



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 04.02.2014
SG.B.4/MF/rc - sg.dsg2.b.4(2014) 243579

Mr Tasos Ntetsikas

**By e-mail only: ask+request-912-6ffdaf85
@asktheeu.org**

**Decision of the Secretary General pursuant to Article 4 of the Implementing Rules to
Regulation (EC) N° 1049/2001¹**

**Subject: Confirmatory application for access to documents under Regulation
N°1049/2001 - Gestdem 2013/5195**

Dear Mr Ntetsikas,

I refer to your electronic mail of 3 December 2013, registered on the same day, through which you make 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').

As a preliminary remark, I draw your attention to the fact that this decision is taken within the provisions of Regulation 1049/2001 and the related detailed rules for its application³. I note that your e-mail contains a number of statements about the allegedly illegal nature of data processing by Commission services. These remarks constitute general comments, rather than an application for access to documents under Regulation 1049/2001. The merits of these allegations can therefore not be addressed within the scope of this confirmatory decision.

1. SCOPE OF YOUR REQUEST

In your initial application of 18 October 2013, addressed to the Commission's Internal Audit Service (DG IAS), you requested access to:

I. Concerning DG INFSO's Control Strategy for on-the-spot control and fraud prevention and detection:

R1. The documents DG IAS dispatched to DG INFSO about the preparation of the field audit activities;

R2. The meeting minutes of meetings between DG IAS and DG INFSO;

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

² Official Journal L145, 31.05.2001, p. 43.

³ Cf footnote 1.

R3. The note(s) to file of DG IAS;

R4. The DG IAS final audit report of DG INFSO;

R5. The 'statement of contents' of the DG IAS audit file within the meaning of the Case of the General Court T-437/08, CDC Hydrogene Peroxide v Commission;

II. Concerning DG RTD Control Strategy for on-the-spot control and fraud prevention and detection:

R6. The documents DG IAS dispatched to DG RTD about the preparation of the field audit activities;

R7. The meeting minutes of meetings between DG IAS and DG RTD;

R8. The note(s) to file of DG IAS;

R9. The DG IAS final audit report of DG RTD;

R10. The 'statement of contents' of the DG IAS audit file within the meaning of the Case of the General Court T-437/08, CDC Hydrogene Peroxide v Commission.

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

A. Documents falling under points R1, R4, R6 and R9 of your initial request:

- R1 : Announcement letter to DG INFSO on the audit of the control strategy for on-the-spot control and fraud detection and protection, dated 8 October 2010;
- R4: DG IAS' audit report of the control strategy for on-the-spot control and fraud detection and protection audit report of DG INFSO, dated 6 October 2011;
- R6: Announcement letter to DG RTD on the audit of the control strategy for on-the-spot control and fraud detection and protection, dated 8 October 2010;
- R9: DG IAS' audit report of the control strategy for on-the-spot control and fraud detection and protection audit report of DG RTD, dated 29 September 2011;
- R1 and R6: Scoping memorandum to DG INFSO and DG RTD of the audit of the control strategy for on-the-spot control and fraud detection and protection, dated 7 March 2011.

B. Documents falling under points R2, R3, R7 and R8 of your initial request:

159 working papers and 1144 uploaded attachments, consisting of (draft) meeting minutes between DG IAS and DGs RTD and INFSO, notes to the file by DG IAS staff, preliminary findings and raw data, including names of natural and legal (third) persons having formed the object of audits and controls by DGs INFSO and RTD. These internal working documents are all located within DG IAS' Governance, Risk Management and Compliance (GRC) electronic auditing control system, which is accessible only to a limited number of DG IAS staff, under very restrictive conditions.

C. Documents falling under points R5 and R10 of your initial request:

No documents were identified as falling under parts R5 and R10 of your initial request. Indeed, the GRC electronic auditing system, which contains all documents linked to DG IAS' audit files, does include neither a statement of contents nor a list of the documents forming part of a specific audit file.

Through its reply of 12 November 2013, DG IAS:

- granted partial access to all the documents listed under point A above by redacting the personal data appearing therein based on Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual);
- refused access to the documents falling under point B, based on the exceptions of Article 4(1)(a), 4th indent (protection of the EU's financial policy) and Article 4(2), 3rd indent (protection of the purpose of audits).

Through your confirmatory application you reiterate your interest in obtaining the documents falling under point B above⁴. You support your request with detailed arguments which I will address in the corresponding sections 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 an independent review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG IAS to refuse access to the documents requested, based on the exceptions of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits); Article 4(3), second indent (protection of the decision-making process); Article 4(2), first indent (protection of commercial interests) and Article 4(1)(b) (protection of the privacy and the integrity of the individual), as detailed below.

2.1. Protection of the purpose of inspections, investigations and audits

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

In the present case, whilst the audits to which the documents requested relate have been finalised, these audits are closely linked to other (internal) audits carried out by the IAS and DGs INFOS and RTD which are still ongoing, as explained in more detail below.

Under these circumstances, release of the documents to which you seek access would clearly undermine the protection of the purpose of inspections, investigations and audits, in four, closely linked, respects:

⁴ You also reiterate your interest in obtaining the documents described under point C above. However, as indicated above no documents were identified as falling under that part of your request. Therefore, that part of your request is devoid of purpose.

- As indicated above, the documents to which you seek access are electronic working documents drafted exclusively for internal use, located within the DG IAS' internal electronic auditing control system. They include the detailed audit approach, strategy and preliminary audit findings for each audit assignment, as well as raw data relating to audits and controls carried out by DGs INFSO and RTD.

Contrary to the DG IAS' final internal audit reports, to which you received access following your initial application, these internal electronic working documents are of a preliminary, unprocessed and un-aggregated nature. Taken out of their context, release of these documents or parts thereof would give rise to invalidated and unfounded conclusions about the effectiveness and compliance of the control strategies of DGs INFSO and RTD and/or the regularity of the underlying transactions having formed the subject of these audit and control strategies.

Doubts about the lawfulness of the on the spot-controls carried out by DGs RTD and INFSO could thus arise in the minds of grant and contract beneficiaries, leading to a reduced willingness, by the latter, to participate constructively in the on the spot-control process. Indeed, individuals and undertakings subject to such controls would lose their trust in the Commission's reliability and in the sound administration of the project files. These parties would then become reluctant to cooperate with the Commission. This, in turn, would jeopardise the Commission's authority and lead to a situation where the Commission would be unable to properly carry out on the spot-controls to protect the financial integrity of EU projects. Release of the documents would therefore **seriously hamper the performance and the effectiveness of any ongoing and future on the spot-controls carried out across the various programmes, projects and contracts financed by the Commission, including those relating to the Research Framework Programmes;**

- I should also like to point out that on the spot-controls are an essential first step in the EU's efforts to protect the EU budget against irregularities and fraud. Indeed, the on the spot-controls of the Research programmes, which are the subject of your access to documents request, uncovered irregular and sometimes potentially fraudulent behaviour into which the European Union Anti-Fraud Office (OLAF) is currently conducting investigations. Release of the documents would therefore also seriously and negatively affect the financial integrity of EU projects and programmes in a wider sense, by reducing the EU's capacity to fight against irregularities and fraud against the EU budget and protect taxpayers' interests.

Some on the spot-controls of grant or service contracts, which form the subject of the IAS' internal audits, are directly linked to ongoing investigations by OLAF. Selected on the spot-controls were even carried out jointly with OLAF. Disclosure of the documents to which you seek access would therefore seriously affect the confidentiality and effectiveness also of the OLAF investigations. Not only would – as yet unconfirmed – doubts arise about the legitimacy of the OLAF investigations, through the same mechanism as described above for the on the spot-controls, but the disclosure would also carry the risk of **affecting the confidentiality and, therefore, the effectiveness and the purpose of the OLAF investigations;**

- Disclosure of the working documents would also lead to a **breach of the climate of trust between DG IAS and its auditees**, which is an essential precondition for the effective fulfilment, by DG IAS, of its duties.

In this context it is worth noting that the working documents, stored in DG IAS' electronic auditing documentation system (GRC), are neither shared with the auditees nor with other DGs. Even within DG IAS, access to audit working documents is strictly limited to the relevant audit team.

The essential nature of the confidentiality of the internal audit process is reflected in the Mission Charter of DG IAS, which provides that the Head of Internal Audit Service should "respect confidentiality with regard to the information gathered from the audit and consultancy engagements performed". This obligation to respect confidentiality, which has been translated into a Mutual Expectations Paper, is based both on the Financial Regulation⁵ and the International Standards for the Professional Practice of Internal Auditing⁶, each of which includes specific provisions to that effect.

If the documents were to be released in contradiction with these legitimate confidentiality expectations and requirements, there is a real and non-hypothetical risk that this would undermine the trust of DGs INFSO and RTD, and of any future auditees, in the objectivity, impartiality and confidentiality of the audit process. This, in turn would reduce the willingness of these auditees to cooperate in future audits and in their follow-up, thereby undermining the effectiveness and, consequently, the purpose of these audits. Indeed, in the absence of such confidentiality, future auditees and DG IAS staff would be hesitant to freely express their views about the quality of the audit and control strategies and processes in DGs RTD and INFSO. The release would thus seriously hamper the purpose of DG IAS' internal audits, which is, *in fine*, to assess the effective implementation of control processes and strategies;

- Disclosure of the requested working files would reveal information on the specific way in which internal audits are concretely carried out during these on-going and future audits. Contrary to what you allege, this information goes beyond the information which has already been revealed through the partial release of the FP7 Audit Manual, as it would reveal the selected audit strategy and the applied methodology, of DGs INFSO and RTD and of DG IAS, in particular the careful considerations and judgements leading to audit conclusions. Disclosure of the documents would therefore **give indications to (potentially) audited entities as regards the scope and focus of future audits, thus enabling the latter to unduly anticipate these audits**. Its disclosure while the FP7 audit campaign and related internal audits by DG IAS are still underway would therefore seriously undermine the purpose of the ongoing and future audits by DGs INFSO and RTD and other Commission services as well as the internal audits carried out by DG IAS.

⁵ Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, Official Journal L 298 of 26.10.12, p.1.

⁶ Code of Ethics, section C.3 of the Institute of Internal Auditors, IIA stipulates that Internal auditors (3.1.) shall be prudent in the use and protection of information acquired in the course of their duties and (3.2.) shall not use information for any personal gain or in any manner that would be contrary to the law or detrimental to the legitimate and ethical objectives of the organization.

I would like to point out in this respect that, whilst the requested documents refer to two internal audits for which the audit recommendations have been finalised, there are other closely related on-going internal audits in this field. Examples are the audits of the control systems and/or control strategies with respect to the implementation, respectively, of the Seventh Framework Programme for Research and Technological Development (FP7) by the Directorates-General for Research and Innovation and Communications Networks, Content and Technology (DGs RTD and CNECT), and - though addressing the external aid sector still applying the same strategy - of the Foreign Policy Instruments (FPI), which were initiated respectively in November 2013 and January 2014.

Such disclosure would also constitute a breach of the Financial Regulation, Article 99(1) of which provides that "the internal auditor shall advise his or her institution on dealing with risks, by issuing independent opinions on the quality of management and control systems and by issuing recommendations for improving the conditions of implementation of operations and promoting sound financial management". Indeed, if the documents requested were to be publicly released, this would prevent the DG IAS from effectively carrying out its mandate as defined in that provision.

Please note in this respect that in its *TGI* and *Bavarian Lager* judgments,⁷ the Court of Justice confirmed that the application of Regulation 1049/2001 cannot have the effect of rendering the provisions of another Regulation over which it does not have primacy, ineffective.

The fact that Article 99(6) of the Financial Regulation limits the public accessibility of DG IAS documents to "the reports and findings of the internal auditor, as well as the report of the institution"⁸ only reinforces my conclusion that disclosure of the documents requested would lead to a breach of the Financial Regulation.

It follows that disclosure of the documents would undermine the purpose of inspections, investigations and audits in the sense of Article 4(2), third indent, of Regulation 1049/2001 read in conjunction with the Financial Regulation, by jeopardising the ongoing internal audits by DG IAS, ongoing and future audits by DGs RTD and INFSO and other Commission services, as well as ongoing OLAF investigations.

2.2. Opinions for internal use reflected in the documents: protection of the decision-making process

Article 4 (3), second paragraph of Regulation 1049/2001 provides that *access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution 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..*

⁷ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63.

⁸ The latter are made available "only after validation by the internal auditor of the action taken for their implementation".

As explained above, the documents to which you seek to obtain access were drafted for a very restricted internal audience within DG IAS and were not intended to be made known outside that service. They aim to contribute to the drafting of audit conclusions and recommendations, at a very early stage in their development. Their purpose is therefore clearly to contribute to deliberations and preliminary consultations in the sense of Article 4(3), second paragraph of Regulation 1049/2001.

The documents include preliminary findings and views of DG INFSO, DG RTD and DG IAS staff for internal use about the control strategies of DGs INFSO and RTD and the underlying audit evidence. If these preliminary findings and views for internal use were to be made public, this would carry a real and non-hypothetical risk of undermining the relations between the DG RTD and DG INFSO staff concerned and the IAS, as well as between the DG RTD and DG INFSO staff and their respective DGs. In addition, as indicated above under point 2.1, release of the documents would carry a real and non-hypothetical risk of self-censorship by future audited entities of the views shared with DG IAS, and by DG IAS staff as regards the analysis of future audit evidence, thereby reducing the quality, objectivity and reliability of the audit evidence. This risk continues to exist even after the audits to which the documents relate have been finalised.

Consequently, release of the opinions of internal use reflected in the documents would seriously undermine the decision-making process of DG IAS and the Commission protected by Article 4(3), second indent of Regulation 1049/2001, and access has to be denied on that basis.

2.3. Protection of privacy and the integrity of the individual

According to Article 4(1)(b) of Regulation 1049/2001, access to documents is refused where disclosure would *undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*.

The documents to which you seek access contain the names and functions of Commission staff. These constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

In its judgment in the Bavarian Lager case⁹, the Court of Justice ruled that, when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable. This means that the necessity of disclosing the personal data must be established and that there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

Your confirmatory request does not contain any arguments demonstrating the necessity of disclosing the personal data. Furthermore, there are clear reasons to assume that release of these data might prejudice the legitimate rights of the persons concerned.

⁹ Judgment of 29 June 2010, C-28/08 P.

Indeed, releasing the names and titles of the **Commission staff whose names appear in the documents** would infringe the privacy of these staff and expose the latter to undue pressure and criticism concerning their integrity. This is also the case for those **Commission staff whose names do not explicitly appear in the documents**, but whose actions are, directly or indirectly, the object of your allegations regarding the purported lack of compliance, by DGs IAS, RTD and INFSO, with Data Protection Regulation 45/2001¹⁰. Indeed, given that there is only a limited number of staff in DG IAS and in the Commission services dealing with grant agreements, service contracts and related controls and audits in the framework of the Seventh Research Framework Programme (“FP7”), it is very well possible to identify the staff who are the object of the allegations. Partial release of the documents, by redacting the names of those Commission staff explicitly appearing in the documents, would not, therefore, remove the risk of prejudice to the privacy and integrity of these Commission staff. Given the current heightened interest in the work of auditors, as evidenced by the numerous applications for access to documents and requests for information concerning the Commission's audits, the risk to the privacy and integrity of the Commission staff concerned is real and not purely hypothetical.

For these reasons, I conclude that the release of the documents would also undermine the protection of privacy and integrity of individuals in the sense of Article 4(1)(b) of Regulation 1049/2001.

2.4. Names of legal persons appearing in the documents: protection of commercial interests

Article 4(2), first indent of Regulation 1049/2001 provides that *the 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 documents to which you seek access include the names of legal persons who received EU funding. If access were granted to these names alongside the audit evidence and related preliminary assessments by DG IAS staff reflected in the documents, there is a reasonably foreseeable and non-hypothetical risk that this would negatively affect the reputation and, therefore, the commercial interests of the legal persons concerned. As the Court ruled in its *Odile Jacob* judgement¹¹, such a risk could persist after the administrative proceedings have been closed, up to 30 years or even beyond.

Consequently, access to the names of the fund beneficiaries appearing in the documents has to be refused, as release of these names would undermine the commercial interests of the legal persons concerned in the sense of Article 4(2), first indent of Regulation 1049/2001.

¹⁰ 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 12.1.2001.

¹¹ Judgment of the Court (Grand Chamber) of 28 June 2012 in case C-404/10 P, *European Commission v Editions Odile Jacob SAS*, paragraph 125.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions of Article 4(2), third indent and Article 4(3), second indent, of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure.

In your confirmatory application you refer back to the arguments included in your initial application to support the existence of an overriding public interest. In your initial application you stated that:

- there is of a *host of questions* about the extent to which DG IAS had suspected or realised the alleged *illegalities of DGs INFSO and RTD* in the control and audit of the Research Framework Programmes, *and what DG IAS did about it by informing the competent "bodies" within the Commission*;
- the requested documents *might shed light* into the audit units of DG INFSO and their alleged *internal "methods" for disregarding legality, including "twisting the arms" [of] FP6 contractors and FP7 beneficiaries by "obliging" them in risk-based audits to hand over personal data of third parties to the audited FP6 [...] [and] FP7 projects in contravention of the national data protection legislation and Regulation No 45/2001.*

Without prejudice to the question whether your allegations regarding the alleged illegal behaviour of DGs IAS, RTD and INFSO are correct, which falls outside the scope of this decision, I would like to draw your attention to the fact that the legislator has laid down specific procedures in Regulation 45/2001 to supervise, monitor and enforce the data protection rights and obligations flowing from that Regulation. In particular, pursuant to Article 41 of Regulation 45/2001, a European Data Protection Supervisor (EDPS) has been appointed, who conducts inquiries either on his or her own initiative or on the basis of a complaint and monitors and ensures the application of the provisions of Regulation 45/2001. These procedures, which are specified further in the Rules of Procedure of the EDPS¹², contain in-built guarantees that the rights of all persons involved are respected and that inquiries are carried out in an impartial manner.

It is difficult to see how the public release of the documents requested by you would fit in with, or add anything to, these established oversight procedures. To the contrary, public release of the documents would interfere with such procedures, as it would detract from their confidentiality and impartiality and from the guarantees that the rights of all persons involved are observed. I therefore cannot agree with you on the existence of an overriding public interest to disclose the documents.

I would also like to draw your attention in this respect to the Court of Justice's *TGI* and *Bavarian Lager* judgments,¹³ in which the Court confirmed that administrative activities are to be clearly distinguished from legislative procedures, for which the Court has acknowledged the existence of wider openness.

¹² Decision of the European Data Protection Supervisor of 17 December 2012 on the adoption of Rules of Procedure.

¹³ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63.

Consequently, I have to conclude that in this particular case there is no public interest which would justify a restriction of the protection of the purpose of the on-going audits and investigations, of the Commission's internal decision-making process, of the privacy and integrity of individuals and of the commercial interests of fund beneficiaries.

4. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested documents, in accordance with Article 4(6) of Regulation No 1049/2001. However, partial access is not possible given the fact that the documents concerned are entirely covered by the exceptions under Article 4(2), third indent, and 4(3), second paragraph, of Regulation 1049/2001, as detailed above.

Furthermore, for the reasons explained under point 2.3 above, partial access would not remove the risk to the protection of privacy and integrity of Commission staff in the sense of Article 4(1)(b) of the Regulation.

5. CONCLUSIONS

For the reasons set out above, I regret to inform you that I have to confirm DG IAS' decision to refuse access to the documents requested.

6. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Catherine Day', written in dark ink.

Catherine Day