as regards your request to have access to the part of the document which outlined the precise justification used to resort to the negotiated procedure, I must conclude that DIGIT’s decision to refuse access to it, at a time when the negotiations were still ongoing, was justified in the light of the need to enable the awarding authority and the prospective contractor to conclude the negotiations without outside interference, which is the purpose sought by the specific transparency requirements applicable to negotiated procedures under Article 134 of the Rules of Application.

However, on 25 April 2014, the award notices relating to the two negotiated procedures in question were published in the Official Journal. Section IV (Procedure) of these award notices refers to the legal basis which justified the choice of the negotiated procedure. In view of these latest developments, I consider that access to the specific section underpinning the rationale for using the negotiated procedure on page 17 of the Orientation Document can now also be granted.

As regards the remaining redacted sections pertaining to the decision-making process and contained in the Orientation Document, I refer to the description of their content provided by DIGIT in points 3.4(1) and 3.4(3) of its initial reply. Since you do not refer to these sections in your confirmatory application, nor put forward any elements challenging the assessment carried out by DIGIT, I must conclude that you have withdrawn your request for access in this respect.

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3 OJ/S S81, DI/07300 (Microsoft high-level services) 2014/S 081-140675 and DI/07280 (interinstitutional licensing agreement) 2014/S 081-140672.
2.1.2. Documents 2, 7 and 8

In spite of the fact that documents 2 (invitation to submit an offer), 7 and 8 (appointment of opening board and evaluation committee members) do not, as such, contain any elements on the rationale for the negotiated procedure, I have reviewed the assessment carried out by DIGIT at the end of Section 3.4 of its initial reply.

Following this assessment, I conclude that, in view of their content, DIGIT’s decision to invoke the exception on the decision-making process with regard to these three documents was not justified. Hence, I have decided to grant you access to these documents, notwithstanding my assessment on the exception related to the protection of personal data (see 2.4 below).

In addition, you will note that document 2 includes two annexes, namely a "Draft Framework contract" and "General Terms and Conditions for informatics contracts". These annexes are standard contractual documents which are already publicly available on DIGIT’s website, at the following URL:


2.2. Protection of commercial interests

Article 4(2), first indent of Regulation 1049/2001 provides that [t]he 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 exception pertaining to the protection of commercial interest applies only to certain parts redacted from the Orientation Document (document 1).

I recall that in the initial decision DIGIT provided you with a detailed description of the relevant sections of the Orientation Document, disclosure of which would undermine the commercial interests of either the Commission and/or Microsoft. This description consisted of 4 indents as regards the Commission’s commercial interests (Section 3.3.2) and of 2 indents as regards Microsoft’s commercial interests (Section 3.3.3).

In your confirmatory decision, you argue that at least one specific issue is not covered by the above-mentioned exception and this is the product coverage. You explain in this regard that "if the purpose of negotiated contract is to ensure business continuity, the list of products should be the list of products used by the institutions today. This should be no secret. Exceptions may be acceptable for some products in the area of security. The list of products also defines the scope of the market. There is no reason for the Commission to withhold this information". On this basis you conclude that "releasing the list of products, licenses and services the Commission wishes to acquire could not possibly impact [...] its commercial interests".
Insofar as you only refer to "product coverage", it appears from your above submissions that you wish to challenge the initial decision as regards the redactions relating to the Commission's and Microsoft's commercial interests concerning this aspect. Therefore my understanding is that you want to challenge DIGIT's decision as far as the first indent in Section 3.3.2 and the first indent in Section 3.3.3 of the initial reply are concerned, but that you have withdrawn your request for access as regards the other elements.

I note in this regard that you were granted full access to Annex 10 of document 1 (the Orientation Document), which discusses the products used within the Commission at present and the possible changes in the future. This already gives a quite comprehensive overview of the perimeter of the negotiations.

The parts of the document redacted on the basis of this exception and related to "product coverage" contain even more detailed information on product names, versions and their bundling, and on current and expected usage ratios within the Commission.

Following my assessment, I conclude that the explanations provided by DIGIT in Section 3.3 of its initial reply were fully justified:

- Insofar as the information on "product coverage" to which you request access refers to the contracts which were being negotiated, disclosure of that information would seriously undermine the Commission's bargaining power in the context of such negotiations and therefore jeopardise its commercial interests.

- Insofar as the information on "product coverage" to which you request access refers to contracts in force, or to past contracts, with Microsoft, disclosure of that information would undermine the protection of the contractor's expertise, strategy, creativity and commercial strength. This is especially the case if one takes into account the provisions of Article 35(2) of the Financial Regulation, which require the Commission to publish detailed information on expenditure under its contracts. By crossing the information on product names, versions and their bundling, and on current and expected usage ratios within the Commission, with the detailed information on expenditure available under those provisions, the confidentiality of the specific commercial solution put forward by Microsoft in order to address the Commission's needs would be seriously undermined. As correctly pointed out by DIGIT, this would also have the counter-effect of undermining the Commission's credibility as a reliable business partner, and ultimately affect the Commission's commercial interests as well.

In view of the above, I conclude that further partial access to the relevant parts of the Orientation Document I cannot be granted, since they are protected by the exception laid down in Article 4(2), first indent of Regulation 1049/2001.
2.3. Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that *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.*

All four documents covered by your confirmatory request contain personal data, as follows:

- Document 1 contains personal names of the Commission officials that had drafted and revised the document in question, the name of the authorising officer for the two negotiated procedures in question (on the cover page) and the names of the Commission's officials who were responsible for drawing up the procurement specifications for these procedures (on page 28).

- Document 2 contains the name of the Microsoft employee and the name of the Commission official who signed the invitation to Microsoft to submit an offer.

- Documents 7 and 8 contain the names of the Commission officials that are appointed as members of the opening board and the evaluation committee for the two negotiated procedures and the name of the authorising officer.

In its judgment in the *Bavarian Lager* case,


the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001 (hereinafter the 'Data Protection Regulation') becomes fully applicable.

Article 2(a) of Data Protection Regulation provides that *'personal data' shall mean any information relating to an identified or identifiable person [...].* The personal names referred to above constitute undoubtedly personal data in the sense of Article 2(a) of the Data Protection Regulation.

In your confirmatory application, you express a concern regarding the Commission's practice of keeping secret the names of Commission staff acting in their official capacity. In your view, the Commission officials acting in pursuance of their official duties do not qualify as natural persons as intended in the Regulation. Finally, you add that in the interest of transparency, and in order to increase the credibility and trustworthiness of the Commission in the eyes of the Europe's citizens, [you] hope that this practice will soon be changed.

I understand from your above submissions that you do not question the redaction of personal data of Microsoft representative and you consider that only the names of the Commission officials had been wrongly withheld.

5 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, Official Journal L 8 of 12.1.2001
Please note that when taking a decision to redact the names of the Commission officials, the Commission makes a careful assessment in each specific case of the possible risks in disclosing the names by subjecting the officials to undue external pressure. The Commission also consults the relevant officials as to whether their personal details could be disclosed in the relevant context.

I am pleased to inform you that the names of certain Commission officials could be granted. These are the names of the head of unit, who signed the invitation to Microsoft to submit an offer (in document 2) and the authorising officer, who signed documents 7 and 8 concerning the appointment of the members of the opening board and the evaluation committee.

However, I consider that disclosing the personal data of other Commission officials, which appear in the documents in a particular context is not justified, as such disclosure would carry specific risks to the privacy or integrity of the individual concerned. These are the personal names and departments of the members of the opening board and the evaluation committee, as both these elements make the officials concerned identified or identifiable. Indeed, I see a clear risk to the privacy and integrity of the members of the opening board and the evaluation committee for the said negotiated procedures with Microsoft if their personal data would be released, as there is a high risk that these officials, which are likely to be called upon to assess other offers in the future, could be subjected to unsolicited contacts and pressure from the outside.

The same considerations apply for the names of the Commission officials that drafted and revised document 1 (the Orientation Document), as the officials concerned are called upon to advise on the future office automation environment of the Commission and should be able to do so without being subjected to any external pressure.

Furthermore, pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC 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.  

In your confirmatory application you object to the redaction of personal data, but you have not established the necessity of the transfer of the personal data in question in the meaning of Article 8(b) of Regulation 45/2001. As the Court of Justice confirmed in Case C-465/00 (Rechnungshof), there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life. The Commission is entitled, on the basis of Article 4(1)(b) of Regulation 1049/2001, to redact the names of its officials if, in view of their specific duties and responsibilities, they could be subjected to external pressure.

6 Judgment of the Court of Justice of 29 June 2010, Bavarian Lager, quoted above, paragraphs 77-78.
7 Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between Rechnungshof and Österreichischer Rundfunk, paragraph 73.
I conclude, therefore, that the personal data of these specific individuals should be protected on the basis of the exception laid down in Article 4(1)(b) of Regulation 1049/2001.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, reinforces this conclusion.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), first indent and 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), first paragraph and 4(3) of Regulation 1049/2001.

I note that you have not put forward any arguments demonstrating the existence of an overriding public interest in disclosure. Nor have I been able to identify any elements capable of demonstrating the existence of an overriding public interest in disclosure of the refused parts of document 1 (the Orientation Document). Therefore, the protection of commercial interests and of the decision-making process prevails in this case.

Please note also that Article 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the Orientation Document and concluded that further partial access was indeed possible. Please find enclosed the relevant extracts pertaining to the rationale underpinning the two negotiated procedures on page 17 of document 1.

I have also concluded that a wide partial access to documents 2 and 3 could be granted, which were redacted with a view to protect certain personal data only.
5. 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,

[Signature]

Catherine Day

Enclosures:

- Further disclosed elements of page 17 of document 1;
- Partial access to document 2;
- Partial access to documents 3.1 and 3.2.