



**EUROPEAN COMMISSION**  
Neighbourhood and Enlargement Negotiations

The Director-General

Brussels, **14 SEP. 2017**

**By registered letter:**

Mr. Vincent van Gerven Oei  
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Albania

**Advance copy by email:**

[vincent@exit.al](mailto:vincent@exit.al)

**Subject: Your application for access to documents Ref. GestDem No 2017/4518**

Dear Mr. van Gerven Oei,

I refer to your email dated 31 July 2017 addressed to the European External Action Service, in which you make a request for documents:

*"In relation to the procurement of:*

*1. AL-Tirana: construction of the sewerage systems in Vlora, Ksamil, Kavaja and Shengjin, Albania 2012/S 130-214715, publication reference EuropeAid/130985/C/WKS/AL awarded to Friulana Bitumi SrL;*

*2. Design and Tender Documents for Sewerage Systems for Vlora and Ksamil and Works Supervision for Vlora, Ksamil, Kavaja, Lezha/Shengjin, publication reference EuropeAid/129600/C/SER/AL awarded to IRD Engineering;*

*- Final evaluation score of all the companies that filed bids and the decision to award it to the winning company;*

*- Any interim progress report on the state of the work;*

*- Final project acceptance forms."*

Your request has been reattributed to Directorate-General Neighbourhood and Enlargement Negotiations. Acknowledgement of receipt and holding response were sent to you on 2 August 2017 and 22 August 2017.

The documents listed in the Annex have been identified as falling within the scope of your application.

Having examined these documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission

documents<sup>1</sup>, I have come to the conclusion that they can only be partially disclosed, based on Article 4(1)b (protection of personal data) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

The justifications are as follows:

### **Protection of personal data**

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."*

The documents identified contain personal data of third-parties' staff and Commission staff not forming part of senior management<sup>2</sup>.

The applicable legislation in this field is Regulation (EC) No 45/2001 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<sup>3</sup>. When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable. According to Article 8(b) of this Regulation, *"personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced"*.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. If you wish to receive these personal data, we invite you to provide us with arguments explaining your need for such information and demonstrating that there would be no adverse effects to the legitimate rights of the persons whose data should be disclosed.

The exception set out in Article 4 (1) (b) of Regulation (EC) No 1049/2001 is not subject to a public interest test.

### **Protection of the commercial interests and know-how**

Article 4(2), first indent, of Regulation (EC) No 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"*.

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<sup>1</sup> Official Journal L 145 of 31.5.2001, p. 43.

<sup>2</sup> Access is granted to the names and functions of Commissioners and their cabinet members and staff in senior management positions. This access is exceptionally extended to the names and functions of staff not occupying any senior management position, if the need thereto has been clearly substantiated and there are no reasons to assume that the legitimate rights of the individuals concerned might be prejudiced.

<sup>3</sup> Official Journal L 8 of 12.01.2001, p.1



The withheld parts of the evaluation report contain sensitive commercial information from the applications submitted by the grant applicants, details on the requested contribution, the reasons for their elimination, and the strengths and weaknesses of their applications. These parts of the documents have to be considered as elements reflecting the specific know-how and experience belonging to the applicants. The public disclosure of such information would undermine the "commercial interests" of these entities

In this context, I would also like to bring to your attention case T-439/08, *Agapiou Josephides v Commission*<sup>4</sup>, where the General Court ruled that *"methodology and expertise [...] highlighted as part of the [...] application, [...] relate to the specific know-how [...] and contribute to the uniqueness and attractiveness of applications in the context of calls for proposals such as that at issue, which was intended to select one or more applications, following in particular a comparative review of proposed projects. Thus, particularly given the competitive environment in which [the project promoters] operate, it is necessary to consider that the information in question is confidential"*.

Furthermore, the General Court in its Judgement of 29 January 2013 in case T-339/10, *Cosepuri v EFSA*<sup>5</sup>, ruled that *"[i]t follows from all the foregoing that EFSA did not err in considering, in essence, that there was a general presumption that access to the bids submitted by the other tenderers would, in principle, undermine the interest protected. The applicant has not put forward any evidence to justify the conclusion that, in the present case, that presumption did not apply to the documents disclosure of which was requested."*

Finally, the exception of Article 4(2), first indent, of Regulation (EC) No 1049/2001 has to be read in light of Article 339 of the Treaty on the Functioning of the European Union, which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

In consequence, there is a real and non-hypothetical risk that public access to the abovementioned information would undermine the "commercial interests", including intellectual property, of the applicants.

To the extent that access is refused on the basis of Article 4 (2), first indent, of Regulation (EC) No 1049/2001, the exception 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 provided by virtue of Article 4 (2), first indent, of Regulation (EC) No 1049/2001.

In your application you do not invoke any interest except your own interest which is of a private nature. For these reasons, you have not established arguments that would show the existence of an overriding public interest in disclosure at this point in time. Neither has the Commission identified such an overriding public interest, based on the elements in its

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<sup>4</sup> Paragraphs 127 and 128.

<sup>5</sup> Paragraph 101.

possession. For all these reasons, I do not see in the case at hand a public interest within the meaning of Regulation (EC) No 1049/2001, that is to say objective and general in nature and which is not indistinguishable from individual or private interests that would outweigh the public interest in protecting the commercial interests of the applicants.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review its position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-5  
BERL 5/327  
B-1049 Brussels

or by email to:  
[sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, sweeping initial 'C' followed by several loops and a long horizontal stroke at the end.

Christian Danielsson