

From: RTD ACCESS DOCUMENTS
To: [REDACTED]
Cc: RTD ACCESS DOCUMENTS
Subject: Application for access to documents – [REDACTED] - Ref GestDem No 2012/5826 - Ares(2013)26172

Dear M

We refer to your email dated 11/12/2012 in which you make a request for access to documents, registered on 12/12/2012 under the above mentioned reference number.

Your application concerns the "Presentation of a Case, Maurizio Dal Toso, External Auditor, European Commission, DG Research and Innovation" which was given during the *International Workshop on Managing Risks and Accountability Challenges*, 22-24 June 2011, Brussels. This workshop was co-hosted by the European Commission and the U.S. National Science Foundation. In respect of this presentation, you request access to the following documents:

1. The slide presentation
2. The speaker notes, if any
3. The documents the official submitted to the Commission requesting permission to proceed with the presentation, as stipulated by the Staff Regulations
4. The Commission's permission to the official to make the presentation at the workshop."

Your application is currently being handled. However, we will not be in a position to complete the handling of your application within the time limit of 15 working days, which expires on 14/01/2013.

An extended time limit is needed as your application concerns documents possibly held by different Services which must be consulted.

Therefore, we have to extend the time limit with 15 working days in accordance with Article 7(3) of Regulation (EC) No 1049/2001 regarding public access to documents. The new time limit expires on 04/02/2013.

We apologise for this delay and for any inconvenience this may cause.

Yours faithfully,

Silvia BOJINOVA

Head of Unit



European Commission

DG Research & Innovation

R5

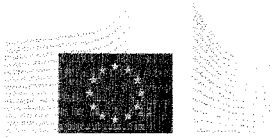
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EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR RESEARCH & INNOVATION

The Director-General

05 FEB 2013

Brussels,
ACCESS DOCUMENTS-2010-2013
GestDem number 2012/5826

Sent by email only

Dear M

Subject: Your request for access to documents
Our reference: GestDem 2012/5826

We refer to your email of 11 December 2012, in which you make a request for access to documents, which was registered on 12 December 2012 under the above mentioned reference number.

All documents concern the Presentation of a Case, by Maurizio Dal Toso, External Auditor, European Commission, DG Research and Innovation, which was made during the *International Workshop on Managing Risks and Accountability Challenges*, on 22-24 June 2011, in Brussels. This closed workshop was co-hosted by the European Commission and the U.S. National Science Foundation (hereinafter 'NSF').

Your request is considered to fall within the scope of Regulation N°1049/2001 regarding public access to European Parliament, Council and Commission documents.¹

I. The slide presentation of Maurizio Dal Toso External Auditor, European Commission, DG Research and Innovation and the Speaker's notes (should there have been any)

The points 1 and 2 of your request concern respectively the slides and notes (should there have been any) of the presentation of Mr Dal Toso.

After examination of your requests 1 and 2 under the provision of Regulation N° 1049/2001, we regret to inform you that we cannot give you access to these documents, as

¹ Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.05.2001, p. 43, hereinafter, Regulation N°1049/2001

their disclosure is prevented by exception to the right of access laid down in Article 4(2), third indent, of this Regulation.

Pursuant to the established case law of the European Court of Justice, we have assessed, firstly whether the requested documents fell within the scope of one of the exceptions provided for by Article 4 of Regulation N° 1049/2001 (*infra*, 1). Secondly, we have examined whether the disclosure of that document would specifically and actually undermine the protected interest (*infra* 2). Thirdly, we have analysed whether the protection of that interest applied to the whole document (*infra* 3); and fourthly if there was an overriding public interest in disclosure which would outweigh the harm caused by the disclosure (*infra* 4).

1. The Request falls within the scope of the third indent of Article 4(2)

Pursuant to Article 4(2), third indent, "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure".

According to settled case-law, this provision applies only if disclosure of the requested documents may endanger the completion of inspections, investigations or audits (See *inter alia*, *Franchet and Byk v. Commission*, [2006] ECR II-2023, paragraph 109). The General Court has also clarified that this exception can be invoked as long as the inspections, investigations, or audits are ongoing. (Concerning specifically the matter of audits, see *Terezakis*, T-380/04, [2008] ECR II-11)

In the present case, the requested documents relate to an ongoing audit case. Indeed, the presentation of Mr Dal Toso concerned a hypothetical fraud case which was based on an ongoing actual fraud case encountered by DG RTD and which is currently being handled by OLAF.

The NSF was not allowed to publish the presentation together with the presentations of the other speakers or to publish the summary report on their website.

2. Disclosure of the slides and notes of the Presentation would specifically and actually undermine the protected interest, namely the ongoing audit

In the present case, we reached the conclusion that disclosure of the slides or notes of the presentation would specifically and actually affect the purpose of the ongoing audit, as it would put in the public domain preliminary findings which have not yet been confirmed and which may be rebutted by the entities being audited. It could also undermine the efficient conduct of on-going procedures or investigations, as public disclosure of the requested documents could enable the persons concerned by the case to try to influence the result of the audit.

3. Partial Disclosure of the slides and notes of the Presentation cannot be granted

We have examined whether the need for protection of the audit concerned, applied to the whole slides and notes of the presentation. We came to the conclusion that since the presentation consisted precisely in explaining and analysing this concrete audit case, no partial disclosure could be granted in this case.

In its *Franchet and Byk* judgment², the General Court acknowledged that disclosure of audit related documents, even if they *had been rendered anonymous*, could undermine the protection of the purpose of inspections, investigations and audits (*op. cit.*, Paragraph 125 of the judgment).

Even if it had been rendered anonymous; the disclosure of some information regarding the audit case which was the subject of the presentation, could have a serious negative impact on the audit proceedings. Due to the specifics of the case, should any of its information become public, even anonymously, this would compromise the adversarial nature of the ongoing audit process concerned and its effectiveness.

4. Lack of overriding public interest justifying disclosure

Finally, we have assessed to which extent the exception of Article 4(2), third indent might be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be of public interest and, secondly, outweigh the harm caused by the disclosure.

The examination of your request did not reveal any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(2), third indent.

In light of the abovementioned elements, we have concluded that the exception to access to documents provided in the third indent of Article 4(2) was applicable to the points 1 and 2 of your application.

II. The documents the official submitted to the Commission requesting permission to proceed with the presentation, as stipulated by the Staff Regulations

The Staff Regulations of Officials of the European Communities do not require the submission of such documents for this type of presentation.

The documents which you request in point 3 of your Application do not exist.

Regulation N° 1049/2001 grants the public a right of access to documents which are in the possession of the institution receiving the request.

We regret to inform you that we are, therefore, unable to handle your application in respect of point 3 of your request for access to documents.

III. The Commission's permission to the official to make the presentation at the workshop

The Staff Regulations of Officials of the European Communities do not require such a document for this type of presentation.

² *Op. cit.*

The document which you request in point 4 of your request does not exist.

Regulation N° 1049/2001 grants the public a right of access to documents which are in the possession of the institution receiving the request.

We regret to inform you that we are, therefore, unable to handle your application in respect of point 4 of your request for access to documents.

Should you wish this position to be reviewed, you should send a confirmatory application to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen working days to do this as from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

The Secretary-General would then inform you of the result of this review within 15 working days from the date of registration of your request. You would either be given access or your request would be rejected, in which case you would be informed of how you could take further action.

All correspondence should be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS
Email : SG-ACC-DOC@ec.europa.eu

Yours sincerely,

For the Director General absent
W. BURTSCHEP
Deputy Director General

Robert-Jan Smits

CC: Ms S. Bojinova (RTD.R5), Mr M. Bellens (RTD.M1),
Ms S. Gruener (RTD.M1), Mr M. Dal Toso (RTD. M1),
Ms G. Lucza (RTD.R5), Ms C. Moal-Nuyts (RTD.R5)



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Direction B
SG-B.5
Transparency

Brussels, 20.03.2013
SG.B.5/JMLC/rc - sg.dsg1.b.5(2013) 447585

Mr Nikos Kollistavros

per email only:

Subject: Confirmatory application for access to documents under Regulation 1049/2001 GestDem number 2012/5826

Dear M

I am writing in reference to your e-mail of 27 February 2013 in which you requested a review of the positions taken by the Directorate General for Research and Innovation (hereafter DG RTD) regarding the access to documents. This application was made in accordance with Article 7(2) of Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (hereafter Regulation 1049/2001).

Your application is currently being handled. Unfortunately, we have not yet been able to gather all the elements we need to carry out a full analysis of your request in order to take a final decision and, therefore, we are not in a position to reply to your confirmatory request within the prescribed time limit expiring 20 March 2013. Consequently, we have to extend this period by another 15 working days in accordance with Article 8(2) of Regulation 1049/2001. The new deadline expires on 15 April 2013.

Yours sincerely,

Marc Maes
Deputy Head of Unit

¹ OJ L145, 31.05.2001, p. 43.



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Direction B
SG-B-5
Transparency

Brussels, 12.04.2013
SG.B.5/JMLC/rc -
sg.dsg1.b.5(2013) 646455

M

per email only:

Subject: Confirmatory application for access to documents under Regulation 1049/2001 GestDem number 2012/5826

Dear M

I am writing in reference to your e-mail of 27 February 2013 in which you requested a review of the positions taken by the Directorate General for Research and Innovation (hereafter DG RTD) regarding your application for access to documents made in accordance with Article 7(2) of Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (hereafter Regulation 1049/2001).

I also refer to the holding reply dated 20 March 2013, in which the time limit for replying to your confirmatory application was extended with 15 working days, pursuant to Article 8(2) of the Regulation. This extended time-limit will expire on 15 April 2013.

Unfortunately, we are still not in a position to provide you with a final reply to your request as the consultation of the Member State is still ongoing. I can assure you that we are doing our utmost to provide you with the final reply on your application as soon as possible. I regret this additional delay and sincerely apologise for any inconvenience this may cause.

Yours sincerely,

Marc Maes
Deputy Head of Unit

¹ OJ L145, 31.05.2001, p. 43.



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/JMLC/psi – sg.dsg1.b.5(2013)762839

M

only by email to:

Subject: Confirmatory application for access to documents under Regulation 1049/2001 – ref. GestDem 2012/5826

Dear M

I am writing in reference to your e-mail of 27 February 2013 in which you requested a review of the position taken by the Directorate General for Research and Innovation (hereafter DG RTD) on 5 February 2013 with regard to your request for access to documents of 12 December 2012. This application was made in accordance with Article 7(2) of Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (hereafter Regulation 1049/2001).

1. SCOPE OF YOUR APPLICATION

In your confirmatory application you reiterate your request for access to the following documents referring to the presentation by Mr Maurizio dal Toso, external auditor working for the European Commission, in an international workshop on managing risks and accountability challenges that took place on 22-24 June 2011 in Brussels, co-hosted by the Commission and the USA national science Foundation (hereafter NSF). The items covered by your request are:

1. *The slide presentation;*
2. *The speaker notes, if any;*
3. *The request for permission of the official to proceed to the presentation;*
4. *The permission to make the presentation.*

2. EXAMINATIONS AND CONCLUSIONS

First of all, I note that the response given to your initial application indicates that DG RTD has provided you with a proportionate answer to your particular queries.

¹ OJ L145, 31.05.2001, p. 43.

However, following your confirmatory application, I can confirm to you that no documents as described under items 3 and 4 exist. Therefore, your request is devoid of purpose for these two items.

Regarding documents concerned by items 1 and 2 of your request, following a thorough examination of the documents concerned, I regret to inform you that they cannot be disclosed for public access as they fall within the scope of exceptions laid down in Article 4 of Regulation 1049/2001, as detailed below.

2.1. The protection of the Union's financial policy

Article 4(1) (a) fourth indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) [t]he public interest as regards (...) the financial, monetary or economic policy of the Community.*

The financial policy of the Union (formerly the Community) can be understood as relating to the proper management of the funds of the EU. It is a policy aimed at protecting the financial resources managed by the Commission by way of audits of beneficiaries of grants and other subcontractors.

I confirm what DG RTD already explained, that these slides and/or any related notes used for this presentation are based on two on-going real cases that are actually being handled by DG RTD and by the European anti-fraud office OLAF. One of these cases has in the meantime be transferred to the judicial authorities. Therefore, any misuse of this information would have a direct financial impact for the EU budget, not only for the cases themselves but also through any other potential future investigation of unduly paid money.

2.2. The protection of the purpose of on-going audits

Article 4(2), third indent, of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits.*

As previously stated, these slides and/or any related notes are based on real cases of alleged fraud which are actually being handled by DG RTD, by OLAF and by the judicial authorities. Any public disclosure of this information would not only undermine the protection of the on-going cases but could also endanger the proper investigation of future cases. This information could even inspire future fraudulent behaviour, as the examples given could be misused in attempts to circumvent regular controls in future. Therefore, access to these two documents cannot be granted.

Besides that, taking into account the content and the issues at stake, at the time of the international workshop, as confirmed by DG RTD in the initial reply, the Commission asked the NSF not to publish this presentation.

2.3. Overriding public interest

Pursuant to Article 4(2), the exceptions to the right of access must be waived if there is an overriding public interest in disclosure. For such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. it must outweigh the interest protected by virtue of Article 4(2), of Regulation 1049/2001.

In your confirmatory application you state that the public has an interest in being fully informed on the matter, in relation to allegations you have made throughout both applications of unlawful behaviour. Once again I must stress that this is a response to a request for access to documents, which is not the appropriate procedure for making this kind of allegations. These allegations are not relevant as regards the handling of a request for disclosure of documents and they should be formulated in a proper complaints procedure.

The claim that the public has an interest in knowing about unlawful behaviour of the Commission it is not relevant in this regard as the documents requested do not reveal any information that would substantiate such a claim.

Furthermore, the public interest is better served by ensuring that the Commission can properly audit contractors and beneficiaries of grants in order to ensure that funds are put to good use. After all it is public funds that are used to finance the European institutions and they should therefore be protected from misuse.

Consequently, I consider that the prevailing interest in this case is to protect the purpose of the on-going and future audits.

In addition, the exception in Article 4(1) (a) fourth indent, which equally applies to all of the withheld sections, is an absolute exception that should not be balanced against the public interest in disclosure.

3. 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 TFEU.

Yours sincerely,



Catherine Day