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BUDG.D2 - Programme management and implementing contracts

Secretariat-General
Directorate B - Institutional and Administrative Policies
SG.B.4-Transparency

GUIDANCE NOTE ON ACCESS TO INFORMATION AND DOCUMENTS RELATED TO PROCUREMENT AND GRANT AWARD PROCEDURES

1. INTRODUCTION, DEFINITIONS AND LEGAL BASES

The objective of this document is to provide guidance to services on how to deal with requests to access documents or information in relation to grants and procurement¹ directly managed by the Commission or executive agencies, so indirect management is not covered. This guidance note does not deal with the obligations of publication under grants and procurement.

In procurement and/or grant award procedures unsuccessful grant applicants, candidates or tenderers often request access to documents and/or to information concerning these procedures. The Financial Regulation ('FR') and its Rules of Application ('RAP') include specific provisions on the information that can be given to participants at different stages of the procedure. Such access is considered to be privileged access to information, because not everybody, but only specific parties can ask for it. You can find details about this kind of access under point 2.

Any citizen of the Union, and any natural or legal person residing or having its registered office in Member State, has the right to request public access to documents of the institutions according to Regulation No 1049/2001. Contrary to the privileged access which can be granted to specific parties, access to documents according to Regulation No 1049/2001 is a general right. It does not depend on whether the applicant was a candidate, a tenderer or a grant applicant. Furthermore, a document released under Regulation 1049/2001 to an applicant for access to documents is, legally speaking, accessible *erga omnes*. You can find details about access to documents according to Regulation No 1049/2001 under point 3.

Grant applicants, candidates or tenderers often base their requests for access to documents and/or information in procurement and/or grant procedures both on the FR and its RAP and on Regulation No 1049/2001.

The legal basis on which you reply (FR and RAP or Regulation 1049/2001 or both) depends on the specific circumstances and on the wording of the applicant's request. If the applicant is entitled to privileged access under the FR and RAP and not explicitly refer to Regulation 1049/2001, the application can be handled exclusively under the provisions of the FR and RAP. If, in addition to that,

¹ For more information on grants and procurement procedures, please consult:
Grants: https://myintracomm.ec.testa.eu/budgweb/EN/imp/grants/Pages/imp-090_grants.aspx
Procurement: https://myintracomm.ec.testa.eu/budgweb/EN/imp/procurement/Pages/imp-080_procurement.aspx

Regulation 1049/2001 is invoked, the request will have to be assessed also under this angle. In case of doubt, you can ask the applicant to clarify.

1.1. DEFINITIONS

For the purpose of this guidance, the following terms are used:

- **‘Information’** is any news, knowledge or data **not necessarily available** in written, visual, oral, electronic or any other form. Requests for information may concern only news, knowledge or data not to be found in a single document or a number of items that may be found in several documents and that require a certain level of aggregation;
- **‘Document’** is, according to Article 3(a) of Regulation No 1049/2001, ‘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’;
- **‘Applicant for access to documents’** means any person who requests documents under Regulation No 1049/2001;
- **‘Grant applicant’** means a person who has submitted a grant application in response to a call for proposals;
- **‘Candidate’** means a person who has submitted a request for participation in a procurement procedure in two steps;
- **‘Tenderer’** means a person who has submitted a tender in response to a procurement procedure;
- **‘Contractor’** means a person who has signed a procurement contract;
- **‘Beneficiary’** means a person who has signed a grant agreement.

This note refers to grant applicants, candidates, tenderers, contractors and beneficiaries as interested parties. Their rights depend on the specific provisions of the FR and the RAP.

1.2. LEGAL BASES

1.2.1. THE TREATY

The principle of transparency and openness is enshrined in the Treaty on the Functioning of the European Union (TFUE)² and in the Charter of Fundamental Rights of the European Union (the Charter).

Article 42 of the Charter provides that *[a]ny citizen of the Union, 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, bodies, offices and agencies of the Union, whatever their medium.*

Article 15(3) TFEU provides that *[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph (...).* These conditions are defined in Regulation No 1049/2001³.

² Official Journal C 326, 26.10.2012.

³ [Regulation No 1049/2001](#) of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.05.2001, p.43). See also, as regards the right of public access to environmental information, Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.09.2006, p. 13).

In addition, the Commission applies its own Detailed Rules for the Application of Regulation No 1049/2001 contained in Commission Decision 2001/937⁴ (Commission Rules of Procedure).

1.2.2. THE FINANCIAL REGULATION AND ITS RULES OF APPLICATION

Although applicants for access to information or documents related to procurement or grant award procedures may base their requests on either the FR/RAP, Regulation No 1049/2001 or both, please be aware that ‘privileged access to information for interested parties’ and ‘public access to documents’ are governed by different rules.

The provisions relating to privileged access to information for interested parties are laid down in the Financial Regulation (FR)⁵ and its Rules of Application (RAP)⁶:

- Concerning interested parties in **procurement** procedures, Article 113(2) FR and Article 161(1) RAP impose upon the contracting authority an obligation to inform all candidates or tenderers of the grounds on which the award or rejection decision was taken. In addition, Article 113(3) FR and Article 161(2) RAP also provide for a specific right of access to information, upon written request by tenderers who are not in a situation of exclusion and whose tenders are compliant with the tender specifications. Those tenderers can have access to the name of the successful tenderer and of the characteristics and relative advantages of the successful tender.
- Concerning interested parties in **grant award procedures**, Article 133(3) FR and Article 205 RAP impose to the contracting authority an obligation to inform grant applicants of the award or rejection decision and its justification.

1.2.3. REGULATION NO 1049/2001 ON PUBLIC ACCESS TO DOCUMENTS

Requests for **public access to documents** (introduced by any natural or legal person) are governed by Regulation No 1049/2001 which contains the principles, conditions and limits to the right of access to Parliament, Council and Commission documents.

The detailed rules of application of Regulation No 1049/2001 are laid down by Commission Decision 2001/937.

For the Commission, the Secretariat-General (SG.B4) provides a website with guidance on how to deal with requests under Regulation No 1049/2001:

<https://myintracomm.ec.europa.eu/sg/docinter/Pages/index.aspx>

Administrative and legal coordinators for access to documents are at your disposal in each DG. They can provide help and guidance when dealing with initial requests for access to documents⁷.

For administrative and legal questions of horizontal importance the Transparency Unit (SG.B.4) in the Secretariat-General provides assistance to the administrative and legal coordinators of the DGs.

⁴ [Commission Decision 2001/937 of 5 December 2001 amending its rules of procedure \(OJ L 345 of 29.12.2001, p. 94\).](#)

⁵ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298 of 26.10.2012, p. 1) as amended.

⁶ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1) as amended.

⁷ https://myintracomm.ec.europa.eu/sg/docinter/documents/liste_corresp_fr.pdf

Regular courses are organised by SG.B4 for all officers interested in deepening their knowledge on access to documents (in *Syslog*). Specialised courses and Legal Seminars are organised by SG.B4 for administrative and legal coordinators. Tailored trainings for DGs are available upon request to the SG.B4 Unit.

1.2.4. THE CODE OF GOOD ADMINISTRATIVE BEHAVIOUR

In the Commission, requests for **information** (not documents) are governed by the Code of Good Administrative Behaviour⁸.

For practical implementation, please consult DG HR intranet⁹.

Unit SG.B3 is responsible for following the [complaints procedure](#) foreseen by the Commission's Code of Good Administrative Behaviour, including for the drafting of corresponding answers in consultation with the Legal Service.

2. PRIVILEGED ACCESS TO INFORMATION IN PROCUREMENT AND GRANT AWARD PROCEDURES

This part of the guidance (point 2) concerns solely access to information, which is not intended to be disclosed to the general public, by interested parties in the framework of procurement and grant award procedures, as provided for in the FR/RAP.

Other basic acts may provide for privileged access, for instance by the Programme Committee to the award decision for certain grants. These rights of access are specific to each basic act and are not covered by this note.

2.1. PRIVILEGED ACCESS TO INFORMATION OF INTERESTED PARTIES IN PROCUREMENT PROCEDURES (ART. 113 FR)

2.1.1. INFORMATION ON REJECTED REQUESTS TO PARTICIPATE OR TENDERS

Article 113(2) FR provides that *[t]he contracting authority shall notify all candidates or tenderers whose requests to participate or tenders are rejected, of the grounds on which the decision was taken. In addition, the second subparagraph of Article 161(1) RAP provides that [t]he contracting authority shall indicate the reasons why the request to participate or tender has not been accepted.*

It is therefore an obligation for the contracting authority to provide full information to an unsuccessful candidate or tenderer about the grounds and the full reasons (usually copied from the evaluation report) for the decision to reject its request to participate or tender. The candidate or tenderer does not need to request any of this information in writing and has a right to know from the outset.

To this end, DG BUDG provides [model notification letters](#) which provide for the inclusion of excerpts from the evaluation report, as well as the duration of the standstill period and the available legal remedies.

2.1.2. INFORMATION ON THE CHARACTERISTICS AND RELATIVE ADVANTAGES OF THE SUCCESSFUL TENDER

In addition, Art. 113(3) (a) of the FR provides that *[t]he contracting authority shall inform each tenderer who is not in an exclusion situation, whose tender is compliant with the procurement documents and who makes a request in writing, of ... the name of the tenderer, or tenderers in the case*

⁸ [Commission Decision \(EC, ECSC, Euratom\) No 2000/633 of 17 October 2000 amending its Rules of Procedure \(OJ L 267 of 20.10.2000, p. 63\).](#)

⁹ https://myintracomm.ec.europa.eu/hr_admin/en/code/Pages/conduct.aspx.

of a framework contract, to whom the contract is awarded and, except in the case of a specific contract under a framework contract with reopening of competition, the **characteristics and relative advantages of the successful tender**, the price paid or contract value, whichever is appropriate.

Such information is provided on a **privileged** basis, as only the specific parties fulfilling the conditions indicated in Art. 113(3)(a) of the FR can obtain, upon written request, the said information during the procurement procedure, before signature of the contract.

If the contracting authority receives such a request, it must provide the information about the successful tender **as soon as possible** and at the latest within 15 days of receipt of the request. The information includes the name of the tenderer (including the names of the different legal entities in case of joint offer), the contract price (not unit or detailed prices which are part of the commercial secrets of the tenderer) or contract value (for framework contracts), the break-down of points and comments of the evaluation per criterion, the total score and the comparative ranking, exactly as provided for in the evaluation report. It is therefore strongly recommended to integrate the corresponding excerpts from the latter into the reply to the information request. However, at this stage of the procedure, provided full information is given, it is not required to provide the evaluation report itself before the contract is signed^{10, 11}.

Indeed, the evaluation report should contain the full grounds for rejection, so when providing this information, it is important to provide exactly the reasons written originally in the evaluation report and not to formulate new ones¹².

2.1.2.1. FRAMEWORK CONTRACTS

In the specific case of **framework contracts** ('FWCs') **in cascade**, a successful tenderer can request information about the **comparative advantages of successful tenders ranked above it**. Thus, the second ranked tenderer can request information about the first ranked but not about the third, the third can request information about the first and second tender and the first tenderer cannot request any information about other tenders.

¹⁰ Case T-165/12 *Evropaiki dynamiki vs. Commission*, para. 50-51.

¹¹ The General Court has judged that the evaluation report does not need to be provided for requests under Article 113(3) (see Case [T-250/05 *Evropaiki Dynamics vs. Commission*, ECR 2007 page II-00085 at para. 113](#) as well as [T-63/06, *Evropaiki Dynamiki vs. EMCDDA*, ECR 2010 page II-00177](#)); it is only necessary to state the reasons for which the tenderer was rejected. Although a judgement of the General Court (Case [T-59/05 *Evropaiki Dynamics vs. Commission*, ECR 2008 page II-00157 at para. 134-135](#), confirmed on appeal by the Court of Justice [C-476/08P, *Evropaiki Dynamiki vs. European Commission*, ECR 2009 page I-00207](#)) considered desirable that the Commission systematically provides, to the tenderers which have made a written request, a copy of the evaluation report from which, if necessary, confidential information has been removed (i.e. partial access), in following case-law (Case C-560/10 P para 15 and C-462/10 P, paras 38-39) the Court of Justice found that it does not follow from the wording of the then applicable first subparagraph of Article 100(2) of the Financial Regulation or of the then applicable third subparagraph of Article 149(3) of the Implementing Rules, or from the judgment in Case T-59/05 *Evropaiki Dynamiki v Commission*, that, upon written request by an unsuccessful tenderer, the contracting authority is under an obligation to provide it with a full copy of the evaluation report. This latter approach has been further confirmed by the General Court in recent Case T-536/11, *European Dynamics v Commission*, para 40.

¹² [Case T-387/08 *Evropaiki dynamiki vs. Commission*, ECR 2010 page II-00178 at para. 37](#), [Case T-183/00 *Strabag Benelux vs. Council*, ECR 2003 page II-00135 at para. 57-58](#), [Case T-465/04 *Evropaiki Dynamiki vs. Commission*, ECR 2008 page II-00154 at para. 59](#), [T-406/06, *Evropaiki dynamiki vs. Commission*, ECR 2008 page II-00247 at para. 106-108](#), [T-300/07 *Evropaiki dynamiki vs. Commission*, ECR 2010 page II-04521 at para. 59-61](#) and [C-560/10P, *Evropaiki Dynamiki vs. European Commission*, ECR 2011 page I-00151 at para. 18](#), confirming the General's Court decision.

In the case of award of a FWC **with reopening of competition**, successful tenderers can request information about the **characteristics and relative advantages of all successful tenders**. Indeed, a successful tenderer may dispute the award of the FWC to another successful tenderer that would compete for specific contracts.

In such FWC with reopening of competition, this privileged access to information about competitors **does not apply** when reopening the competition between contractors for specific contracts. In this case, the unsuccessful contractors for specific contracts can only be given the name of the successful contractor.

2.1.2.2. INFORMATION ON NEGOTIATION AND DIALOGUES

In case of negotiations or competitive dialogue, tenderers who are not in a situation of exclusion and whose tenders are compliant with the tender specifications may request in writing information on the progress of negotiation or dialogue with tenderers (Art. 113(3) (b) FR). The contracting authority should explain the rounds of negotiations/dialogue that have taken place so far. If the negotiation/dialogue take place in stages, the number of rejected tenders/solutions should also be given for each stage.

2.1.2.3. REDACTION OF CERTAIN PARTS

When answering a request for the characteristics and relative advantages of a tender or information on negotiation or dialogue, information cannot be provided if the (...) disclosure would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of economic operators or might distort fair competition between them (Article 113(3), second subparagraph FR), or would be contrary to the provisions applicable to the protection of personal data (see section 4.3). This must be checked on a case-by-case basis, particularly if the comments of the evaluation committee refer to parts of the technical offer that could be considered as business secrets. If this happens, the relevant parts must be redacted.

2.2. INFORMATION OF INTERESTED PARTIES IN GRANT AWARD PROCEDURES (ARTICLE 133(3) FR)

According to Article 133(3) of the Financial Regulation, upon adoption of the award decision, all applicants should be informed in writing on whether their proposal has been accepted or rejected:

- Where applications are accepted, this notification must state the maximum amount of the grant to be awarded to the applicant;
- Where applications are rejected, the notification must **state the reasons for rejection** with reference to the exclusion, eligibility, selection and award criteria.

Such notifications are based on the evaluation report and the award decision and should be carefully formulated, as they can serve as a basis for a potential complaint or appeal against the decision.

3. PUBLIC ACCESS TO DOCUMENTS (REGULATION No 1049/2001)

The principle enshrined in Regulation No 1049/2001 on public access to documents is that all documents held by the institution are covered by its material scope; therefore no internal documents relating to the activities of the institution are, *a priori*, excluded from its scope.

However, the right of access can be limited by the exceptions of Article 4 of the Regulation, pertaining to the protection of legitimate public or private interests.

All documents made available under Regulation No 1049/2001 enter the public domain and are thereby available to everyone (*erga omnes*). It follows that all natural or legal persons requesting public access to a document under Regulation No 1049/2001, irrespective of whether or not they are candidates, tenderers or grant applicants, have equal rights of access under this Regulation. Therefore,

their particular interests as candidates, tenderers or grant applicants cannot be taken into account under Regulation No 1049/2001.

An individual assessment must be carried out in each case, to assess if one or several of the exceptions of Article 4 of Regulation No 1049/2001 applies to a set of documents, a particular document or parts thereof. In case of a refusal, partial access must always be considered.

Detailed information on how to deal with access-to-documents requests is provided in GoPro ([GoPro on access to documents](#)) and the [SG.B.4 website](#).

4. EXCEPTIONS TO THE RIGHT OF ACCESS POTENTIALLY APPLICABLE TO PROCUREMENT AND GRANTS-RELATED DOCUMENTS

The exceptions that are usually considered in case of procurement and grants-related documents, or parts thereof, are listed below.

Depending on the specific circumstances of each case other exceptions could nevertheless be applicable. In all cases, a concrete and individual assessment of the documents falling within the scope of a specific request must be carried out.

4.1. EXCEPTION ‘COMMERCIAL INTERESTS, INCLUDING INTELLECTUAL PROPERTY’

Article 4(2), first indent of the Regulation foresees 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.

Given the nature of the documents relating to procurement and grant award procedures, the exception of access relating to commercial interests of natural or legal persons, including those relating to intellectual property (Article 4(2), first indent of the Regulation), is the exception most likely to apply.

Indeed, information relating to methodologies, know-how, specific pricing or any other information carrying a commercial value is usually reflected in the tender or grant application for the purpose of responding to a grant or procurement award procedure.

Disclosure, to the general public, of such information relating to the execution of a service or of an action would undermine the protection of the relevant natural or legal person’s expertise, strategy and creativity and thus their commercial strength. It must be noted that, in cases of grant applications, the exception relating to commercial interests can in principle be applied to non-commercial entities, such as non-profit associations. The General Court also accepted this exception for a university¹³. The General Court has acknowledged the existence of a general presumption in cases concerning the bids submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer¹⁴. This was confirmed again recently by the General Court¹⁵. This exception can even apply to the Commission, for example to its own commercial interests in concluding contracts.

If it is clear that the requested document is not covered by any exception and therefore should be disclosed (for example, the award decision after the contract signature), the Commission discloses the document.

¹³ [T-439/08 Agapiou Joséphidès vs. Commission and EACEA](#), §127-128.

¹⁴ Judgment of 29 January 2013 in Case T 339/10 and T 532/10, Cosepuri vs EFSA EU:T:2013:38, paragraph 101.

¹⁵ Judgment of the General Court of 26 May 2016 in Case International Management Group vs Commission (not yet reported), para. 30.

On the contrary, if, after a concrete assessment, the Commission deems that the disclosure of commercial information would undermine an entity's commercial interests, access to the respective parts of the document must be refused.

In case of doubt as regards documents originating from a third party, the third party needs to be consulted according to Article 4(4) of Regulation No 1049/2001. This means in practice that you first need to assess whether it is clear that the requested document(s) shall or shall not be disclosed. The third-party author must be consulted regarding the possibility to grant partial or full access to the document(s) requested only if it is not clear that the document(s) shall or shall not be disclosed.

No consultation is necessary in the following three cases:

- If access to the content of the documents originating from third parties manifestly does not affect one of the protected interests under the exceptions provided for in Article 4 of Regulation 1049/2001. Correspondence (letters, e-mails) from third parties can normally be made public, unless specific commercially sensitive elements, personal data of staff or other sensitive elements warrant protection under one of the exceptions of Article 4, and without prejudice to the need to consult in case of doubt;
- If the documents are clearly covered by one or several exceptions (such as documents containing commercially sensitive data);
- If the third-party documents are covered by a general presumption of non-disclosure, recognised by the case-law of the ECJ (for more information see the case-law table available on the [SG.B4 website](#)).

In all other cases, the third-party author must be consulted (Article 4 of the Regulation; Article 5 of the internal rules stipulated in Commission decision 2001/937). Consultations of third parties should enable the latter to explain their position if possible with reference to the exceptions set out in Article 4 of Regulation No 1049/2001.

Please note that when dealing with the request at the initial level, the DGs/services should not grant access to the documents concerned, or parts thereof, in cases where the author objects to disclosure and justifies the objection, if possible with reference to the exceptions provided for in Article 4, paragraph 1 or 2 of Regulation No 1049/2001. Where no such justification is given, the service concerned should insist that the third-party author provides one. The fact that a third party objected is not in itself an exception that can be invoked, as the refusal should always be argued by the Commission services on the basis of exceptions laid down in Article 4 of Regulation 1049/2001. The decision whether the document is disclosed remains with the Commission.

In case of Member State opposition, a reference should be made both to Articles 4(4) and 4(5) and to the *prima facie* assessment of exceptions invoked by the Member State. In these cases, the Commission checks whether the explanations put forward are manifestly wrong.

Practical details on the consultations can be found in SG.B4's guidance on the current administrative practice.

In the context of procurement and grant award procedures refusals on the basis of the exception relating to commercial interests can, for example, be substantiated by the risk that disclosure of technical and/or detailed financial information would be used by competitors in future similar procedures, to the detriment of the natural or legal persons concerned.

The evaluation report is in principle partially accessible to the public after the end of the procurement or grants award procedure, i.e. after contract or grant agreement signature. The scores, ranking, application of the ranking formula and the global price should be accessible. Only the names of natural

persons and commercially sensitive information (including details on pricing) should be redacted. Therefore, special attention should be given when drafting the report, so as to avoid including, as far as possible, any sensitive commercial information, the disclosure of which may be detrimental to the legitimate commercial interests of tenderers or candidates while at the same time ensuring the quality of the evaluation report that has to give a clear overview of the merits and weaknesses of the different proposals or tenders.

The names of legal persons that participated in a call for tenders or a call for proposals can be protected if the rejection was based on a comparison of their merits, as the divulgation of these names could undermine the reputation of the company or organisation concerned (but this has to follow from the specific contents of the documents concerned).

If, on the other hand, the rejection was based only on fulfilling (or not) purely objective criteria (for instance, eligibility criteria such as the absence of a European character of an association), the respective parts of the documents cannot be protected under Article 4(2), first indent of Regulation 1049/2001.

Moreover, the exception relating to commercial interests is an expression of the Commission's obligation of professional secrecy which flows from Article 339 TFEU. This means that the Commission must take all necessary precautions to ensure that the protection of information about undertakings covered by professional secrecy and other confidential information is not undermined. It applies in particular to (...) information about undertakings, their business relations or their cost components.

4.2. EXCEPTION 'PRIVACY AND THE INTEGRITY OF THE INDIVIDUAL'

Article 4(1)(b) of Regulation 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.

The above-mentioned exception must be invoked in the context of procurement and grant award procedures if public disclosure of personal data appearing in the procurement and grant-related documents were to undermine the privacy and integrity of natural persons. This flows from the wording of Article 4(1)(b), which refers explicitly to the applicable data protection rules which become applicable.

Indeed, where a request based on Regulation No 1049/2001 seeks to obtain access to personal data included in documents held by the Commission, the provisions of Data Protection Regulation No 45/2001¹⁶ become applicable in their entirety¹⁷.

This means that the applicant for access to documents must substantiate a need to obtain the personal data concerned, based on express and legitimate justifications or convincing arguments¹⁸. If this condition is fulfilled¹⁹, then the institution examines if the transfer of the requested personal data would prejudice the legitimate rights of the individuals concerned.

These conditions are cumulative. However, the applicant has to first prove the necessity of the transfer. If it is demonstrated to be necessary, it is then for the institution to determine whether there is

¹⁶ [Regulation \(EC\) No 45/2001 of 18 December 2000 on the protection of individuals with regard to processing of personal data by the Community institutions and bodies and on the free movement of such data \(OJ L 8 of 12.01.2001, p.1\).](#)

¹⁷ [Case C-28/08 P *Bavarian Lager*, ECR 2010 page I-06055 at para. 57 and 59-64.](#)

¹⁸ *Idem*, para. 78.

¹⁹ Judgment of the Court of Justice of 2 October 2014 in case [C-127/13, *Strack vs Commission*](#), para. 108.

no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access²⁰.

A general reference to the principle of transparency is often not sufficient to substantiate a need to obtain the personal data concerned²¹. Instead, there should be concrete reasons invoked in order to justify the proportionality of the transfer and to consider that the transfer is the most appropriate and proportionate measure for attaining the aim put forward by the applicant²².

The privacy and integrity of natural persons may also be at stake where the document requested contains names and/or other personal data of grant applicants, candidates, tenderers or other individuals (e.g. CVs, email addresses, etc.). In such cases, the names and CVs concerned must be redacted on the basis of the exception of Article 4(1)(b), unless the two above-mentioned conditions (substantiation of a need and no prejudice to the individuals' legitimate rights) are fulfilled. In practice, there will be partial access to the rest of the document. The same risks exist for the names of firms only in so far as the official title of the firm identifies one or more natural persons²³.

4.3. 'DECISION-MAKING PROCESS' EXCEPTION

Article 4(3), first subparagraph of Regulation No 1049/2001 provides 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 (...)*.

Article 4(3), second subparagraph of Regulation No 1049/2001 provides that *[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultation 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 (...)*.

An exception to the right of access may have to be invoked in order to protect the institution's decision-making process from serious harm (Article 4(3), first subparagraph of Regulation No 1049/2001 for ongoing public procurement or grant award procedures, or Article 4(3), second subparagraph for closed procedures).

In case of ongoing procurement or grant award procedures, access to the procurement and grant award documents must be refused if their disclosure would seriously affect the ongoing decision-making process because of likely undue external pressure. This will normally be the case for documents reflecting opinions of the evaluation committee, of external experts as well as for the tenders and grant proposals submitted to the Commission.

Individual evaluation reports by experts or members of the evaluation committee relate to a very early step within an evaluation process resulting in a recommendation for award and, subsequently, the adoption of the final decision regarding the award/rejection of a grant or contract and can be protected according to Article 4(3) first subparagraph of Regulation No 1049/2001. They can also contain personal data according to Regulation No 45/2001, if a natural person is or could be identified through those data.

²⁰ Judgment of the Court of Justice of 16 July 2015 in case [C-615/13 P, ClientEarth vs EFSA](#), para. 47.

²¹ Judgment of the Court of Justice of 2 October 2014 in case [C-127/13, Strack vs Commission](#), para. 108.

²² See Judgment of the Court of Justice 16 July 2015 in case [C-615/13 P, ClientEarth vs EFSA](#), para 53.

²³ Judgment of the Court (Grand Chamber) of 9 November 2010, [Volker und Markus Schecke GbR \(C-92/09\)](#) and [Hartmut Eifert \(C-93/09\)](#) vs Land Hessen, para. 53.

In principle, individual comments or evaluation grids filled out by the individual members of an evaluation committee are not attached to the corresponding evaluation report because the evaluation is an opinion of the committee as such, and not a sum of the opinions of its separate members. Concerning the individual assessment sheets drawn up by the members of the evaluation committee, the General Court has stated that the public interest in transparency cannot be considered superior to the principle of independence of the members of the evaluation committee and cannot, therefore, justify disclosure of the evaluation grids²⁴.

In specific cases (e.g. under certain grant programmes or in some IT systems), the individual assessment sheets are registered and stored either with the evaluation report or separately. Individual evaluations which are stored in an IT Tool, for example in the Horizon 2020 system, are, in principle, not accessible (protection of the decision making process and if applicable, protection of privacy and integrity of the individual).

Also in case of closed procedures, opinions for internal use expressed as part of deliberations and preliminary consultations, such as the individual opinions of the evaluation committee members can be protected under Article 4(3) (in that case: second subparagraph) of Regulation No 1049/2001. As a precondition, it must be reasonably foreseeable that their disclosure would seriously undermine the decision-making process, even after the decision is taken.

4.4. OVERRIDING PUBLIC INTEREST

The exceptions on the grounds of ‘commercial interests’ (Article 4(2), first indent of Regulation No 1049/2001) and ‘decision-making process’ (Article 4(3) of Regulation No 1049/2001) are not absolute. They apply only ‘unless there is an overriding public interest in disclosure’. This implies that, even where the conditions for applying one of the exceptions have been fulfilled, the documents to which access has been requested must nonetheless be disclosed where this is justified by an overriding public interest.

In this connection, it is necessary to check, for each document involved, whether:

- (1) Disclosure is in the public interest or, rather, in the interest of a private party;
- (2) Where there is a public interest, it is sufficiently important to override the interest which the exception in question is designed to protect (e.g. the protection of the commercial interests of the natural and legal persons concerned or the decision-making process).

Where procurement and grant award procedures are concerned, requests for access are generally submitted by one of the unsuccessful tenderers or grant applicants in an attempt to obtain information to understand why their tender or grant application was not selected. In such cases, the interest at stake is clearly private and cannot under any circumstances constitute an overriding public interest that would justify the disclosure of the document in question.

In practice, it will be difficult to substantiate an overriding public interest which is sufficiently important to override the interest(s) protected, as the Financial Regulation provides the necessary procedural guarantees to ensure that the procurement and grant award procedures take place under the fairest conditions possible.

A mere general interest of the public in obtaining the document concerned or in assessing whether the procedure was conducted fairly will normally not constitute in itself a public interest that can override the need for protection of the legitimate commercial interests of the natural and legal persons

²⁴ Judgment of the General Court of 22 May 2012 in case [T-6/10, Sviluppo Globale vs Commission](#), para. 88.

concerned or the Commission's decision-making process²⁵. Nor can an applicant's personal interest in obtaining access to the document concerned (for instance, to finalise a master's thesis, initiate court proceedings or verify whether his/her tender or grant application was rightfully rejected) constitute an overriding public interest.

Please note that the exception of 4(1)(b) of Regulation No 1049/2001 (exception 'privacy and the integrity of the individual') cannot be set aside by an overriding public interest.

²⁵ Judgment of the Court of Justice of 21 September 2010 in case [C-514/07, Sweden and Others vs API and Commission](#) , para. 156-159.

ANNEX 1

ACCESS TO DOCUMENTS (REG. 1049/2001) RELATED TO PROCUREMENT PROCEDURES

The listed documents do not necessarily appear in all procedures.

OP = Open Procedure

RP = Restricted Procedure (1st step: candidates send a request to participate; 2nd step: invited candidates submit tenders)

CPN: Competitive Procedure with Negotiation (1st step: candidates send a request to participate; 2nd step: invited candidates submit tenders)

NP = Negotiated Procedure (low or middle value or without publication of contract notice under Article 134 RAP)

The proposed practices listed below can help the services in their analysis. It is imperative to carry out a concrete assessment of the document(s) on a case-by-case basis by reference to the guidance note. Reading the table is not sufficient in order to assess if a document should or should not be disclosed.

NB: under the ‘privacy and integrity’ exception, the applicant for access to documents must justify the necessity of transfer of personal data in accordance with Regulation No 45/2001

Document requested	Timing	Usual administrative practices
Launch of the procurement procedure		
Pre-information notice	From the moment of publication	Accessible (document published)
Justification for using a NP	After the procedure is launched (the decision to use a NP is already taken)	Accessible
Contract notice	From the moment of publication	Accessible (document published)
Submission and opening of requests to participate		
List of candidates who submitted a request to participate in a RP or CPN or NP	During procedure/after submission of requests to participate (1 st step for RP or CNP)	Not accessible (decision making process exception), as disclosure, at this stage, may encourage collusion of candidates
	After deadline for receipt of tenders has elapsed (end of 2 nd step) or cancellation of the procedure	Accessible except for the names of natural persons or names of firms identifying one or more natural persons (privacy exception)
Requests to participate	During procedure/after contract signature or cancellation of the procedure	Not accessible in principle (privacy and/or commercial interests exceptions);
Written record of the opening of requests to participate (1 st step of RP or CPN or NP)	After deadline for receipt of tenders has elapsed (end of 2 nd step)	<u>Partially</u> accessible: the names of individuals and of the members of the opening committee are normally redacted (privacy exception or decision-making process)

Written record of the evaluation of requests to participate (1 st step RP or CPN or NP)	After contract signature or cancellation of the procedure	<u>Partially</u> accessible: the names of individuals and the names and individual opinions of the evaluators (privacy exception or decision-making process exception), as well as passages whose disclosure would harm candidates' commercial interests (commercial interests exception), are normally redacted
Procurement documents (notice, invitation to tender, tender specifications and draft contract)	As soon as the procedure is launched	OP, RP, CPN, NP: Procurement documents are accessible after redaction of personal data (privacy exception) except for the parts thereof that are confidential, in particular for tender specifications in RP or NP, if the choice of the procedure reflects a specific concern and a need for confidentiality (for example for security reasons). Confidential parts of the procurement documents are not accessible according to Art. 153(1) RAP
Additional information, questions & answers	As soon as the information is published	OP, RP, CPN, NP: Accessible (documents published) (after redaction of personal data)
	As soon as the information has been made available to candidates or tenderers	All procurement documents are accessible except for the confidential parts according to Art. 153(1) RAP (see above)
Submission and opening of tenders		
Received tenders		Normally not accessible (commercial interests exception)
Decision appointing the committees for the opening and evaluation of tenders	After contract signature or cancellation of the procedure	<u>Partially</u> accessible: the names of members of the committees (privacy exception and/ or decision-making process exception) are normally redacted
Written record of the opening of tenders (OP + 2 nd step RP, CPN, NP)	As soon as the written record is drawn-up	<u>Partially</u> accessible: the names of individuals, members of the opening committee and representatives of the tenderers (privacy exception or decision-making process exception) are normally redacted

Evaluation of tenders		
Declarations on the absence of conflicts of interest and confidentiality signed by the evaluators	As soon as they are drawn-up	<u>Partially</u> accessible: the names of individuals and members of the opening committee (privacy exception or decision-making process exception) are normally redacted
Clarifications on supporting documents or correction of clerical errors requested from tenderers during evaluation and their replies	After contract signature or cancellation of the procedure	<u>Partially</u> accessible: information covered by the commercial interests and privacy exceptions are normally redacted
Evaluation report	After contract signature or cancellation of the procedure	<p><u>Partially</u> accessible: the names of individuals and the names of the evaluators (privacy exception or decision-making process exception) and passages whose disclosure would harm tenderers' commercial interests including specific prices (commercial interests exception) are in principle redacted.</p> <p><i>Please note that in the restricted procedures there are two evaluation reports relating to two successive stages of the procedure. <u>Privileged access</u> rights provided for in Article 113(3) FR is limited to tenderers. Therefore, candidates that are not selected in stage 1 do not have the privileged access right to ask for information related to stage 2.</i></p> <p>During the standstill period (starting by the communication of the result of the selection to participants and ending by the signature of the contract) candidates often request the evaluation report and/or the offer of the winner. Until the contract is signed, the exception of the ongoing decision-making process applies for access-to-documents requests under Regulation No 1049/2001. <i>During the standstill period, such requests should be dealt with under 113(3) of the FR for the interested parties who have a <u>privileged</u> access.</i></p>

Individual evaluation sheets		Not accessible in principle: personal notes or evaluation sheets (scores and comments) drafted or filled in by individual members of the evaluation committee (decision making process exception/ privacy exception).
Expertise report from external expert to contribute to evaluation report		<u>Partially</u> accessible: the names of individuals and the names of the evaluators (privacy exception or decision-making process exception) and passages whose disclosure would harm tenderers' commercial interests including specific prices (commercial interests exception) are normally redacted
Award and signature of contract or cancellation of procedure		
Award decision	After adoption of the decision	Accessible
Notification of contract award to the successful tenderer	After signature of the contract	<u>Partially</u> accessible: the names of individuals and the names of the evaluators (privacy exception or decision-making process exception) and passages whose disclosure would harm tenderers' commercial interests including specific prices (commercial interests exception) are normally redacted
Contract and its annexes (tender specifications, tender...)		<p>The contract is accessible once it has been signed with the exception of the tender submitted by the tenderer which is annexed to the contract and which is normally withheld (commercial interests exception), even after signature of the contract.</p> <p>The tender specifications are normally public. Exceptionally, if confidential information pertaining to the authority that issues a call for tenders is given only to tenderers that meet certain criteria in RP or NP, this information is not publicly disclosed (example: plan of a Commission building in the context of a call for tenders for security services).</p>
Notifications of award decision to unsuccessful tenderers	After contract signature or cancellation of the procedure	<u>Partially</u> accessible: the names of individuals (privacy exception) and passages where disclosure would harm tenderers' commercial interests (commercial interests exception) are normally redacted
Decision to cancel the procedure	As soon as the decision is taken	Accessible

Notification to tenderers of cancellation of procedure	As soon as the notification letters are sent out	<u>Partially</u> accessible: the names of individuals (privacy exception) and those parts falling under the commercial interests and/or decision-making process exceptions are normally redacted
Award or cancellation notice	From publication	Accessible (document published)

ANNEX 2

ACCESS TO DOCUMENTS (REG. 1049/2001) FOR GRANT AWARD PROCEDURES

The proposed practices listed below can help the services in their analysis. It is imperative to carry out a concrete assessment of the document(s) on a case-by-case basis by reference to the guidance note. Reading the table is not sufficient in order to assess if a document should or should not be disclosed.

NB: under the ‘privacy and integrity’ exception, the applicant for access to documents must justify the necessity of transfer of personal data in accordance with Regulation No 45/2001.

Document requested	Timing	Usual administrative practices
Publication of call for proposals		
Call for proposals	From the moment of publication	Accessible (document published)
Call for proposals file	From the moment of publication or once it is made available to applicants	Accessible (document published)
Additional information during the procedure	As soon as the additional information is published	Accessible (information published)
Submission of grant applications		
Grant applications		Not accessible (commercial interests and privacy exceptions), even after finalisation of the grant award procedure
Evaluation of grant applications		
Declarations on the absence of conflict of interest signed by the members of the evaluation committee	As soon as they are drawn-up	<u>Partially</u> accessible: names of members of the committee (privacy exception) or parts falling under the decision-making process exception are normally redacted
Document on evaluation methodology, where applicable	If published with the call for proposals	Accessible immediately
	After taking the award/rejection decision on concerned applications (if not published)	Accessible
Clarifications requested from applicants during evaluation and their replies	After signature of grant agreement or after cancellation of the procedure	<u>Partially</u> accessible: information covered by the commercial interests and privacy exceptions is normally redacted
Written record of evaluation of grant applications	After signature of grant agreement or after cancellation of the procedure	<u>Partially</u> accessible: the names of individuals, the names of external experts and members of the evaluation committee (privacy exception), and passages whose disclosure would harm grant applicants’ commercial interests (commercial interests exception)

		are normally redacted
Individual evaluation sheets		Not accessible in principle: (privacy exception, commercial interests and/or decision-making process exceptions) Individual evaluations which are stored in an IT Tool , for example in the Horizon 2020 system, are, in principle, not accessible (protection of privacy and integrity of the individual and of the decision making process)
Award of grants and signature of grant agreements		
Award/rejection decisions	When the decision is signed	Award and rejection decisions are <u>partially</u> accessible (protection of commercial interests, of privacy and integrity of the individual) The names of unsuccessful applicants (or candidates to expert groups) can under certain conditions be protected (commercial interests exception)
Notification of the award/rejection decision to the applicants	As soon as notification letters are sent out	<u>Partially</u> accessible: the names of individuals, the names of external experts and members of the evaluation committee (privacy exception), and passages whose disclosure would harm grant applicants' commercial interests (commercial interests exception) are normally redacted
Grant agreement and its annexes	When the agreement is signed	<u>Partially</u> accessible: the grant application and personal data (commercial interests exception and/or privacy exception) are normally withheld.