



**Second meeting of 2019 of the access to documents legal coordinators of the
Research & Innovation family**

Monday, 25 November 2019

15:00 – 17:00, ORBN 06/ [REDACTED]

MINUTES

Participants: [REDACTED] (SESAR JU), [REDACTED] (IMI2 JU),
[REDACTED] (ERCEA), [REDACTED] (ERCEA),
(REA), [REDACTED] (REA), [REDACTED] (CNECT),
[REDACTED] (CNECT), [REDACTED] (MOVE),
(EASME), [REDACTED] (EAC), [REDACTED] (R&I),
(R&I), [REDACTED] (R&I), [REDACTED] (R&I),
(R&I).

**1. Initial decision: Practice on disclosure of ethical screening/clearance documents-
GestDem 2019/5027**

In October 2019, the CLSS handled an application for access to the report of ethical screening of six Horizon 2020 projects - the "Ethics Summary Report". According to CORDA, the responsible services to handle this request for access to documents were DG HOME, SESAR, INEA and REA. Although initially we agreed that DG RTD would coordinate and ensure a consistent reply for all concerned services, after analysis we came to the conclusion that a specific assessment of each case-project should be conducted due to the fact that the content of these reports may vary from one to another.

The general guidance of the guidelines for ethics reports points at a partial refusal. However, after examination of each document separately by the responsible service, different approaches were finally proposed (full access, partial access and refusal) with reference, where considered necessary, to the exceptions usually applied for this type of documents i.e. the exceptions for the protection of the privacy and integrity of the individual and for the protection of commercial interests. Even in some cases and within the same RAO. For instance, DG HOME granted full access to one report and partial to another.

**2. Confirmatory decision by SG: Decision-making process and fresh review of the
document by SG - GestDem 2019/3447**

In June 2019 the CLSS handled an application for access to the draft Research Fund for Coal & Steel Monitoring & Assessment Report covering the period 2011-2017. Following the operational unit's contribution and legal assessment, CLSS refused access

to the draft report under the exception for the protection of the decision-making process laid down in Article 4(3), second paragraph of the Regulation. This document was being drafted by a group of independent experts (High Level Expert Group) and a decision on the final version had not been taken yet. CLSS considered that a disclosure of any draft versions of the report would prejudice the Commission's margin of maneuver, and, thus, undermine the integrity of the decision-making process of the Commission concerning the monitoring and assessment of the Research Fund for Coal and Steel. In addition, the report is expected to be published in 2020, in line with Article 38 of the Council Decision 2008/376/EC.

The initial reply was based on the version of the draft report of June 2019. Since then, the experts have been working remotely, discussing and revising parts of the RFCS Monitoring and Assessment report. Chapters of the report were available, but at the time of the initial reply there was not a consolidated draft version as the one shared with SG after the submission of the confirmatory application. It is considered that this is important, in order to clarify at what moment the individual examination of the document as an existing one is possible. For the handling of the confirmatory application, CLSS has had several exchanges with the SG, namely on the concept of the existing document and the strict application of the decision-making exception.

In the **draft** confirmatory decision, SG confirms that:

- the exception under Article 4(3), second paragraph relates to any decision (referring to both legislative and non-legislative documents, including documents within the administrative activity of the Commission) which has not yet been taken by the Commission
- the arguments of the applicant that the report requested refers to the coal sector – a sector which is ‘affecting people’s health and livelihoods’, are general considerations and not specific grounds showing to what extent a disclosure of a draft report, the final version of which will be published in 2020, would serve the general interest.
- when assessing a confirmatory application, **the Secretariat-General conducts a fresh review of the reply** given by the Directorate-General concerned at the initial stage and **takes into account the most recent version of the draft document requested.**
- the protection of the decision-making exception is applicable in the case at hand. However, in order to rely on this exception, following a concrete and individual examination of the requested documents (and, in the given case, following an examination of each chapter of the draft report), the Commission services should provide solid arguments demonstrating that public disclosure would seriously harm the decision-making process in a real and non-hypothetical way.

The CLSS will distribute the confirmatory decision once signed by SG.

3. Procedural elements

- **Access to documents vs. Request for sincere cooperation – GestDem 2019/5375**

The Access to Documents team of DG RTD received a request, addressed directly to one Unit, submitted by [REDACTED]. The requestor explained that he had been asked by the [REDACTED] Ministry of Education and Science to cooperate with the provision of documents related to a lawsuit raised at [REDACTED] Regional Court in

connection with the HORIZON 2020 proposal. For the purposes of the court proceedings and according to the request of the national court, ■ asked for “*the submitted proposal [...] and the evaluation report [...]*”. Following the standard procedure when a request is submitted by or on behalf of national authorities, we contacted the applicant requesting for clarifications as regards the legal framework under which the request should be treated, i.e. either under the principle of sincere cooperation Article 4(3) of TEU or under Regulation 1049/2001. In principle, all requests submitted by national authorities must be handled within the framework of sincere cooperation under Article 4(3) of TEU. However, if the Member State explicitly requests so, a request for access to documents may be treated under Regulation EC (No) 1049/2001, according to the usual procedure. The requestor replied confirming that he wished his request to be treated as a request for access to documents within the framework of Regulation 1049/2001. Accordingly, ■ application was registered on the same day under reference GestDem 2019/5375.

- **SG Guidance on document registration with respect to e-mails**

In September 2019 DG RTD received a request for access to documents related to all the communication originating from and targeting the DG with respect to a certain consortium.

After the initial analysis and consultation of the operational units responsible, we prepared a “devoid of purpose” answer as according to the procedure, due to the fact that no documents were found in our registries. At that time, we have been contacted by another DG that received the same type of request, confirming the existence of certain documents, among which emails originating from DG RTD, unregistered there.

We conducted a further analysis of the documents received from the other DG and we reached the conclusion that they represented short-lived emails that were sent in order to set up a date and a location for a lunch with the respective consortium. These emails containing short-lived information were automatically deleted from the Inbox of the operational unit after a period of 6 months. These emails were not registered because they did not fulfill the conditions necessary for a document to be registered, in accordance with the official guidelines for Document Management and Access to Documents ([Ares\(2019\)4833796](#)).

We have also consulted the SG on the matter, as this situation could imply that DG RTD is not in their possession in order to circumvent the application of Regulation (EC) No 1049/2001.

We were advised to assess *in concreto* whether DG RTD did not have to register any relevant documents in the area of activity in question, and whether the unregistered documents received from the other DG should not be *a posteriori* registered.

The duty of good administration requires indeed the institution to retain documents in respect of some of its activities, however we came to the conclusion that in this particular case, the keeping and registration of these documents was not necessary – see, in this respect, the recent judgment of 20 September 2019, *Dehousse v ECJ* in case [T-433/17](#), §§54-55.

- **Reminder in case of no postal address**

To our knowledge, there is no formal guidance on this issue.

The CLSS recently had a situation where we decided to apply by analogy our practice in cases of requests for clarification. According to CLSS internal procedure, the usual time limit for the applicant to provide the requested clarification is 5 working days. In absence of reply within this deadline, we send a reminder mentioning that the application will be closed unless the applicant replies within the next 2 working days. In this reminder we confirm that the applicant will still be able to introduce a new request for access to documents on the same subject.

Therefore, we consider it would be good administrative practice to apply the same procedure in cases of requests for postal address. In our recent case we sent a reminder and the applicant replied on the same day.

- **E-mail for correspondence with the applicant, AoR of initial replies – GestDem 2019/4199, 2019/4197, 2019/3982 and 2019/4173**

Five requests were submitted by the same Applicant, through the online platform *fragdenstaat*. In one of the requests, the declared address of the applicant was in [REDACTED], but, in the remaining four, the address was in [REDACTED]. While our registered letter was received [REDACTED], the replies addressed to the [REDACTED] address were returned to us. Since it is important to be in position to prove receipt of the reply by the applicant, and given that we had not received a “read receipt” of our emails communicating the replies to the specific requests, we contacted the applicant via email, using the four different email addresses we had at our disposal, one for each request, and we asked confirmation of receipt.

- **Defining the responsible service for requests for documents related to the EIC:**

According to the MoU on EIC ‘*Requests for access to documents should be handled in accordance with Part I - section 2.7.2 of MoU 1*’. This section stipulates that: ‘*The Agency’s Document Management Officer is a member of the Inter-service Group of Documents Management Officers coordinated by the Secretariat-General. The Access to Documents Coordinator is a member of the Access to Documents Coordinators Network coordinated by the Secretariat-General. Following the delegation of new activities to the Agency, the requests for access to documents addressed either to the Agency or to its parent DGs may raise doubts about the origin or the location of the document. In such cases the parent DGs and the Agency consult each other and by common agreement decide whether the parent DGs or the Agency is the main author (or in case of doubts about the location of the document – which of them is in possession of it) and handle the request accordingly. If the requested document contains information that originates from both the Agency and its parent DGs, the Agency and its parent DGs by common agreement decide whether the parent DGs or the Agency is responsible to register and handle the request. In such case, the lead service handling the request will prepare the reply in cooperation with the other service.*’

4. AOB

- [Order in case *Breyer v REA*, T-158/19, EU:T:2019:791](#)

An order of the General Court of 12 November 2019, not following the exception of inadmissibility invoked by the European Commission against the action of annulment which had been introduced against the institution notwithstanding the fact that the access

to documents decision at issue had in fact been adopted by the Research Executive Agency ('REA').

The General Court held indeed that it was it is **necessary to grant the correction requested**, in substance, by the applicant in his observations on the objection of inadmissibility and **to consider that the party against whom the annulment action was brought was the REA**.

The General Court noted that **pursuant settled case law, errors in form concerning the designation of the defending party could be corrected after the introduction of the action** where its identity could be inferred without any ambiguity. The General Court considered that it was the case in this instance and **construed the heading of the decision at issue, which indicated, in capital letters, as expeditor 'European Commission Research Executive Agency' as possibly misleading** as to the distinct legal personality of the REA.