



EUROPEAN COMMISSION

Brussels, 11.7.2019
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[REDACTED]
2273KK Voorburg
Netherlands

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/573**

Dear [REDACTED]

I refer to your letter of 15 March 2019, registered on the same day, 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 30 January 2019, addressed to the Directorate-General for Neighbourhood and Enlargement Negotiations, which you further clarified on 20 February 2019, you requested access to:

“All documents related to the contract ‘Consolidation of the Justice System in Albania’ (EURALIUS V), including, but not limited to:

- Contract between the European Commission and the consortium implementing EURALIUS V, including the Annexes: General Conditions, Description of the Action, Standard Operating Procedures, etc.
- All reports provided by the EURALIUS mission to the EU Delegation in Tirana and/or the European Commission: Inception Report, Monthly Reports, etc.”

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

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

The European Commission has identified the following documents as falling under the scope of your request:

- Grant Contract 2018/395-806 ‘Consolidation of the Justice System in Albania’ (EURALIUS V), reference Ares(2019)542956, which includes the following annexes:
 - Special conditions (hereafter ‘document 1’);
 - Annex I: Description of the Action (including the Logical Framework of the Project and Concept Note (hereafter ‘document 2’);
 - Annex II: General Conditions applicable to European Union-financed grant contracts for External Actions (hereafter ‘document 3’);
 - Annex III: Budget for the Action (hereafter ‘document 4’);
 - Annex IV: Procurement rules for beneficiaries (hereafter ‘document 5’);
 - Annex V: Standard request for payment and financial identification form (hereafter ‘document 6’);
 - Annex VI: Model narrative and financial report (hereafter ‘document 7’);
 - Annex VII: Terms of reference for an expenditure verification of a Union financed grant contract for external actions and model report of factual findings (hereafter ‘document 8’);³
 - Annex IX: Standard template for Transfer of Asset Ownership (hereafter ‘document 9’);
- Weekly reports: 40 reports (hereafter ‘document 10’)⁴;
- Monthly reports: 10 reports (hereafter ‘document 11’);
- Inception report, reference Ares(2019)3246826 (hereafter ‘document 12’), which includes five annexes:
 - Annex 1 - Draft Regulation General meeting of judges on the election of high judicial council members (hereafter ‘document 12.1’);
 - Annex 2 - Information on CoM Decision on IT Structures of Courts and Prosecution (hereafter ‘document 12.2’);
 - Annex 3 - Recommendations ITC Structure in Justice System and other Regulatory Matters (hereafter ‘document 12.3’);
 - Annex 4 - Scheme of IT Structures of the Justice System (hereafter ‘document 12.4’);

³ Please note that Annex VIII: Model financial guarantee was not applicable for this grant.

⁴ The reference numbers for the weekly and monthly reports can be found in Annex 1.

- Annex 5 - Monitoring Report on Proficiency Testing of Certain Assesses (hereafter 'document 12.5');
- Progress report, reference Ares(2019)3252835 (hereafter 'document 13').

In its initial reply of 15 March 2019, Directorate-General for Neighbourhood and Enlargement Negotiations:

- granted full access to documents 3 and 5 – 9;
- refused access to documents 1, 2, 4 and 10 – 13 based on the exceptions of Article 4(1)(a) (protection of public interest as regards international relations) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position with regards to documents 1, 2 and 12. The scope of this confirmatory decision is therefore limited only to the above-mentioned documents. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Since the documents originate from a third party, the Secretariat-General consulted the EURALIUS consortium coordinator in accordance with Article 4(4) of Regulation (EC) No 1049/2001 with a view to assessing whether an exception in paragraph 1 or 2 of Article 4 of Regulation (EC) No 1049/2001 could be applicable. In their reply to the consultation, EURALIUS agreed to the partial disclosure of documents 1 and 12 based on the exceptions of Article 4(1)(a) (protection of public interest as regards international relations) and Article 4(2), second indent (protection of legal advice) of Regulation (EC) No 1049/2001.

Following this review and after taking into account the result of the consultation, I can inform you that:

- partial access is granted to documents 1 and 12.

With regard documents 2, I regret to inform you that I have to confirm the initial decision of Directorate-General for Neighbourhood and Enlargement Negotiations to refuse access, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001,

With regard to the redacted parts of document 1, they are covered by the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

With regard to documents 12, 12.1, 12.2, 12.3, 12.4 and 12.5, the redacted parts are covered by the exceptions of Article 4(1)(a) (protection of public interest as regards international relations) Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), second indent (protection of legal advice) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that '[t]he 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 Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data⁶ (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁷ (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation'.⁸

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.⁸

⁵ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager*') C-28/08 P, EU:C:2010:378, paragraph 59.

⁶ Official Journal L 8 of 12.1.2001, page 1.

⁷ Official Journal L 205 of 21.11.2018, p. 39.

⁸ Judgment in *European Commission v The Bavarian Lager*, cited above, paragraph 59.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.⁹

Documents 1, 12 and 12.1 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission and names of representatives of third parties. Moreover, it contains a handwritten signature.

The names¹⁰ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data.¹¹ This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

⁹ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁰ Judgment in *European Commission v The Bavarian Lager*, cited above, paragraph 68.

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

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signatures appearing in document 1, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interest of the person concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data included in document 1, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the public interest as regards international relations

Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations'.

With regard to this provision, the Court of Justice has acknowledged in *In't Veld* judgment that the institutions enjoy 'a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest'.¹²

Albania is a candidate country to the European Union following the European Council conclusions of June 2014. As a candidate country, Albania is actively engaged in carrying out various reforms in order to achieve the standards required for European Union membership.

In this context, the European Commission awarded grant contracts to support actions which focus on supporting the Albanian institutions to consolidate their justice system following a comprehensive justice reform. A justice reform is a key criterion in the accession negotiations, stressed by the Council of the European Union in the conclusions of the General Affairs Council of 26 June 2018 on Enlargement and Stabilisation and Association Process¹³. The justice reform is at a critical phase of implementation. Its objective to fight corruption and depoliticise the justice system is by its very nature of high sensitiveness both at national and European level.

The inception report and its annexes (documents 12, 12.1, 12.2, 12.3, 12.4 and 12.5) were prepared by the consortium awarded the grant for 'Consolidation of the Justice System in Albania (EURALIUS V)'. The inception report and its annexes contain analyses of ongoing issues on various levels of the justice reform design and implementation. They

¹² Judgment of the Court of Justice of 3 July 2014, *Council v In't Veld*, C- 350/12 P, EU:C:2014:2039, paragraph 63.

¹³ <https://www.consilium.europa.eu/media/35863/st10555-en18.pdf>

describe various issues related to the justice system and propose actions, activities and steps to be taken in that regard. Some of the actions proposed are still ongoing and remain to be implemented. Other suggestions proposed by EURALIUS were not retained, as the final decision on any justice reform is reserved to the Albanian authorities, who need to be able to deliberate free from external pressure and criticism. Public disclosure of the withheld parts of the EURALIUS report would be perceived by the Albanian authorities not only as a breach of trust but also as an action undermining their authority to take the final decision on the justice reform. In this context, it is to be underlined that EURALIUS, which is in constant contact with the Albanian authorities, repeatedly opposed disclosure of the withheld parts.¹⁴ The General Court has acknowledged that ‘the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country.’¹⁵

Were the Commission to provide public access to the withheld parts, the environment of mutual trust necessary for shedding light on aspects which could be improved, thus supporting the justice reform, would be negatively affected.¹⁶

In this case, public disclosure would undermine the effectiveness of the EU action regarding the implementation of the reform efforts, would negatively affect the European Union’s relations with Albania and undermine the mutual trust, which is paramount for the ongoing accession negotiations.

Therefore, access to part of the requested documents would undermine the protection of public interest as regards international relations protected by Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, and that access has to be refused on that basis.

2.3. Protection of commercial interests, including intellectual property

Article 4(2), first indent of Regulation (EC) No 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’.

Document 1 contains the VAT number of the contracting entities that form the EURALIUS consortium. This constitutes sensitive commercial information, the disclosure would undermine contractual interests of the contractors.

Document 2 forms part of the grant application and contains the Description of the action, including the Logical framework for the project of the grant beneficiary submitted under call for proposals EuropeAid/155321/DD/ACT/AL – ‘Consolidation of the Justice System in Albania (EURALIUS V)’. It contains the intervention strategy of the proposed

¹⁴ Judgment of the General Court of 12 May 2015, *Jurašinović v Council*, T-658/14, EU:T:2015:766, paragraph 35.

¹⁵ Judgment of the General Court of 27 February 2018, *CEE Bankwatch Network v European Commission*, T-307/16, EU:T:2018:97, paragraph 90.

¹⁶ Judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 47.

actions, overall and specific objectives, objectively verifiable indicators of achievement, as well as the sources and means to be deployed to achieve these objectives. It includes details on the envisaged activities, the proposed methodology, the costs involved for the proposed actions and other information related to operational aspects of the implementation of the proposed action, such as the necessary pre-conditions.

All this information reflects the specific know-how and experience of the grant applicant. That know-how was taken into account by the Commission when evaluating the applications submitted under the call for proposals organised for the grant in question. It contributed to the attractiveness of the funding application of the grant applicant, which became beneficiary of the grant. This information had a major impact on selection of the applications of the beneficiary from among other ones submitted under the above call.

Therefore, public disclosure of such information would undermine the commercial interests of grant applicant, as it would give other potential grant applicants in future calls the possibility to copy from that application and use it to support their own application.

The General Court ruled that ‘methodology and expertise [...] highlighted as part of the grant application, [...] relate to the specific know-how [...] and contribute to the uniqueness and attractiveness of applications in the context of calls for proposals such as that at issue, which was intended to select one or more applications, following in particular a comparative review of proposed projects. Thus, particularly given the competitive environment in which [the applicants for a grant] operate, it is necessary to consider that the information in question is confidential’.¹⁷

Furthermore, the General Court in its judgement of 29 January 2013 in Case T-339/10, *Cosepuri v EFSA*¹⁸, ruled that ‘[i]t follows from all the foregoing that EFSA did not err in considering, in essence, that there was a general presumption that access to the bids submitted by the other tenderers would, in principle, undermine the interest protected. The applicant has not put forward any evidence to justify the conclusion that, in the present case, that presumption did not apply to the documents disclosure of which was requested.’ This general presumption of non-disclosure of the bids submitted by a tenderer applies, by analogy, to grant applications.

You argue that similar documents have been, partly or fully, disclosed in the past. However, each request needs to be assessed on its own merits and on the basis of the context at that specific time, which explains the assessment made in this case for the reasons explained above.

In consequence, in this case, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests, including intellectual property, of the grant applicant.

¹⁷ Judgment of the General Court of 21 October 2010, *Agapiou Joséphidès v Commission & EACEA*, T-439/08, EU:T:2010:442, paragraph 127.

¹⁸ Judgment of the General Court of 29 January 2013, *Cosepuri v EFSA*, T-339/10, EU:T:2013:38, paragraph 101.

I conclude, therefore, that access to document 2 and parts of document 1 have to be refused on the basis of the exception laid down in the first indent of Article 4(2) (protection of commercial interests, including intellectual property) of Regulation (EC) No 1049/2001.

2.4. Protection of legal advice and court proceedings

Article 4(2), second indent of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] court proceedings and legal advice.’

In its judgement in Case T-84/03, the Court of First Instance¹⁹ underlined that the exception provided for in Article 4(2), second indent protects two distinct interests: court proceedings and legal advice²⁰. In the case at hand, the refusal of access to the documents concerned is based on a need to protect legal advice.

It needs to be recalled that the concept of the ‘legal advice’, as well as the applicability of the exception protecting it, was interpreted by the case law of EU Court. Indeed, in its judgment in Case T-755/14, the General Court took the position that legal advice is ‘advice relating to a legal issue, regardless of the way in which that advice is given’²¹.

In the above-mentioned judgment, the General Court also explicitly underlined that ‘it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process’²². Furthermore, according to General Court’s reasoning ‘there is nothing in the wording of the second indent of Article 4(2) of Regulation No 1049/2001 to support the conclusion that that provision concerns only advice provided or received internally by an institution’.²³

The inception report and annexes 1 – 5 include analysis and legal opinions in matters of a sensitive nature that were being analysed and proposed to the Albanian authorities in the context of the grant for ‘Consolidation of the Justice System in Albania (EURALIUS V)’. They were addressed to the European Commission and to the beneficiary of the project – the Albanian authorities - for their internal use and consideration, and was not intended to be shared in public. Part of the role of EURALIUS is to provide legal advice on ongoing legislative and legal interpretation issues with the view to allow the Albanian authorities to have an overview of the issues related to the justice reform, so as to enable them to evaluate the advice provided by EURALIUS and finally take the necessary decisions relating to the justice reform. For this process to be effective, it is therefore

¹⁹ Currently: the General Court.

²⁰ Judgment of the Court of first Instance of 23 November 2004, *Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

²¹ Judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Commission*, T-755/14, EU:T:2016:482, paragraph 47.

²² Judgment in *Herbert Smith Freehills v Commission*, cited above.

²³ Judgment in *Herbert Smith Freehills v Commission*, cited above, paragraph 48.

essential that both EURALIUS and the EU maintains a constant, frank and open dialogue, based on trust, with the stakeholders and the Albanian authorities.

Disclosure of the requested document would clearly have a serious impact, both on the EURALIUS consortium's capacity to assist the Albanian authorities and the European Commission in this and future matters, and on the Albanian authorities' interest in seeking and receiving frank and objective advice from the EURALIUS consortium. The EURALIUS consortium and the Albanian authorities would be exposed to undue external pressure in case of its premature disclosure.

In light of the above, access to part of the inception report and its annexes 1 – 5 must be denied on the basis of the exception laid down in Article 4(2), second indent of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent (protection of commercial interests, including intellectual property) and Article 4(2), second indent (protection of legal advice and court proceedings) of Regulation (EC) No 1049/2001 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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2), first and second indent of Regulation (EC) No 1049/2001.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

Moreover, I would like to draw your attention that several documents, including the templates used for the grant application, are publicly available here: <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1556638377214&do=publi.detPUB&searchtype=AS&zgeo=35357&aoet=36537&ccnt=7573876&debpub=29%2F04%2F2013&orderby=ctr&orbyad=Asc&nbPubliList=25&page=1&aoref=155321>.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

As explained above, partial access is granted to documents 1 and 12.

Partial access to document 2 is not possible as this document forms part of the grant application and is covered by the general presumption of non-disclosure.

As stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.²⁴

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



Enclosures: (3)

²⁴ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.