EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR RESEARCH & INNOVATION

Directorate B - Common Implementation Centre
B.1 - Common Legal support service

First meeting of 2019 of the access to documents legal coordinators of the Research & Innovation family

Wednesday, 17 July 2019
15:00 – 17:00, ORBN 06/[redacted]

MINUTES

Participants: [redacted] (IMI2 JU), [redacted] (ERCEA), [redacted] (CNECT), [redacted] CNECT), [redacted] (MOVE), [redacted] (EASME), [redacted] (EAC), [redacted] (ENER), [redacted] (RTD), [redacted] (RTD), [redacted] (RTD), [redacted] (RTD).

1. **Coordination of requests submitted to multiple Commission services and EAs and JUs** (requests for information vs. requests for access to documents; Fragdenstaat and asktheEU platforms; etc.)

Recently, there have been several cases of multi-services requests submitted by applicants via the AsktheEU platform and/or the German Fragdenstaat platform.

The requests are usually sent directly to the services and often arrive in the ATD FMB Junk e-mail folder, therefore these are to be regularly checked.

For some of the cases the Secretariat-General considered them to be requests for access to information [redacted]

In addition, regarding requests from Fragdenstaat, in May 2019 the SG instructed Commission services that all current and future applicants using this platform will receive an automatic message asking them to submit their request through the Regdoc form. The SG clarified that they will provide additional information on the content of the message and how to set it up for automatic replies. Currently there is no such information

provided by the SG and there is no specific message for the acknowledgments of receipt for requests made through the Fragdenstaat platform. Therefore, for the moment the standard template for AoR is to be used. It is important to note also that the Fragdenstaat has a system, which automatically hides personal data on its website, so no disclaimer in this sense is to be included in the standard AoR.

2. Initial decision

- ***Data concerning H2020 rejected proposals – GestDem 2019/2176***

The applicant requested access to data concerning all H2020 rejected proposals, and in particular, for each proposal: (i) proposal title, (ii) abstract, (iii) consortium composition, (iv) call and topic, (v) funding requested, (vi) allocation of the funding requested by partner.

We qualified the application as an access to documents request, on the basis of the judgment of the Court of Justice T-214/13 according to which data extracted by a database using a routine tool constitute a "document" within the meaning of Regulation 1049/2001.

On the substance of the request, we decided to provide the applicant only with a part of the requested data, while we withheld (i) the consortia composition and (ii) the funding allocation, based on the exception of the protection of commercial interests. In particular, in our opinion, data concerning the consortia composition allows identifying the unsuccessful applicants and they are therefore commercially relevant, as the rejection of the unsuccessful applicants' proposals could adversely affect their image towards potential commercial partners.

The applicant challenged our reply on this point and SecGen is currently handling the confirmatory application.

3. Confirmatory decision by SG

- ***Overriding public interest in transparency - GestDem 2019/707***

We received a request related to documents from the evaluation and the redress of an H2020 proposal. Following examination of the request, we granted partial access to all the identified documents, with the exception of the *individual evaluation reports* to which no access was granted based on the Commission's decision-making process exception. The arguments were the following: individual evaluation reports form an integral part of that decision-making process and their confidentiality is therefore essential. The requested documents contain the opinions of the individual experts and relate thus to a very early step within a complex evaluation process at the end of which a funding decision is taken. Public disclosure of the opinions of the expert evaluators would have impact on the other ongoing and future evaluations. Indeed, such disclosure would lead to the risk of experts' and panel members' self-censorship and as the result, the European Commission would no longer be able to explore all possible options free from external pressure. Consequently, this would prejudice the margin of manoeuvre of the European Commission and, thus, undermine the integrity of the decision-making process of the Commission concerning the award of grants under Horizon 2020 programme.

In confirmatory application the applicantargued that the requested documents should be disclosed in the general overriding public interest of transparency, in order to allow for public verification whether the alleged fraud of public fund actually occurred (or not). The SG overruled this argument, based on the Strack case, according to which, 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 importance[1]. 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-disclosur. SG ruled that the applicant had not demonstrated how and in what manner public disclosure of the withheld documents would be beneficial for examination of the alleged frauds in relation to financing the projects under Horizon 2020 programme. SGalso emphasised that any potential case of fraud of mismanagement of the EU funds should be examined by the competent bodies (such as fOLAF), in line with the relevant procedures. These procedures are based on the principle of confidentiality of the material and evidence examined in their course. Therefore public disclosure of the (parts of the) documents concerned, would not facilitate these procedures, but in contrary, it would undermine their purpose.

- ***Financial documents related to FP6 projects- GestDem 2019/0314***

The request concerned financial documents related to the participation of a company to 25 FP6 projects, some of them handled by DG RTD and some others handled by DG CNECT.Those projects had been subject to an audit performed by the Commission, which had led to an OLAF investigation and, afterwards, to a criminal proceeding in front of the authorities, with charges of fraud.

At the time of the request, the criminal proceeding was still pending in front of the tribunal and the Commission had nominated an external lawyer to evaluate the opportunity of participating to the proceeding.

Given the above-mentioned circumstances, we assessed the possibility of invoking the court proceedings exception against disclosure of the requested documents. The exception can be applied when three criteria exists, as explained below.

(i) A Court proceeding - the Court of Justice affirmed, in case T-796/14, that the exception could apply to proceedings pending in front of a national court whether a question of interpretation or validity of an act of EU law so that a preliminary ruling appears particularly likely.

We consulted SG and the Legal Service concerning the interpretation of this criterion.

According to the Legal Service, the applicability of Court proceedings exception should be interpreted and applied strictly and therefore the link with EU law of the national proceeding should be only on a matter of interpretation of EU law and not on facts.

[1] Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2104:2250), paragraph 128.

According to SG the case law should not be construed too restrictively, at least at the initial stage of reply to an access to documents request. In their opinion the exception can be invoked when a reasonable link with an EU act or legislation exists.

In our assessment we took into account the fact that the charges of the national court related to the fraudulent use of EU funds during the implementation of the projects and that the launch of the national investigation and criminal proceeding was triggered by the OLAF investigation on the implementation of the projects. On the basis of the above, we considered that a sufficiently strong link between EU law and the national proceeding existed in order to invoke the relevant exception.

(ii) As per Regulation 1049/2001, the exception applies to '*documents drawn up solely for the purposes of specific court proceedings*'. According to the case-law, this wording must be understood to mean the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers. In our case, the requested documents were all relevant for the investigation of the case, as they referred to the financial management of the mentioned projects. We therefore considered them to fall within the scope of the exception.

(iii) In order to invoke the exception, it has to be proven that disclosure of the documents could undermine the principle of equality of arms or the Commission's ability to defend itself. In other words, the Commission has to be able to prove that disclosure of the requested documents would undermine the equality of arms or its ability to defend itself.

In this regard, we took into account the fact that the external lawyer appointed by the Commission was, at the time of our assessment, in the process of evaluating and developing the strategy for the defence of the Commission's interests within the national proceeding. We therefore considered that disclosing, at that stage, evidence outside the framework of the contentious proceeding could have been detrimental to the position of the Commission in the adversarial proceeding.

We therefore refused access to the applicant on the basis of the mentioned exception, without the possibility to provide meaningful partial access.

The reply was challenged and in its decision SG also refused access, invoking different exceptions as per Regulation 1049/2001:

(i) Protection of commercial interests: even though the documents referred to already closed projects, the information included could have still had commercial relevance;

(ii) protection of the purpose of inspection, investigation and audit: with reference to the OLAF investigation, SG affirmed that all documents part of the file of an OLAF investigation are protected by the mentioned exception (T-221/08). A general presumption of non-disclosure covers documents concerning OLAF activities, in particular but not limited to those documents which contain opinions for internal use as part of deliberations and preliminary consultation. In this regard, according to SG it is irrelevant whether the request for public access concerns ongoing or already closed enquires. In addition, it was considered that the documents were falling under the scope of the criminal investigation performed by the [redacted] authorities, as this also qualifies as investigation as per the meaning of Regulation 1049/2001;

(iii) protection of privacy and integrity of the individual.

4. Wide-scope requests

- ***Handling of wide-scope requests according to the current administrative practice – Confirmatory application GestDem 2019/1913***

We received 15 access to documents requests from the same applicant, with the same scope but concerning 28 different entities active in the health area.

After a first examination of the requests, we decided to treat them as one wide-scoped request, according to Ryanair's judgment T-494/08 in which the Court of Justice established that Article 6(3) of Regulation 1049/2001 may not be evaded by splitting an application into several, seemingly separate, requests.

We therefore explained to the applicant that requests would have been treated as one wide-scoped request which was too broad and we invited him to restrict the scope of the request to a manageable number, proposing a possible option and specifying the objective of his request and his interest.

The applicant replied with a first restriction of the scope; we assessed the restricted request and informed the applicant that it was still too broad to be handled within the deadline. We therefore invited to reconsider a different restriction of the request.

then proposed to handle request in batches, meaning a first part within the deadline and the remaining part after the deadline. We explained that the Commission no longer handles access to documents requests in batches, as clarified by the Court of Justice in Judgment C-127/13, para. 26-28. We therefore reiterated our request for a further restriction of the scope of the request.

Unfortunately, as it was not possible to agree on a fair solution, we decided to restrict unilaterally the scope of the request to documents from or to one of the mentioned entities, within a limited time frame and for which only redaction of personal data was needed.

The replied was challenged in a confirmatory application but SG confirmed our position and the procedure applied.

5. Interpretations of exceptions under Regulation1049/2001

- ***Decision making and commercial interest (Joint Undertakings)***

We consulted SG on the application of the commercial interests exception and the decision-making exception to Joint Undertakings of the Commission, even though Regulation 1049/2001 mentions only "institutions" and Joint Undertakings are EU bodies but not institutions.
SG confirmed that EU bodies can have a proper decision-making process and that therefore it is possible to invoke their decision-making protection, applying the exception per analogy.
Also the exception protecting the commercial interests can be invoked for JUs; the circumstance that JUs have a private partner reinforces this conclusion.

- ***Disclosure of names of authors***

We receive quite often requests for access to documents that relate to research studies, reports, etc., published or not, all having the authors mentioned therein.

According to the newest SG guidance on disclosure of third party's personal data, revised on 11 April 2019 (Fiche 9):

- "*Names of outside individuals, who are not public figures acting in their public capacity, are normally withheld, unless the following (cumulative, successive) conditions are fulfilled:*
- *the applicant substantiates a necessity for a specific purpose (demonstrated by express and legitimate justifications or convincing arguments) to obtain access to these names;*
- *there is no reason to think that the transfer would prejudice the legitimate rights of the individuals concerned (for instance, if the data subject has unambiguously given his/her consent or his name is proactively published under the applicable rules);*
- *the institution considers the transmission proportionate for the specific purpose brought forward by the applicant, after having demonstrably weighed the various competing interests;*
- *there must be no less invasive measures available, taking into account the principle of proportionality*."

We consider that the names of the individuals in their capacity as authors of the document requested, or of reference documents listed in the reference section of the document requested, can be made public, if it is clear that the authors have exercised their right to claim authorship and be identified as authors (e.g. their names in their capacity as authors of the document requested and/or authors of the references cited therein are publicly accessible online and have been made public by a trustworthy source). It could be considered that the authors (the data subjects), whose names are publicly accessible online and have been made public by a trustworthy source, have provided their consent in a way which leaves no doubt that they agree to the disclosure of their personal data (i.e. their names) in their capacity as authors of the documents they produced (Article 5(d) of Regulation 2018/1725).

It would be therefore redundant for the applicant to, for example, expressly ask for this type of personal data when requesting specifically access to a research report or study that has, by default, the names of the authors published on the cover.

SG agreed with this interpretationand clarified that in such a case indeed, the protection of personal data should not interfere with the protection of intellectual property..

6. SG guidance: 58th meeting of the network of access to documents coordinators, 25 June 2019

- ***Updated guidance on procurement and grants as of 19 June 2019***

https://myintracomm.ec.europa.eu/sg/docinter/Documents/guidance-note-procurement-grand-award-procedures.pdf

- ***Updated guidance on personal data of third parties as of 11 April 2019***

https://myintracomm.ec.europa.eu/sg/docinter/Documents/Fiche9-Third-party_names_and_signatures.pdf

- ***Level of signature for initial access to document requests***

https://myintracomm.ec.europa.eu/sg/docinter/Documents/who-signs-initial-atd-reply.pdf

- ***Wide-scope requests***

In case of a wide-scoped request referring to meetings, if after proposing a fair solution a unilateral restriction is needed, the Commission service should focus on meetings published on the Transparency Register.

According to the opinion of the Legal Service, if the request covers up to 20 documents it cannot be considered as a wide scope request (the size of the documents is also to be taken into account).

- ***Overruling third party's consultation***

SG reiterated that consultation of a third party is needed only if it is unclear whether access should be refused/granted.
Overruling of the third party's opinion is possible, **but not advisable**; overruling implies that certain administrative steps need to be taken and the legal/political risk must be assessed before disclosure. More precisely, in case the Commission service intends to overrule the third party's opinion:

- a letter needs to be sent to the applicant explaining that the Commission intends to overrule the Member State/third party's refusal;
- in accordance with the rules of application, the Member State/third party must be informed before disclosure of the Commission's decision to disclose [art.5 (6)]. This decision can be attacked before the Court;
- the Legal Service and the political hierarchy must also be informed before disclosure.

- ***Clarification requests***

If clarifications are asked, you should note in the DG comments field in GestDem:

  - *"Clarification request sent on…."*
  - *"Reply to clarification request received on…"*

and recalculate the deadline of the request by changing the registration date and replacing it with the date when the reply was received. Clarifications may be asked one or two days after the receipt of you request, depending on the time needed for internal consultation in the DG.

If the applicant does not reply to the request for clarifications, the DG may close the request, after informing him.

- ***Data breach***

In case of erroneous disclosure of personal data, the following steps need to be taken:

- inform the HoU in charge of the request, the DPC and SG.C.1;
- identify the relevant facts that led to the breach;
- take measures to restrain the breach and to eliminate/mitigate consequences:
    - inform the person that received the relevant personal data by mistake and ask him/her to sign a declaration, stating that he is not going to use the personal data.
- inform AsktheEU, if applicable;
- launch a procedure to remove personal data from Google cache (see Google privacy statement) or search engines, if applicable;
- conduct an assessment of the risk for rights and freedoms of data subject(s) concerned (in accordance with the DPO guidance):
    - inform the EDPS without undue delay and in any case within 72 hours after the controller became aware of the breach (fill in the relevant form).
    - in case of high risk of harm (e.g. data published in asktheEU for a long time), also inform the data subjects involved.