



**First meeting of 2020 of the Access to documents coordinators of the
Research & Innovation family**

Thursday, 16 July 2020

15:00 – 16:30

Cisco Webex

MINUTES

Participants: [redacted] (DEFIS), [redacted] (CLEANSKY),
[redacted] (SESAR JU), [redacted] (EASME), [redacted]
[redacted] (FCH), [redacted] (REA), [redacted] (EAC), [redacted]
[redacted] (EASME), [redacted] (SHIFT2RAIL), [redacted]
(RTD), [redacted] (RTD), [redacted] (CNECT), [redacted]
(HOME), [redacted] (CNECT), [redacted] (RTD), [redacted]
[redacted] (ERCEA), [redacted] (DEFIS), [redacted]
(INEA), [redacted] (ENER).

**1. Discussions on the updated version of the CLSS Guidelines on public access to
R&I programmes documents**

**a) Presentation of the CLSS guidelines on public access to R&I programmes
documents**

The draft of the updated version of the CLSS Guidelines on public access to R&I programmes documents was provided to the participants prior to the meeting, on 10 July. Participants and all coordinators from the R&I family were invited to provide CLSS with their input on guidelines by 30 August 2020. The guidelines are expected to be submitted for endorsement to the Common Implementation Centre Executive Committee in September. After endorsement, they will be sent to coordinators and published on GoFund.

b) Requests for public access to grant applications

In principle, the rule is that grant applications cannot be disclosed if such disclosure would undermine commercial interests and/or personal data. However, it is possible that, after the concrete assessment of requested grant applications, partial public access can be granted to them upon compulsory third party consultation.

DG RTD dealt with a request for public access to a grant application concerning an awareness-raising project. [redacted] the project officer agreed

that the grant application may be disclosed considering the subject and aim of the project. Following the concrete assessment, the document was disclosed.

c) Requests for public access to unsuccessful grant applications

Public access to the IDs, acronyms, titles, and abstracts of unsuccessful applications (proposal evaluated above threshold, but grant agreement not signed due to lack of funds) may be granted.

ERCEA and SHIFT2RAIL shared their practice: ERCEA makes publicly available the lists of successful proposals. However, it grants public access to documents concerning unsuccessful applications only after obtaining consent from third parties, according to the rules on data protection; SHIFT2RAIL publishes on its website both the list of awarded proposals and the list of proposals placed below the threshold.

2. Presentation of cases relevant for the Research & Innovation family

a) GestDem 2019/6391 (ongoing decision-making process, but not for all documents – assessment as a group of documents)

A request for public access to documents was submitted in the context of an Article 22 request against the decision of EASME, following which the applicant's proposal had been rejected.

The request referred to “*supporting documents (for example listing of winners with scores, reasoning etc)*”, which was perceived as referring to the copy of the ESR of the winning proposals, as well as to the ranking list. Among the 283 successful proposals, 270 had been signed, while the remaining ones were at the process of being finalised. According to EASME, it was possible that the number of signed Grant Agreements (GA) would be different on a daily basis, as the GAs were signed at different times. Considering the changing situation and, also, the number of documents, RTD decided that it would be more efficient to treat all the ESRs related to the specific call in the same manner until all GAs would be finalised. This way, legal certainty for the reply and equal treatment of all documents of the same type were ensured without intervening in the decision-making process. The status of the GAs was explained to the applicant and ■ was informed that he may submit a new public access to documents request after all GAs had been finalised.

b) GestDem 2019/6682 (request for access to an enforced recovery Commission Decision under Art. 299 TFEU – concrete assessment required)

DG RTD has received two requests for public access to enforced recovery Commission Decisions under Art. 299 TFEU

The first one was received in 2018, under reference GestDem 2018/1121. As there was no coherent practice until the moment of the request, DG RTD consulted the Secretariat General (SG) and the Legal Service (LS). The latter replied that the exceptions as regards the protection of the decision-making process and of the pending court proceedings could not be invoked (in line with the General Court's judgment in case T-300/10). Concerning

the exception as regards the protection of the commercial interests of the undertaking concerned, the LS considered that such interests must be weighed against the requirement for transparency of the Commission's activities. As the LS pointed out, in the case of enforced recoveries under Art. 299, the Commission adopts a final decision which has the same value as a judgment, following proceedings where the undertaking has been able to express its views. As a rule, the context of the recovery should also be taken into account, e.g. if there is an OLAF report/ national court proceedings, and the documents should be concretely assessed. Therefore, taking into consideration the above, in this case, full access was granted to the enforced recovery Commission decision.

In 2019, a second request for public access to an enforced recovery Commission Decision under Art. 299 TFEU was addressed to DG RTD, registered under reference GestDem 2019/6682. In the meantime, the SG had issued its [Guidance on access to documents concerning grants and procurements](#), where it is mentioned that the enforced recovery documents are not accessible in principle, in accordance with the exceptions as regards the protection of commercial interests and of the privacy of the individual.

Based on this guidance and on the advice DG RTD had received the year before, it consulted the SG for a second time. The latter confirmed that there is no general presumption of non-disclosure, so the relevant document would have to be concretely assessed. However, the SG underlined that the enforced recovery Commission Decision of Article 299 TFEU usually involves sensitive commercial information and personal data. This is why, their advice is, **in principle to refuse access**, without this meaning, though, that disclosure cannot be envisaged following a careful analysis of the document in question.

- c) **GestDem 2020/1030 (refusal of audit related documents when audit has not been finalised yet)** - confirmatory application still pending (last check on 22/07/2020)

Following an audit on [REDACTED] SME, where costs had been rejected as non-eligible, [REDACTED] submitted a request for all documents related to audits on SMEs [REDACTED] performed on FP7 and H2020 projects, concerning Commission Decision C(2011) 174 final and more specifically for documents concerning the costs for SME Owners/Managing Directors. The scope of the request was very wide, not specifying which service or period was targeted. As numerous audits have been identified, DG RTD contacted INEA, REA, SEJAR, DG CNCT and DG MOVE in order to confirm the status of numerous audits on projects of FP7 and H2020, referring to costs for SME owners. Since the requestor addressed the initial request to DG RTD, the scope of the request was limited to documents produced during audits performed by the CAS, where costs for SME Owners had been rejected/accepted. Finally, the identified documents concerned audits performed by CAS on DG RTD, REA, INEA and CONNECT.

It was concluded that partial access can be granted to documents concerning closed and implemented audits, where no further action is expected to be taken. Commercial interests and personal data were expunged.

However, following the consultation of the responsible services and the concrete assessment of the requested documents, it was considered that public access must be refused to documents concerning audits which are closed but not fully implemented since

follow-up actions are still expected. Such actions were the non-implementation of the audit (still in contradictory phase) or the partial implementation. The applicable exceptions are the decision-making process and, on a secondary basis, the exceptions as regards the protection of commercial interests and personal data. Currently, a confirmatory application is pending.

d) Any other relevant cases

- *Request for public access to the Panel Report*

ERCEA received a request for public access to the Panel Report of an ERC panel evaluating the Starting Grant 2017 proposals at step 2 of the peer-review evaluation. The report describes the methodology followed and the results for the step 2 panel meeting. It has also several annexes that concern the conflict of interests taken into consideration by the panel, the list of delivered reviews for step 2, the ranked list of proposals, the panel comments for feedback to applicants and the panel recommendations for future evaluations.

ERCEA refused access to the requested document based on the exceptions of protecting the privacy and integrity of the individuals and the decision-making process of the institution. It considered that disclosure of the methodology applied by the panel and its recommendations for future evaluations would seriously undermine the decision-making process and would put the future work of the panel under external pressure.

- *Public access to projects using animals for experiments/tests*

ERCEA received two requests from animal welfare activists. The applicants requested public access to different documents related to ERC funded projects including tests on animals. The first applicant requested public access to the ethics screening report, the ethics summary report, the ethics issue table and ethics self-assessment for the proposal filled in by the grant beneficiary. The second applicant requested access to the grant application and the signed Grant Agreement. At the initial stage, ERCEA denied access to the requested documents based on the exceptions related to the protection of the privacy and integrity of the individual and commercial interest of the beneficiary.

In the (ongoing) confirmatory stage, the applicants argued that the public interest in ensuring adequate protection of animals outweighs the protection of commercially sensitive information. In particular, they referred to Directive 2010/63/EU on the protection of animals used for scientific purposes, as well as to Art 13 of the TFEU and to the recital 29 of the Regulation 1291/2013 establishing the H2020 Framework Programme. In addition, they mentioned several initiatives and surveys, asking for example that all information on animal testing should be made public or showing that big percentage of respondents favoured prohibiting all experiments in which animals would be subjected to severe pain and suffering.

REA mentioned that it has also handled a request for public access to an ethical appraisal and self-assessment in 2015. The request was refused both at the initial and confirmatory stage due to the protection of personal data and commercial interests.

- *Request for information in the public interest*

EASME shared a request, submitted by a university, concerning public access to documents related to a grant application. At the initial stage, the public disclosure was refused due to protection of personal data. However, the university explained that it is currently investigating the applicant and requested information whether he declared in the grant application that he has a PhD title from said university. They consider that disclosure of the information is in the public interest.

It is considered that the necessity for having the information transferred has been established. However, it is currently being assessed whether the disclosure is proportional since the applicant's legitimate interests might be prejudiced.

- *Personal data in technical reports published on CORDIS*

SESAR JU has been dealing with a request for public access to technical reports concerning H2020 grants. The requested reports are published on CORDIS. However, SESAR noted that the reports contain the names of experts who contributed to their drafting. SESAR brought up a question of the potential breach of the protection of personal data.

DG RTD considered that it is the beneficiaries' obligation to receive the experts' consent to publish their names. According to SecGen's practice, if the requested documents were lawfully published (which is the case on CORDIS), public access to the requested documents may be granted by providing a link to the webpage where they are published. The assessment of the documents is not necessary in this case.

3. Updates of the administrative practice since the last meeting (25 November 2019)

Since the last meeting there have been the following updates:

On procedures:

- Guidance on AtD handling under teleworking;
- Classified and marked documents (7 November, but not covered during the meeting);
- Reply to a MS consultation.

On substance:

- Personal data of Commission staff and of third-parties;
- Practical guide on redactions;

- Accidental disclosure of (parts of) documents;
- Personal data breach in AtD;
- UK during the transition period;
- Requests by consulted third parties to know the name of the applicant.

a) AtD handling under teleworking

- the legal deadlines for handling AtD applications prescribed in the Regulation 1049/2001 cannot be prolonged due to the exceptional character of the current (coronavirus) situation;
- the provided guidance must be applied until further notice. No new instructions will be issued soon.

b) Classified and marked documents

- the security markings SENSITIVE and SPECIAL HANDLING contain handling instructions, indicating restrictions on the authorised recipients or the expected timeframe of sensitivity. They are not recognised under Regulation 1049/2001 and do not have any external effect. However, in order to avoid any confusion, it is recommended to remove the marking before the document is released to the applicant;
- once uploaded in eGrefe, the new, unmarked version automatically appears in Vista and its sensitivity level is accordingly reduced to '*standard treatment*' (meaning that the documents can be made public).

c) Personal data of Commission staff and of third-parties

- in principle, names and functions of:
 - o Commissioners
 - o Cabinet members (AD officials)
 - o Staff in senior management positions (SG, DGs, Dirs, Spokes)
 - o Heads of Commission's Representations in the MS
 - o Public figures acting in public capacity are disclosed.
- names and functions of:

- Commission staff not occupying any senior management position
- outside individuals, who are not public figures acting in public capacity

are normally withheld, unless the following (successive) tests are “*passed*”:

- **necessity** (specific purpose in the public interest, demonstrated by express and legitimate justifications or convincing arguments and no less invasive measures available)
- **prejudice** (no reasons to assume that the legitimate interests of the concerned individuals might be prejudiced)
- **proportionality** (transmission is proportionate for the specific purpose, after weighting the various competing interests – public/general interest & data subjects’ interests)

d) Accidental disclosure of (parts of) documents

- standard letters are available for:
 - informing the applicant that (parts of) documents were not disclosed lawfully and requesting not to use or disseminate them & requesting the applicant to sign a declaration to this effect
 - standard declaration of applicant
 - requesting removal from public domain, in case the unlawfully disclosed (parts of) documents were already disseminated
 - informing a third party of unlawful disclosure and mitigating measures taken.

e) Personal data breach

- in case an applicant requests a document disclosed in the past in which personal data have not been redacted as they should have been according to the current administrative practice, please make the necessary redactions following the current practice
- the fact that personal data has been made public lawfully in the past in a different context does not make the disclosure of the same personal data included in a document lawful if the document is not public

f) UK during the transition period

- UK is considered a MS as regards the application of Regulation 1049/2001 during the transition period ending on 31 December 2020
- consequently, the reference in Art 4(5) of the Regulation of the special position of a MS with regard to documents originating from it should be interpreted as including also UK until 31 December 2020
- the same applies to consultations and referrals submitted by UK to the Commission based on Art 5 of the Regulation
- correspondence with the UK shall be addressed to the UK Mission to the EU, as the UK no longer has a Permanent Representation

g) Requests by consulted third parties to know the name of the applicant

- disclosure of the applicant's name would entail a transmission of personal data falling under the provisions of Regulation 2018/1725 (EUDPR)
- Art 9(1)(b) of the EUDPR does not allow the transmission of personal data, except if proven that it is necessary to have the data transmitted for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced

4. AOB

The EAs have recently received an email about their public registries of documents. EASME considers that such a registry would be, indeed, useful and inquired about the common approach. DG RTD welcomes the initiative.

The next meeting is proposed for November. R&I coordinators are encouraged to send their comments and inputs on the draft CLSS guidelines and to propose issues and items to be discussed during the next meeting.