



European Research Council
Executive Agency

Established by the European Commission

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Sent by: Registered Letter
Advanced copy via e-mail

Subject: Confirmatory request for access to documents concerning all information submitted by applicants since 2014 for ERC grants (ref. Ares(2018)103090)

Dear Mr Rolle,

I hereby refer to your e-mail dated 26 December 2017, registered with the above mentioned reference number, by which you request, in accordance with Regulation (EU) N° 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (herein under referred to as the public access to documents Regulation), the review of the ERCEA's reply of 23 November 2017 (ref. N° Ares (2017)5749208) to your initial request for access to documents of 27 August 2017 (ref. N° Ares(2017)5386141).

1. Scope of the Request

In your initial demand, you requested access to: "All information submitted by applicants since 2014 for ERC grants (starting, consolidator, advanced, proof of concept, synergy), in particular the descriptions of the proposals themselves as intended for the peer reviewer panel, independently of whether the application was successful or not, with any information that cannot be given due to legal requirements overriding the freedom of information request (e.g. privacy laws) blanked out."

The Agency identified around 35 000 documents, consisting of applications that have been submitted to the ERC since 2014, according to the latest data; and analysed your request in light of the applicable legislation. The conclusion of this analysis was that your request had to be refused on the basis of Article 4(1)(b) and (2) of the public access to documents Regulation, which provides for exceptions to the right of access to documents for the reasons of protection of the privacy and integrity of the individuals; and of protection of commercial interests; respectively.

¹ OJ L 145, 31.5.2001, pp. 43-48.

With your e-mail dated 26 December 2017, you asked for a review of the Agency's position because you consider that your request was misconstrued. You base your request on the fact that the last part of your initial demand ("*with any information that cannot be given due to legal requirements overriding the freedom of information request (e.g. privacy laws) blanked out.*") was not quoted in our reply. You also clarify that in the above-mentioned sentence you were referring only to "*(parts of) documents that can be made legally accessible, not for e.g. telephone numbers or email addresses of applicants*".

In addition, in the same e-mail you are asking whether the Agency's response "*is meant to imply that indeed all parts of ERC grant applications that can be made legally public have been made public*". You followed-up by asking, since your request also included data about failed applications, "*how is it that the ERC does not publish abstracts about failed applications (since this data would presumably of interest to the public when e.g. 2 similar applications were submitted, but one was chosen by the ERC over the other)*". You also pointed out your expectation that a response to your request "*would include at least the abstracts of failed applications, since by analogy it should be possible to make these legally available.*"

Finally, you offered to restrict the scope of your request more explicitly by creating a follow-up request.

2. Assessment and Conclusion

Regarding your assumption that the ERCEA's answer of 23 November 2017 was misconstrued because part of the sentence of your initial request was not quoted, I would like to assure you that it was taken into duly consideration for the assessment of your request.

In conformity with Article 2 of the Regulation (EC) N° 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 data² (hereafter the data protection Regulation), personal data do not only refer to names, telephone numbers or email addresses of individuals, but to any information relating to an identified or identifiable natural person.

According to the above mentioned Article 2, an identifiable person is "*one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity*". This implies that, in the context of ERC applications, the descriptions of the proposals drafted by the applicants may lead to their identification if, for instance, they are among the few experts in the world in a specific research field. Therefore, simply blanking out the names and contact details from all applications is not a solution.

Furthermore, as mentioned in our first reply, the ERCEA is bound to ensure the confidentiality of all the applications it receives in the context of Horizon 2020, principle which is foreseen in the ERC rules for submission of proposals and the related evaluation, selection and award procedures relevant to the specific programme of Horizon 2020, in its different versions since the beginning of the programme in 2014³. As a consequence the

² OJ L 8, 12.01.2001, p. 1.

³ - Commission Decision C(2017) 4750, 12.7.2017, section 1 (Introduction)
- Commission Decision C(2015) 4975, 23.7.2015, section 1 (Introduction)
- Commission Decision C(2014) 2454, 15.4.2014, section 1 (Introduction)

applicants have a legitimate expectation of confidentiality when they submit their proposals, the breach of which could cause significant damages to the reputation of both the ERCEA and the applicants themselves.

However, the ERC publishes summaries of the funded projects on its website, as part of the European Commission's commitment to providing the general public with information on EU-funded research projects and project results. This is done in compliance with the transparency and accountability principles, as EU citizens have the right to know which research projects are funded with EU funds. Such obligation does not apply to the unsuccessful proposals, so long as they do not receive any EU funds.

The above-mentioned summaries are based on the abstracts that applicants submit themselves, as parts of their applications. The grant agreement signed between the Agency and the grant beneficiary(ies) provides for the publication of those summaries⁴. However, no such similar provision exists for the proposals which have not been selected for ERC funding.

Regarding the access to the overall content of ERC applications, funded and non-funded, due to the large amount of applications received since 2014 (around 35.000, as mentioned before), the Agency cannot proceed to the revision of each of these applications and ask all Principal Investigators and applicant legal entities whether they would agree to their full or partial disclosure. This would imply an excessive workload for Agency's services, contrary to the principle of proportionality as confirmed by several rulings of the Court of Justice⁵.

On the basis of the above considerations, the assessment of the possible application of the exception to the right of access to EU documents due to the privacy and the integrity of the individual, provided in **Article 4(1)(b) of the public access to documents Regulation**⁶, for the purpose of your request, becomes mandatory.

This exception refers to the above mentioned data protection Regulation, which fully applies to requests for access to documents containing personal data⁷. According to its Article 8(b), 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.

These two conditions, which are cumulative, have not been established in the case of your request.

⁴ See Article 38.2.1 of H2020 ERC Multi-Beneficiary Model Grant Agreement (MGA-Multi), version 5.0, of 18 October 2017: http://ec.europa.eu/research/participants/data/ref/h2020/mga/erc/h2020-mga-erc-multi_en.pdf
This provision exists in the previous versions of the ERC MGA-Multi since the beginning of the H2020 programme.

⁵ For reference, please see the recent Judgement of the General Court (Fourth Chamber) of 14 December 2017 *Evropaiki Dynamiki - Proigmeana Systimata Tilepikoinonion Pliroforikis Kai Tilematikis AE v European Parliament*, T-136/15, paras 79-103.

⁶ Article 4(1): *"The institutions shall refuse access to a document where disclosure would undermine the protection of:*
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

⁷ Judgment of the European Court of Justice of 29 June 2010 in Case C-28/08 P, *Commission v Bavarian Lager*.

Furthermore, personal data may be transferred to a third party on the basis of the public access to documents Regulation not only where the transfer fulfils the conditions laid down in Article 8(b) of Regulation 45/2000, but also if it constitutes lawful processing in accordance with the requirements of Article 5 of the same Regulation⁸.

Consequently, the exception provided in Art. 4(1)(b) for reasons of privacy and integrity of the individual of the public access to documents Regulation fully applies to your request. In particular, with regard to the abstracts of the unsuccessful proposals, this exception applies in so far as these parts of the applications may also include in some cases personal data or information which may lead to indirectly identify the applicant, while the unsuccessful applicants would have no possibility to request their modification.

The second exception to the right to access invoked in our previous reply is provided in the **first indent of Article 4(2) of the public access to documents Regulation**⁹, which refers to the protection of commercial interests of applicants. This exception foresees that the EU 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 on the content of their applications (e.g., copyright).

This approach is in line with Article 339 of the Treaty on the Functioning for the European Union (TFEU), 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.

Indeed, the ERC applicants may have legitimate commercial interests on the methodologies used for their research work which are described in their applications, as well as on their intended results, information which is sent in confidence and must be safeguarded by the Agency. Therefore, we are of the opinion that the disclosure of applications to ERC Calls would seriously undermine the commercial interests of the applicants who submitted them, independently of whether they obtained an ERC Grant or not, as it would affect their intellectual property rights and know-how.

In the case of the ERC funded projects, such disclosure would also give potential applicants the possibility to copy from those successful applications, thereby giving them an unfair advantage in future calls and possibly harming the commercial interests of the ERC grantees.

This is however also the case for unsuccessful applications, including the abstracts. Indeed, these applicants may equally have commercial interests, or intend to reapply to future calls, including other EU programmes or national schemes. Furthermore, the risk of plagiarism of the research idea would apply also in this case, including the description of the project as provided in the abstracts of unsuccessful proposals.

The Article 4(2) exception can be overruled whenever there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the

⁸ Judgment of the Court of Justice of 2 October 2014 in case C-127/13, *Strack v Commission*.

⁹ "Article 4(2), first indent: *"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,"*

harm caused by disclosure. In the present case, you have not submitted any argument that would justify the existence of such an overriding public interest in the sense of the public access to documents Regulation. In particular, as regards the interest that the public would allegedly have in the abstracts of failed applications (*"e.g. 2 similar applications were submitted, but one was chosen by the ERC over the other"*), it should be noted that the abstracts are not evaluated as such, and they do not include sufficiently detailed information that would enable a meaningful comparison between similar applications.

As a result of all the above, I must inform that our response to your confirmatory request is that your request for access to the applications submitted for ERC grants since 2014, has to be refused on the basis of Article 4(1)(b) and (2)first indent of the public access to documents Regulation.

Pursuant to article 4(6) of the public access to documents Regulation, I have also assessed whether partial access could be granted to the documents requested. However, for the reasons already explained, no meaningful partial access is possible without undermining the interests described above and taking into account the principle of proportionality.

The same consideration applies to your offer to restrict the scope of your request, as the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

3. Means of Redress

I would like draw your attention to the following means of redress that are available against this decision as far as it contains a refusal to give public access under Regulation 1049/2001. You may, under the conditions of Article 263 of the Treaty on the Functioning of the European Union (TFEU) bring proceedings before the General Court or under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Pablo Amor

Director

