



EUROPEAN COMMISSION

Brussels, 22.11.2018
C(2018) 7952 final


France

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/3842**

Dear ,

I refer to your email of 10 September 2018, registered on 11 September 2018, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 18 July 2018³, you requested access to documents regarding contract IFS/2011/272-372 (establishment of mobile laboratories for pathogens up to risk group 4 in combination with chemical, biological, radiological and nuclear capacity building in sub-Saharan Africa).

In its initial reply dated 3 September 2018, the Directorate-General for International Cooperation and Development identified 69 documents as falling under the scope of your request⁴ and:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

³ As narrowed down by the fair solution found in accordance with Article 6(3) of Regulation 1049/2001 (see your e-mail exchange with the Directorate-General for International Cooperation and Development of 3 August 2018).

⁴ Please see Annex 1 to the initial reply.

- gave partial access to 54 documents, only subject to the redaction of personal data based on Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual);
- fully refused access to 14 documents (documents 5, 10, 12, 20 and 48 to 57) based on Article 4(2), first indent, of Regulation 1049/2001 (protection of commercial interests of a natural or legal person); and
- fully refused access to one document (document 11) based on Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

In your confirmatory application, you request a review of this position only with regard to the 15 documents to which access was fully refused. You put forward a number of arguments to support your request. These have been taken into account in the assessment, the results of which are described below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Having examined your confirmatory application, I can inform you that:

- partial access is granted to one document (document 53), subject to the redaction of personal data only on the basis of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual);
- partial access is granted to eight documents (documents 48 to 52, 54, 55 and 57), where the redactions are based on Article 4(2), first indent (protection of commercial interests of a natural or legal person), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;
- access is fully refused to five documents (documents 5, 10, 12, 20 and 56) based on Article 4(2), first indent (protection of commercial interests of a natural or legal person), and, where applicable, Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;
- access is fully refused to one document (document 11) based on Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

The reasons set out below.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation 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'.

The (parts of the) documents in question contain commercially sensitive business information that was submitted by the contractor, such as information on the contractor's technical, financial, reporting and organisational methodology and strategy. They include information on the skills and know-how of the contractor, as well as the costs incurred and the prices proposed.

Through this key information, one could gain access to significant confidential information about the commercial activities, methodology and strategy of the contractor in question. Its public release could damage the contractor's commercial interests, as it would put in the public domain confidential information, thereby harming the contractor's position on the market and its ability to exercise commercial and business activities in the future. Such disclosure could be exploited by other companies who are active on this very specific market, thereby affecting the contractor's competitive position. There is therefore a real and non-hypothetical risk that the disclosure of the withheld (parts of) documents would be used by competitors, giving them an unfair advantage, and hence undermine the commercial interests of the contractor concerned.

In your confirmatory application, you request a review, in particular of the initial decision to refuse access to 'the [three] technical reports, and the inception, progress, and completion reports' (documents 48 to 52). In this respect, please note that the purpose of these reports, to which partial access is granted by the present decision, is to inform the European Commission of the first findings, the progress in collecting data, the difficulties encountered and/or foreseen as well as the work programme and staff mobilisation. They also give details on the progress of activities (such as inputs, outputs, situations of non-compliance, methodology used), the problems encountered, recommendations and requests. They document the implementation of the project, including a realistic time schedule for completion and the exact status of activities that are carried out. In other words, the redacted parts in these documents contain specific information on methodology, organisation and technicalities, the disclosure of which would undermine the commercial interests of the contractor concerned.

Having regard to the above, I consider that the use of the exception under Article 4(2), first indent, of Regulation 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the (parts of) documents in question must be refused on that basis.

2.2. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that 'the 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'.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁵ (hereafter ‘Data Protection Regulation’) becomes fully applicable⁶.

The requested documents contain personal data such as names of natural persons not occupying any senior management position in the European Commission or not being a main representative of the third party in question, or information from which their identity can be deduced, or biometric data in the form of handwritten signatures. Document 11 entitled ‘Annex IV: key experts’, to which access is fully refused, is composed entirely of personal data.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁷.

Article 2(a) of the Data Protection Regulation provides that personal data ‘shall mean any information relating to an identified or identifiable person (...); 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 or her physical, physiological, mental, economic, cultural or social identity’. According to the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”’⁸. The names⁹ of the persons concerned and other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.¹⁰ Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

⁵ Regulation (EC) No 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 data, Official Journal L 8 of 12 January 2001, page 1.

⁶ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

⁷ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

⁸ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁹ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

¹⁰ *Idem*, paragraphs 77-78.

In its judgment in the *ClientEarth* case, the Court of Justice ruled that ‘whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access’¹¹. I refer also to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data¹².

In your confirmatory request, you state that you need to receive access to the key documents of the project in question, which ‘indicate the effectiveness in the use of European funds since they show the impacts of the project during and at the end of its course. Therefore there is a strong public interest in their disclosure.’

In this regard, it must be noted that these considerations do not establish that, in order to attain the objective for the purposes of which you are requesting disclosure of the documents in question, it is necessary to obtain disclosure of the personal data in question.

In the light of the above, I consider that you have not established the necessity of having the data in question transferred to you. I also do not consider that the transfer of the personal data in question is proportionate to the objective you invoke. Furthermore, even in case such a necessity were established, I would consider that such a necessity would not outweigh the legitimate interests of the data subjects.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception that does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need publicly to disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure. As to the handwritten signatures, there is a risk that the disclosure of this biometric data would prejudice the legitimate interests of the persons concerned and access to this data must therefore be refused.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

¹¹ Judgment of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

¹² Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

In your confirmatory request, you state that you need to receive access to the key documents of the project in question, which ‘indicate the effectiveness in the use of European funds since they show the impacts of the project during and at the end of its course. Therefore there is a strong public interest in their disclosure.’

I note that these considerations are of a general nature and have no direct link with the particular circumstances of this case. However, general considerations cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the document in question¹³. Based on the elements at my disposal, I have also not been able to establish the existence of such an overriding public interest.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the commercial interests protected by Article 4(2), first indent, of Regulation 1049/2001.

As regards Article 4(1)(b) of Regulation 1049/2001, it is an absolute exception that does not require the institution to balance the exceptions defined therein against a possible public interest in disclosure.

4. PARTIAL ACCESS

As indicated above under point 2, partial access is granted to nine documents, where the redactions are based on Article 4(2), first indent (protection of commercial interests of a natural or legal person), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. Please find attached the redacted versions of these documents.

In case the redactions regard personal data (Article 4(1)(b) of Regulation 1049/2001), they contain a reference to it. In case nothing is indicated besides the redactions, they are based on Article 4(2), first indent, of Regulation 1049/2001 (protection of commercial interests of a natural or legal person).

Please note that whenever a whole page is redacted in the attached documents on the basis of Article 4(2), first indent, of Regulation 1049/2001 (protection of commercial interests of a natural or legal person), the page was removed. With regard to documents 48 to 52, the removed pages contain only the titles that are listed on pages 21 and 22 of the attached redacted version of document 48.

With regard to the remaining six documents, I have also examined the possibility of granting partial access in accordance with Article 4(6) of Regulation 1049/2001.

As explained under point 2.2, document 11 entitled ‘Annex IV: key experts’ is composed entirely of personal data and access must therefore be fully refused. This document contains a list of the key experts including the proposed position, years of experience,

¹³ Judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

age, educational background, specialist areas of knowledge, experience in beneficiary countries, languages and degree of influence and résumés ('curriculum vitae').

With regard to documents 5, 10, 12, 20 and 56, no meaningful partial access is possible once all parts of documents protected by Article 4(2), first indent (protection of commercial interests of a natural or legal person), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001 are redacted.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

Enclosures: 9