



EUROPEAN COMMISSION

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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 2019/314**

Dear ██████████,

I refer to your letter of 11 April 2019, registered on the same date, by 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

On 25 October 2018 you sent a letter to the Directorate-General for Communications Networks, Content and Technology of the European Commission, in which you requested information regarding the participation of the company ██████████ in the projects co-financed by the EU under Sixth Framework Programme for Research and Technological Development (hereafter ‘Framework Programme’). In your letter you underlined that you were the founder of the above-mentioned company and asked whether ██████████ fulfilled the contractual obligations deriving from participation in the projects in question and in particular, whether it had provided the required deliverables. In this context, you also provided the list of 25 projects in which the above-mentioned company was involved.

The Directorate-General for Communications Networks, Content and Technology replied to you letter on 21 December 2018. It directed you to the information relating to the projects co-financed from the EU Research Framework Programmes, available on

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

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

- Documents containing letters/emails from the European Commission to the projects' coordinators concerning financial assessment of the projects (hereafter 'documents belonging to category 3'),

On 1 April 2019, the Directorate-General for Research and Innovation refused access to all above-mentioned documents. It invoked the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001, which protect the court proceedings, as the basis of the refusal.

The Directorate-General for Research and Innovation also explained in its reply, that in so far as projects [REDACTED] and [REDACTED] are concerned, it did not identify any documents falling under the scope of your application⁷.

Through your confirmatory application, you request a review of this position.

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 or service concerned at the initial stage.

As a preliminary comment, I would like to emphasise that documents disclosed under Regulation (EC) No 1049/2001, legally speaking, become public documents. In line with the case law of the EU Court⁸, the institution that disclosed documents under the above-mentioned regulation may not refuse access thereto if other applicants asked for it.

Following my review, I regret to inform you that I have to refuse access to the documents requested, on the basis of the exceptions provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001, Article 4(2), first and third indents, of that regulation and Article 4(3), second subparagraph of the said regulation. They protect, respectively, privacy and the integrity of the individual, commercial interests of a natural or legal person, the purpose of the investigation and the decision-making process.

The detailed reasons are set out below.

Additionally, please note that the relevant parts of documents belonging to category 3 contain information unrelated to [REDACTED] (for example the financial assessment of the cost statement submitted by other members of the consortium participating in the projects in question). This information falls outside the scope of your application.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that 'the institutions shall refuse access to a document where disclosure would undermine the protection of [...]

⁷ During handling of the confirmatory application, it has been established that with regard to project [REDACTED], one document has actually been identified, however, the initial reply of 1 April 2019 erroneously mentioned that no documents concerning this project were identified.

⁸ Judgment of the General Court of 21 October 2010, *Agapiou Joséphidès v Commission and EACEA*, T-439/08, EU:T:2010:442, paragraph 116.

privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

In this context, please note that in its judgment in Case C-28/08 P (*Bavarian Lager*)⁹, the Court of Justice ruled that when an application 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 data¹⁰ (‘Regulation (EC) No 45/2001’) becomes fully applicable.

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/EC¹¹ (‘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’.¹²

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

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’.¹³

Documents belonging to categories 1, 2 and 3 contain the names, surnames, initials, shortened names and contact details (telephone number, office location, email addresses) of the staff members of the European Commission who do not hold any senior management position and of the third parties (██████████ or other members of the consortium). They contain also biometric data (handwritten signatures of the staff member of the European Commission or the third parties).

⁹ 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* judgment’), C-28/08 P, EU:C:2010:378, paragraph 59.

¹⁰ Official Journal L 8 of 12.1.2001, p. 1.

¹¹ Official Journal L 205 of 21.11.2018, p. 39.

¹² *European Commission v The Bavarian Lager* judgment quoted above, paragraph 59.

¹³ Judgment of the Court of Justice of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

The names¹⁴ of the persons concerned as well as other data from which their identity can be deduced constitute personal data in the meaning of Article 2(a) 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 of its own motion the existence of a need for transferring personal data.¹⁵ 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 a 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.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in documents belonging to categories 1, 2 and 3 has not been established. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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.

Furthermore, as the handwritten signatures, are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

¹⁴ *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

¹⁵ 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, 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 disclosure of the personal data concerned.

2.2 Protection of commercial interests of a natural or legal person

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'.

Documents belonging to category 1 contain the projects' review reports. They include detailed information relating to the technical aspects of the implementation of the projects that reflects and complements the description of work included in the project proposal. That includes, for instance, the description of the particular tasks under responsibility of a given consortium member, together with the information about the resources involved, as well as information concerning the arrangements on subcontracting of the tasks by the consortium members.

Documents belonging to category 2 contain the financial statements ('Forms C') submitted by ██████████ in the course of the projects in question. The relevant parts of the documents contain detailed financial information relating to the categories and amounts of costs incurred in the execution of the project.

Documents belonging to category 3 include the financial assessment of the projects carried out by the European Commission following the examination of the participants' costs statements. This include the individual 'person-month status tables', reports on distribution of the EU financial contribution and the 'summary reports' containing payment calculation for the entire consortium, broken down to the individual consortium members. Significant part of information included in the undisclosed parts of documents is similar to that included in documents belonging to category 2.

Additionally, the information relating to the payment calculation to other consortium members, as explained in part 2 of this decision, falls outside the scope of your application.

That above-mentioned information has to be considered as commercially sensitive business information.

Its public disclosure, through the release of the above-mentioned documents under Regulation (EC) No 1049/2001, would clearly undermine the commercial interests of the entities (including ██████████ ██████████) participating in the projects in question. Disclosing the information concerning details of the implementation of the project (reflecting the description of work included in the proposal of the project), or financial data included in

¹⁶ And its legal successors.

the financial statements (and reflected in the assessment carried out by the European Commission) would give potential competitors an unfair advantage. Given the competitive environment in which the applicants for grants operate, it is necessary to consider that information as sensitive business information.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to the relevant parts of documents belonging to categories 1, 2 and 3 must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

2.3 Protection of the purpose of inspection, investigation and audit and the decision-making process

Article 4(2), 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 purpose of [...] investigations [...] unless there is an overriding public interest in disclosure.'

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

The documents belonging to categories 1-3 relate to the ongoing proceedings by the Greek authorities concerning the participation of [REDACTED] in the projects funded by the EU. Indeed, the proceedings opened by the Greek authorities are the result of the enquiry launched in 2009 by the European Anti-Fraud Office. That enquiry related to a series of projects funded under the EU Framework Programme, in which [REDACTED] participated.

Documents belonging to categories 2 and 3 are part of the administrative file of the above-mentioned enquiry launched in 2009 by the European Anti-Fraud Office.

In order to ensure the effectiveness of enquiries led by the European Anti-Fraud Office into cases of possible fraud, it is essential to preserve a climate of mutual trust between all parties involved in the enquiry, and hence the confidentiality of these enquiries is of high importance. The enquiries led by the European Anti-Fraud Office – and the underlying evidence and information sources – therefore require strict protection from the public, even after the European Anti-Fraud Office enquiry (as in the case at hand) has been closed.

The fact that, as you point out in your confirmatory application in case GESTDEM 2019/287, you had access to the documents concerned in your capacity of the member of [REDACTED] management, may not warrant their public disclosure under Regulation (EC)

No 1049/2001. Indeed, as mentioned in point 2 of this decision, documents disclosed under that regulation become, legally speaking, public documents. Consequently, they would not be disclosed only to you, but also to anyone who would ask for such access, thus undermining the above-mentioned confidentiality of the enquiry.

The activities of the European Anti-Fraud Office in the above-mentioned case were finalised, with the recommendation to the Greek authorities to initiate proceedings in the matter. Subsequently, the Greek authorities launched the proceedings, which are therefore the direct result of the inquiry by the European Anti-Fraud Office.

The General Court, in its Judgment in Case T-221/08, confirmed the existence of a general presumption of non-disclosure as regards documents concerning the European Anti-Fraud Office enquiries, conducted on the basis of Regulation (EC) No 1073/1999¹⁷, in particular, but not limited to, those documents which contain opinions for internal use as part of deliberations and preliminary consultations. The General Court also ruled that, in such a case, it is irrelevant whether the request for public access concerns ongoing or already closed enquiries¹⁸.

Furthermore, the General Court, in the same Case, outlined that, in order to determine the scope of Regulation (EC) No 1049/2001, account must be taken of the relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered¹⁹. In the present case, the administrative procedures are regulated by Regulation (EU, Euratom) No 833/2013 concerning investigations conducted by the European Anti-Fraud Office²⁰, which provides for the obligation of confidentiality with regard to all information gathered during enquiries.

Consequently, the European Anti-Fraud Office are legally bound to treat the information it obtains during an investigation as confidential and subject to professional secrecy. As stipulated by Article 10 of Regulation (EU, Euratom) No 833/2013, the need for protection extends not only to individual interests but also to the purpose of investigations conducted by the European Anti-Fraud Office²¹. The same principle applies to the documents held by the European Commission, but which are, as in the case at hand, the part of the administrative file of the European Anti-Fraud Office enquiry.

The context and purpose of the confidentiality rules applicable to the European Anti-Fraud Office enquiries – as set out above – imply that confidentiality must also be

¹⁷ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Official Journal L 136, 31.5.1999, p. 1 to 7.

¹⁸ Judgment of the General Court of 26 April 2016, *Strack v Commission* (hereafter referred to as '*Strack v Commission* judgment'), T-221/08, EU:T:2016:242, paragraphs 159 to 164.

¹⁹ *Strack v Commission* judgment quoted above, paragraph 154.

²⁰ Regulation (EU, Euratom) No 833/2013 of the European Parliament and of the Council of 11 September 2013, Official Journal and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) concerning investigations conducted by the European Anti-Fraud Office (OLAF) and No 1074/1999, Official Journal L 248 of 18.9.2013, p. 1.

²¹ In this context, 'investigation' is to be understood in a broad sense comprising all information collected during the process.

ensured after the closure of the relevant enquiry. Therefore documents concerned come under the general presumption that disclosure would be harmful to the purpose of the investigation.

Based on the above considerations, I conclude that the documents belonging to categories 2 and 3 fall under the exceptions of Article 4(2), third indent (protection of investigations), and Article 4(3), second subparagraph (protection of the decision-making process), of Regulation (EC) No 1049/2001, and that access has to be refused on that basis.

Documents belonging to category 1 are relevant for the proceedings launched by the Greek authorities, which are, in the light of the judgment of the EU Court in Case C-331/15 P²², an investigation within the meaning of Article 4(2), third indent of Regulation (EC) No 1049/2001. Although that judgment relates to the activities of the European Commission, I consider that it applies by analogy to the activities of the national authorities. Indeed, the process pending before the Greek authorities, is a structured and formalised process that has the purpose of collecting and analysing information in order to enable the Greek authorities to take further steps provided in the national legislation.

As already mentioned, the fact that you had access to the above-mentioned documents in your capacity of the member of [REDACTED] management, may not warrant their public disclosure under Regulation (EC) No 1049/2001. Taking into account the (early) stage of the investigation by the Greek authorities, there is a real and non-hypothetical risk that, the public disclosure of the information included in the documents, would not only undermine the interests protected by the exceptions invoked in point 2.1 and 2.2 of this decision, but would also undermine the purpose of the above-mentioned investigation. Indeed, there is close and direct link between the subject matter of that investigation and the information included in the documents concerned. It would not be possible to ensure or apply the confidentiality provisions applicable to the investigations, if the information concerned would have been already publically disclosed by the European Commission. Consequently, the effective use of that information by the Greek authorities would be compromised. Therefore, in order for the Greek authorities to be able to carry out its tasks in the context of the pending proceedings, there has to be a protected space throughout the whole duration of the procedures until the case has been definitively closed. For this reason, the European Commission must refuse public access to the documents in question, which are relevant for the ongoing proceedings, based on the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 does not need to be balanced against overriding public interest in disclosure.

²² Judgment of the Court of Justice of 7 September 2017, *Schlyter v Commission*, C-331/15 P, EU:C:2017:639, paragraph 46.

The exceptions laid down in Article 4(2) 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 refer to the exception invoked by the Directorate-General for Research and Innovation in its initial reply (provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001) and underline that, in your view, public disclosure of the documents requested would not undermine that exception, but contrary, would allow you to assist in that proceedings.

You also explain that withholding the documents requested actually undermines your ability to defend yourself in these proceedings.

Please also note in this respect, however, that the above-mentioned motives constitute a private interest and can therefore not be considered as an overriding public interest in disclosure. Indeed, as confirmed by the Court of First Instance in its *Sison*²³ and *Franchet and Byk*²⁴ judgments, ‘the purpose of the Regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him and it follows that the applicants’ application must be examined in the same way as an application from any other person’.

Furthermore, the individual interest that a party may invoke when requesting access to documents cannot be taken into account for the purpose of assessing the possible existence of an overriding public interest.²⁵

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the economic operators, the purpose of the investigation and decision-making process, grounded in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001 and Article 4(3), second indent, of that regulation.

In any event, the documents, in question were provided to the Greek authorities or can be requested by them from the European Commission. Consequently, the information included therein can be taken by them into account in the ongoing proceedings, including those which you refer to in your confirmatory application.

4. NO PARTIAL ACCESS

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

²³ Judgment of the Court of First Instance of 26 April 2005, *Sison v Council*, Joined Cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraphs 50-55, Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraphs 43-48 and Judgment of the Court of First Instance of 9 September 2008, *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 66.

²⁴ Judgment of the Court of First Instance of 6 July 2006, *Yves Franchet and Daniel Byk v Commission*, Joined Cases T-391/03 and T-70/04, EU:T:2006:190, paragraph 82.

²⁵ Judgment of the General Court of 20 March 2014, *Reagens v Commission*, T-181/10, EU:T:2014:139, paragraph 144.

However, as stated by the Court of Justice²⁶, where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

With regard to documents belonging to category 1, no meaningful partial is possible for the reasons described in point 2 of this decision.

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



²⁶ Judgment of the Court of Justice of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2013:808, paragraph 133.