



## Second meeting of 2020 of the Access to documents coordinators of the Research & Innovation family

Thursday, 10 December 2020

15:00 – 16:30

Cisco Webex

### MINUTES

**Participants:** [REDACTED] (CNECT), [REDACTED] (MOVE),  
[REDACTED] (SESAR), [REDACTED] (IMI), [REDACTED] (EASME),  
[REDACTED] (CLEANSKY), [REDACTED] (HOME), [REDACTED] (REA),  
[REDACTED] (EAC), [REDACTED] (REA),  
[REDACTED] (EASME), [REDACTED] (REA), [REDACTED] (RTD),  
[REDACTED] (HOME), [REDACTED] (ERCEA), [REDACTED] (RTD),  
[REDACTED] (BBI), [REDACTED] (EASME), [REDACTED] (AGRI),  
[REDACTED] (CNECT), [REDACTED] (AGRI),  
[REDACTED] (RTD), [REDACTED] (ERCEA), [REDACTED] (CNECT),  
[REDACTED] (INEA).

#### **1. Welcome and introduction**

DG RTD welcomed the participants, introduced the new colleagues and reported which colleagues are no longer working as AtD coordinators.

#### **2. Cases relevant to the Research family**

##### **a) GestDem 2020/3271 (confirmatory application - access to personal data)**

##### **Initial request**

The applicant requested documents containing information related to the resignation of Prof Ferrari from the position of special adviser of ERCEA, in particular: *“minutes, report or other documents of the search committee that recommended Prof Ferrari as President in 2019 to Commissioner Moedas, and later negotiations over his contract”*.

##### **Confirmatory application**

Following the initial reply of DG RTD, the applicant submitted a confirmatory application:

*“I am submitting my confirmatory application pursuant to Article 8 of the said Regulation, with regard to the refusal to disclose the names of the two other candidates for the post to which Dr. Ferrari was appointed.*

*I note that personal data has been withheld on the basis that the reasoning required by Regulation 2018/1725 has not been provided. However it is necessary to provide the names of the two unsuccessful candidates* [REDACTED]

- I [REDACTED]
- [REDACTED]
- [REDACTED]

*In this respect, please note that I do not necessarily require their names to be disclosed in a public document. [REDACTED] there is no reason to assume that their legitimate interests might be prejudiced. If the Commission feels that public access pursuant to Regulation 1049/2001 might prejudice their legitimate interests, it would be sufficient to transmit their names to me on the sole basis of compliance with the requirements of Regulation 2018/1725.*

*It is worth underlining that this entire affair with Dr. Ferrari – how he was selected, and the subsequent events leading to his resignation – are of grave public importance, related as they are (according to public statements by Dr. Ferrari and the ERC Scientific Council) to any examination of the Commission’s early handling of the COVID-19 crisis.”*

#### DG RTD

DG RTD did not consider the above message as a confirmatory application asking the Commission to review its initial position concerning a specific document which has not been disclosed or has been disclosed only partially, but a request for information concerning the names of the two other candidates that have been shortlisted following the selection procedure. The reasoning of DG RTD for not considering the request a confirmatory application was based (among others) on [REDACTED] statement that [REDACTED] doesn’t necessarily require their names to be disclosed in a public document. In DG RTD’s opinion the applicant was looking to receive an information (the two names), which may even be extracted from other documents than those falling under his initial request.

If the request would be considered a request for information and, consequently, would have to be handled by the responsible DG RTD unit, it would be for the delegated controller of the personal data (RTD’s Director-General) to assess a possible disclosure, by applying the three successive tests (necessity, prejudice and proportionality), in line with Art 9 of Regulation 2018/1725. Personal data not becoming public *erga omnes* might be an important issue to be considered during this assessment.

## SG

The SG considered that the applicant has clearly set [REDACTED] intention to submit a confirmatory application, for the following reasons:

- the applicant stated that [REDACTED] is submitting a confirmatory request and referred to the appropriate legal basis;
- the email (entitled 'Commission confirmatory application ARES(2020)3720066') was addressed to Ms Ilze Juhansone, Secretary-General, and has been sent to the correct e-mail address (SG ACCESS DOCUMENTS);
- the applicant is challenging the initial reply to [REDACTED] request for public access to documents under Regulation 1049/2001 [REDACTED] challenges notably the initial refusal of document 18).

### **Decision**

The initial position of DG RTD was confirmed and access to the names of the two persons concerned was refused, based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. The applicant's reasons did not justify the transfer of the requested personal data, nor its proportionality.

#### **b) GestDem 2020/5280 (access to database extracts)**

The applicant requested public access to the:

*'database containing all the available information on R&D projects that were funded, partially or fully by the EU, involving at least*

- *one Japanese project participant or*
- *one Japanese donor/co-funding organization,*

*dating back the earliest time recorded until the end of 2019, in particular, the following information for each project: scope, entities involved, contact persons and contact information of each participating entity, received funding, project duration, and a detailed description of the project outcome (both scientific and practical outcome, e.g. a concrete product or technology)'.*

According to the Judgment of 26 October 2011 in Case T-436/09, *Dufour v ECB*, **data contained in a database which can be extracted by means of a normal or routine search functions constitutes a document and may be subject to an application for access under Regulation 1049/2001.**

DG RTD granted full access to the extracted list of research projects that were funded, partially or fully, by the EU and that involved at least one Japanese project participant, from the Fifth Framework Programme until H2020, including ongoing projects in which grant agreements have been signed. The extracted list contained the following information: project number, project acronym, Framework Programme, project title and number of participants from Japan.

However, DG RTD does not register separately in its databases which projects are co-funded. Also, other project information could not be extracted from the Commission's databases by means of normal or routine search functions. Nonetheless, other project information are publicly available on CORDIS and the applicant was referred to it.

**c) Complaint to the EO concerning a request for access to projects with ethics requirements funded under H2020 (REA)**

The European Ombudsman handled a request concerning a refusal of REA to grant public access to projects with ethics requirements that received funding under H2020.

All data relating to electronic grant agreements is stored in CORDA. However, at the time when the applicant submitted his requests for access, the requested data could not be extracted through a routine search operation.

The EO found that, in accordance with Regulation 1049/2001, the right of access applies only to documents in the possession of the institution at the time of the request. As such, REA's decision on the request for public access was correct at the time.

In the meantime, DG RTD has made the necessary changes to CORDA and the requested information can now be extracted through normal or routine search operations, using pre-programmed search tools. Therefore, the EO closed the inquiry, with a conclusion that REA has settled the issue. The EO encouraged the applicant to submit a new request for public access and highlighted that the fact that the information can now be extracted does not mean that REA will necessarily provide public access to the document in question.

**d) Request for access to a grant agreement and handling of the request under both Regulation 1049/2001 and Regulation 2018/1725 (ERCEA)**

ERCEA received a request from [REDACTED]. The [REDACTED] requested access to "*the original complete grant agreement*" of the FP7 ERC Starting Grant (which [REDACTED] had already received at the time by the Host Institution). In case of the ERC grants, the grant agreement is concluded between the ERCEA and the host institution [REDACTED].

ERCEA identified 4 documents corresponding to the request: the core text of the grant agreement, Annex I – Description of the work, Annex II – General Conditions and the supplementary agreement [REDACTED].

In order to provide the applicant with a more extended access to the requested documents, and taking into consideration the *erga omnes* rule applicable in case of replies to requests for access to documents, ERCEA treated this request under two different procedures. One part of the request has been treated as a request for access to documents under Regulation 1049/2001 and the second part as a request submitted directly by the data subject [REDACTED] to access [REDACTED] personal data under Regulation 2018/1725. Consequently, two separate replies have been provided to the applicant in parallel.

The core text of the grant agreement and the Annex II (general conditions) have been assessed under the access to documents regulation. While the full access to the Annex II (general conditions) could be indeed provided, the core text of the grant agreement has been only partially disclosed, since it contains some personal data and commercially sensitive information (the name and signature of the grant beneficiary's legal representative, signature of the ERCEA's director, name and place/date of birth of the principal investigator or the bank and account number of the beneficiary). Disclosure of these parts of the core text of the grant agreement is prevented by exceptions to the right

of access laid down in Article 4(1) (b) (protection of privacy and the integrity of the individual) and first indent of Article 4(2) of the Regulation 1049/2001 (protection of commercial interests).

Finally, the second part of the request, i.e. the request for access to Annex I (Description of the work) and the supplementary agreement has been treated as a request for access to personal data under the data protection Regulation (Art 3 and 17). It has allowed ERCEA to provide the applicant with a more extended access to these two documents.

#### **e) Wide-scope request and applicable case-law (EASME)**

EASME received a request for access to project documents, including grant agreements and deliverables, concerning between 30 and 40 projects. The request was considered a wide-scope request and EASME deliberated whether to follow the approach established in the *Hautala* judgement or whether to negotiate with the applicant a fair solution to this request.

In the case of some wide-scope requests, the only parts to be released are already public. In such cases, the application of the *Hautala* judgment (paragraph 30 of the judgment in *Council v Hautala* (C-353/99 P, EU:C:2001:661)), as reiterated in the *Kuijer* judgment, can be considered. Under this case-law, the institution may, in case the obligation to ensure partial access would result in an excessive administrative burden, refuse to grant partial access in order to safeguard the interests of good administration, and decide to instead refuse access to the documents altogether. A similar approach is recommended where, following a large number of redactions, releasing the remaining parts of the document(s) would be pointless, as those parts would be deprived of any substantive content.

Following internal discussions, EASME and the applicant reached an agreement on a fair solution. The applicant agreed to withdraw the wide-scope request and to submit groups of access to documents requests, each concerning 5 different projects.

#### **f) SG practical guidance on the implementation of the *Basaglia* judgment concerning sensitive commercial information in contractual documents which is 5 or more years old**

Following the *Basaglia* judgment, **information in contractual documents which is 5 or more years old** and falls within the ambit of **commercial secrecy**, should in principle be treated as **historic**. **Therefore it should not be protected further, unless, by way of exception, it is proven that such information still constitutes an essential element of the commercial position** of the undertaking to which it relates<sup>[1]</sup>.

In particular, the institution **may adduce specific justification** after consultation with the undertaking concerned in accordance with Article 4(4) of that Regulation<sup>[2]</sup>, to

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<sup>[1]</sup> Judgment of 7 July 2015, T- 677/13, *Axa Versicherung AG v European Commission*, EU:T:2015:473, paragraph 154 and the case law cited, as reiterated also in the judgment of 23 September 2020, T-727/19, *Basaglia v European Commission*, U:T:2020:446, paragraph 79.

<sup>[2]</sup> Judgment of 23 September 2020, T-727/19, *Basaglia v European Commission*, EU:T:2020:446, paragraph 82.

**demonstrate that, notwithstanding the passing of time, the information in question still requires protection** under the first indent of Article 4(2) of Regulation 1049/2001.

Therefore, in practice, **unless there is absolutely no doubt that the information is clearly outdated/no longer sensitive and can be disclosed**, the institution **MUST**, following a request for access to documents pertaining to contractual documents and containing sensitive commercial information older than 5 years:

- **Assess whether the application of the exception provided under the first indent of Article 4(2) of Regulation 1049/2001 continues to be justified**, having regard to the passing of time or the termination of the contract at stake. This is the case where the information still constitutes an essential element of the commercial position of the undertaking to which it relates<sup>[3]</sup>;
- **Consult the third party originator of the documents concerned in accordance with Article 4(4) of Regulation 1049/2001**; and
- **Provide specific justification** if the commercial interests still require:
  - o the application of the presumption regarding the bid/proposal, notwithstanding the arguments put forward by the applicant to rebut it; or
  - o the protection of the contents of the individually assessed requested documents.

The SG is currently in the process of revamping the Guidance Note on access to information and documents related to procurements and grants, which will be updated accordingly. The CLSS AtD guidelines will also be updated accordingly.

### **3. Updates of the administrative practice since the last meeting of 16 July 2020**

#### **a) Confirmatory applications and the point in time of the assessment of factual and legal circumstances (GestDem 2020/1030)**

In the event of a confirmatory application, a fresh review is conducted. As a result, the legal assessment of the requested documents is performed taking into account the legal and factual circumstances in force at the time of the adoption of the decision replying to the confirmatory application. Any developments occurring after the reply to the initial request has been sent must be taken into account.

- **Reasoning**: if the final decision is challenged before the Court/Ombudsman, the Commission/EA/JU can claim that the decision was legally and factually correct at the time of the adoption.
- **Relevant case law**:
  - o T-485/18 ‘*Compañía de Tranvías de la Coruña v Commission*’, paragraph 36;
  - o C 562/14 P, *Sweden v Commission*, paragraph 63;
  - o T-669/11, *Spirlea v Commission*, paragraph 102.

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<sup>[3]</sup> Judgment of 7 July 2015, T- 677/13, *Axa Versicherung AG v European Commission*, *op.cit.*, paragraph 154.

- **DG R&I cases:**

GestDem 2020/1030 (confirmatory still pending - also mentioned in the context of the meeting in July):

- The request refers to Final Audit Reports. Some of the documents identified at the initial stage referred to audits which were implemented, but not finalised at the time of the treatment of the initial request. Accordingly, DG RTD refused access on the basis, among others, of the exception as regards the protection of the decision-making process (19/05/2020);
- The SG has asked DG RTD to confirm again the status of the audits, as their reply must reflect the legal/factual circumstances in force at the time of its adoption.

GestDem 2019/3447 (mentioned in meeting of November 2019):

- Request for access to the draft Research Fund for Coal & Steel Monitoring & Assessment Report covering the period 2011-2017.
- Access was refused, as the Report was at the time being drafted by a group of independent experts and a decision on the final version had not been taken yet (decision-making process).
- Confirmatory: when assessing a confirmatory application, the SG took into account the most recent version of the draft document requested, granting, therefore, partial access.

REA raised a question on whether this practice is applicable also to deliverables. DG RTD's understanding is that it is and that new documents may be identified following a confirmatory application.

**b) Links to webpages containing personal data (GestDem 2020/6420)**

- GestDem 2020/6420 request for access to documents:

- Requested document: application to the European Capital of Innovation Award.
- The third party author agreed with the disclosure of the requested document after redaction of the personal data, in line with Article 4(1)(b) of Regulation 1049/2001.
- Partial access to the requested document was granted after the redaction of personal data, as well as links to websites of NGOs and private entities, since the linked webpages contained personal data (e.g. Facebook profiles and YouTube videos of [REDACTED]).

- The SG guidance distinguishes two different types of hyperlinks in documents originating from a third party and received by the institution:

- **Hyperlinks which contain directly (in themselves) personal data, which should be removed and protected** as such under Article 4(1)(b) of Regulation 1049/2001 under our standard reasoning for the protection of privacy and the integrity of the individual; and
- **Hyperlinks that link to websites which may or may not contain personal data. The practice of the European Commission seems to not redact such links.**

**c) Qualified Electronic Signature**

REA raised a question on the use of an electronic qualified signature that, pursuant to Article 25 of Regulation 910/2014, has the equivalent legal effect of a handwritten signature. DG RTD suggested the use of the QES in Ares for initial and confirmatory replies after it becomes available at corporate level.

**4. AOB**

DG RTD thanked everyone for their participation. The next Research AtD coordinators' meeting is expected to take place in the first half of 2021, in the new configuration of the R&I family.