



EUROPEAN COMMISSION

Brussels, 13.8.2019
C(2019) 6132 final

[REDACTED]
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Spain

**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 2019/2176**

Dear [REDACTED]

I refer to your email of 9 July 2019, registered on 10 July 2019, 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 APPLICATION

In your initial application of 21 March 2019, addressed to the Directorate-General for Research and Innovation, you requested access to, I quote, ‘documents, which contain [...] the list of rejected [Framework Programme for Research and Technological Development] Horizon 2020 proposals’. You underlined that, you were interested in six categories of data. Indeed, you indicated that, I quote, ‘[f]or each proposal [you] would like to know all the following information:

- Proposal title,
- Abstract,
- Consortium composition’.

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

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

Additionally, you indicated that for each proposal you also would like to receive information about, I quote, ‘if possible:

- call and topic,
- funding requested,
- allocation of the funding requested by partner’.

The information requested is stored in a database used by the European Commission to manage the data related to the framework programmes.

In the reply of 28 June 2019, the Directorate-General for Research and Innovation granted access to the document containing four of the data categories listed in your initial application:

- proposal title,
- abstract
- call and topic and
- funding requested.

With regard to the remaining two categories of data (consortium composition and allocation of the funding requested by partner), the Directorate-General for Research and Innovation refused access thereto based on the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001. That exception protects the commercial interests of a natural or legal person.

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 concerned at the initial stage.

As explained in point 1 of this decision, all six categories of data requested are stored (together with other data) in the dedicated database used by the European Commission to manage the data related to the framework programmes.

Therefore, as a preliminary comment, I would like to point out that the question regarding the possible status of information stored in databases as a ‘document’ within the meaning of Regulation (EC) No 1049/2001 has already been subject to an assessment by the General Court, which established, in its ruling in Case T-214/13, that ‘[...] in the event of an application for access designed to have the Commission carry out a search of one or more of its databases using search criteria specified by the applicant, the Commission is obliged, subject to the possible application of Article 4 of Regulation No 1049/2001, to accede to that request, if the requisite search can be carried out using the search tools which it has available for the database in question’³.

³ Judgment of the General Court of 2 July 2015, *Typke v Commission*, T-214/13, EU:T:2015:448, paragraph 56 (hereafter: ‘*Typke v Commission*’).

With this judgement, the General Court confirmed the previous judgment in Case T-436/09, where the Court stated that: '[...] anything that can be extracted from a database by means of a normal or routine search may be the subject of an application for access [...]'⁴.

The Directorate-General for Research and Innovation applied the case law referred to above when handling your initial application.

Indeed, all six data categories requested can be extracted from the relevant database through routine operations. In the same way, the database offers the possibility to extract any selection or combination of these categories.

Consequently, the data requested constitutes a 'document' within the meaning of Article 2(3) of Regulation (EC) No 1049/2001, both in so far as all six categories are concerned and as regards any selection or combination of these categories.

In the light of the above, the partial access granted by the Directorate-General for Research and Innovation materialised in running a 'routine' data retrieval operation, based on the search criteria limited to four (instead of six) categories listed in your initial application (proposal title, abstract, call and topic and funding requested).

Bearing the above-mentioned considerations in mind, following my review, I have to confirm the position of the Directorate-General for Research and Innovation to refuse access to the withheld (not retrieved) information (concerning the composition of the consortium that submitted the unsuccessful proposals under Horizon 2020 Framework programme and the allocation of the funding requested by partner in these proposals). The underlying exception is provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person).

The detailed reasons are set out below.

2.1 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'.

In your confirmatory application, you contest the argumentation employed by the Directorate-General for Research and Innovation in its initial reply, according to which public disclosure of the withheld information relating to the composition of the consortium that submitted the proposals that were not selected for funding, would undermine the commercial interests of the partners of that consortium, by affecting their public image towards potential commercial partners.

⁴ Judgement of the General Court of 26 October 2011, *Dufour v European Central Bank*, T-436/09, EU:T:2011:634, paragraph 153.

In your view, that argumentation is, I quote, '[...] not only speculative, but also contradicts the collaborative spirit [that] governs the research community and the [Framework Programme for Research and Technological Development] H[orizon] 2020 overall objectives'.

I consider, however, that the risk of undermining the commercial interests of such partners, through the public disclosure of the information in question, is actually reasonably foreseeable, as explained by the Directorate-General for Research and Innovation in its initial reply.

As you pointed out in your initial application, disclosure of that information would allow calculating, I quote, 'the success rate of potential partners'.

Disclosing the information in question would put in the public domain the information about the economic operators whose 'success rate' in applying for the EU funding is low, but without meaningful information why it is low.

That in turn, would result in creating a list of economic operators, with which it is not encouraged to collaborate. Given that, as explained in point 3 of this decision, the reasons behind such low 'success rate' in many cases are complex and are result of many variables, such list would clearly undermine the commercial interests of such economic operators.

With regard to the information about the funding allocation in the consortium, I share the assessment of the Directorate-General for Research and Innovation, that it constitutes the part of the aspect of know-how of its partners. Indeed, it is linked to the distribution of tasks among the partners, which is in turn, one of the criteria taken into account in scoring of the proposal. Its public disclosure would therefore undermine their commercial interest.

Consequently, I conclude that access to the above-mentioned information must be refused based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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 argue that '[d]isclosure [of the requested information] would enable consortium members to be publically known so as to increase synergies needed to put together high quality proposals'.

You also argue that, the disclosure of the 'success rate' mentioned in point 2.1 of this decision, would be useful for, I quote, 'newcomers into the framework programme to choose its partners wisely'.

Firstly, such ‘success rate’, based only on the number of proposals selected for funding against the total number of proposals submitted by a given partner (consortium) would not give, in my view, the meaning full information about the value of the proposals. Indeed, the fact that the proposal was not selected for funding does not automatically mean that it was not sufficiently solid or ambitious. Each call for proposals has budgetary constraints that allows for funding of only limited number of proposals and the European Commission often rejects a proposal, not because it is weak, but because other proposals are better.

Consequently, disclosing the information in question, would not serve the purpose you refer to in your initial application, because, as mentioned in point 2.1 of this decision, it would not provide the necessary information on the reasons behind the low ‘success rate’.

Secondly, please note that any potential interests of the economic operators interested in participating in the research projects co-funded by the EU, constitute a private interest and can therefore not be considered as an overriding public interest in disclosure. Indeed, 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.⁵

You also underline that, ‘[t]he overall research environment requires transparency and accountability’.

In this context, I would like to refer to the judgment of the Court of Justice in the *Strack* case, where it ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance⁶. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure⁷.

Finally, I would like to underline that the European Commission disclosed significant amount of the requested information about the unsuccessful proposals submitted in the context of the Framework Programme for Research and Technological Development Horizon 2020.

4. PARTIAL ACCESS

No further access to the data concerned, through the disclosure of further data categories, is possible, as they are protected by the exception provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

⁵ Judgment of the General Court of 20 March 2014, *Reagens v Commission*, T-181/10, EU:T:2014:139, paragraph 144.

⁶ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128 (hereafter *Strack v Commission*).

⁷ *Strack v Commission*, cited above, paragraph 129.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to 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



CERTIFIED COPY
For the Secretary-General,



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