



EUROPEAN COMMISSION

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Mr Johan Rath
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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 – EASE 2023/1565**

Dear Mr Rath,

I refer to your email of 9 April 2023, registered on 13 April 2023, by which you lodge 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’).

Please accept our apologies for the delay in handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 8 March 2023, you requested access to, I quote:

‘(1) Data on contracts awarded by the EU from 2010 to 2016. The format should be the same as the reports that can be downloaded on <https://ted.europa.eu/TED/search/canReport.do>.

(2) Data on all the unsuccessful contract bidders from 2010 to 2023, including contract-specific information (URL notice, publication date, title of the notice) and bidder-specific information (name of the bidder(s) and size of the bid).

When combined with the available information from TED, this should allow me to construct a dataset on all the bidders and winners of EU contracts from 2010 to 2023.’

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.05.2001, p. 43.

In its initial reply of 29 March 2023, the Publications Office informed you that the European Commission does not hold any documents that would correspond to the description given in your application.

In your confirmatory application, you question the absence of any documents.

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 review of the reply given by the Directorate-General concerned at the initial stage.

Against the background brought in your confirmatory application, the European Commission has carried out a renewed, thorough search for the documents requested. Following this renewed search, the Secretariat-General confirms that the Commission does not hold any document that would correspond to the description given in your application at the date you submitted your confirmatory request.

Indeed, as specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

The Secretariat-General would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v European Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’³.

The above-mentioned conclusion was confirmed in Case C-491/15 P (*Typke v European Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, [...], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001’⁴.

In your confirmatory application, you state, I quote:

‘The request was rejected on the basis that "the TED database does not contain data on unsuccessful tenders. As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution"’.

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

We do not believe that this is a valid reason for rejecting the request. First, we believe that access to data on contract bidders (not only the winners) is in the interest of the public. Transparency in the allocation of contracts is incomplete without disclosing the losers. Second, we do not ask for highly complex data, and the costs associated with providing the data should therefore not be unreasonable. Third, we do not ask for personally sensitive information, and in case of privacy concerns, we are happy to sign an NDA. As a final remark, the main purpose of promoting transparency in EU procurement contracts is to cultivate trust in the political system by showing that public funds are allocated based on objective and efficient criteria. But how can this purpose be achieved if the EU only discloses information about the outcomes of these processes?’

In this respect, the Secretariat-General would like to confirm that, despite the fact that the European Commission keeps records of contracts awarded from 2010 to 2016⁵, the data and the format requested under point (1) of your initial application cannot be extracted from the relevant databases by means of a routine search operation using the search tools available.

Indeed, in *Typke v European Commission* judgment, the Court of Justice held that, ‘[...] the programming and IT management of [...] databases are not included among the operations carried out in the context of general use by final users. Those users access information contained in a database by using preprogrammed search tools. Those tools enable them to perform standardised operations easily in order to display the information which they usually need. A substantial investment on their part is, in general, not required in that context. [...] any information whose extraction from a database calls for a substantial investment must be regarded as a new document and not as an existing document’⁶.

With regard to point (2) of your initial application, the Secretariat-General further confirms that the abovementioned databases do not contain data on **unsuccessful contract bidders** covering the period from 2010 to 2023 (emphasis added).

The European Commission is not in possession of a single document containing data on all the unsuccessful contract bidders from 2010 to 2023, including contract-specific information (URL notice, publication date, title of the notice) and bidder-specific information (name of the bidder(s) and size of the bid). The information requested such as the names or identity of unsuccessful tenderers is contained in several documents held by the Commission including, but not limited to:

- Applications submitted;
- Lists of candidates who submitted a request to participate in a restricted procedure or a competitive procedure with negotiation or a negotiated procedure;

⁵ Such as in the databases, listed by the Publications Office in its initial reply of 29 March 2023, publicly available via: <https://ted.europa.eu/TED/misc/xmlPackagesDownload.do>; <ftp://guest:guest@ted.europa.eu/daily-packages/>; <https://data.europa.eu/data/datasets/ted-csv?locale=en>.

⁶ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraphs 36 and 39.

- Written records of the opening of requests to participate;
- Written records of the opening of tenders;
- Notifications of award decision to unsuccessful tenderers;
- Award or rejection decisions; and
- Evaluation reports.

Given the scope of your request, and the fact that the information requested is scattered through a very high number of different files, it is not possible to identify the precise number of documents that contain the information requested. In any case, the dataset extractable from the TED database⁷ contains 3.304 links to contract award notices only for 2016.

However, the requested names or identity of the unsuccessful tenderers are not publicly accessible under Regulation (EC) No 1049/2001 pursuant to the first indent of Article 4(2) (protection of commercial interest) for the reasons set out below.

2.1. Protection of commercial interests of a natural or legal person

The first indent of Article 4(2) 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’.

Firstly, the Secretariat-General notes that the first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union, which requires staff members of the EU institutions to refrain from disclosing ‘information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components’. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering Article 339 of the Treaty on the Functioning of the European Union, over which it does not have precedence, ineffective.

Secondly, the first indent of Article 4(2) of Regulation (EC) No 1049/2001 must be interpreted consistently with the provisions of the Financial Regulation⁸ and its Rules of Application⁹. Those provisions, as will be better explained below, contain guarantees of confidentiality and limit the information to be provided in respect to public tenders, even to interested parties on a privileged basis¹⁰. Furthermore, as neither Regulation (EC) No 1049/2001 nor the Financial Regulation contain any provision expressly giving one regulation primacy over the other, the right to disclosure of documents under Regulation (EC) No 1049/2001 cannot apply in contradiction with the specific confidentiality

⁷ <https://ted.europa.eu/TED/search/canReport.do>

⁸ Regulation (EU, Euratom) No. 966/2012 of the European Parliament and 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, OJ L 298 of 26.10.2012, p.1, as amended.

⁹ Commission Delegated Regulation (EU) No. 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and the Council on the financial rules applicable to the general budget of the Union, OJ L 362 of 31.12.2012, p.1, as amended.

¹⁰ See in particular Article 170 of the Financial Regulation.

provisions laid down in the Financial Regulation and its Rules of Application, as this would result in these provisions being deprived of their meaningful effect.

Furthermore, the General Court confirmed in *Cosepuri*¹¹ judgment that Regulation (EC) No 1049/2001 and the Financial Regulation have different objectives and do not contain any provision expressly giving one regulation primacy over the other.

Therefore, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables their coherent application.

The Secretariat-General would like to recall that documents disclosed under Regulation (EC) No 1049/2001 are disclosed to the public at large ('*erga omnes*') and not only to the applicant who originally requested access.

Public disclosure of information regarding unsuccessful tenderers would affect the reputation of these operators and thereby undermine their competitive position in the market. While tenderers or grant applicants can attend the opening of the offers on a privileged basis (thus they in principle may know who participates in a given call), this is not open to the general public and the Financial Regulation provides that, where appropriate, only the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract will be awarded will be disclosed. Therefore, the information regarding the names of economic operators that participated in a call for tender and to which the contract was not awarded, in principle, is not publicly disclosed by the European Commission and there is no provision in the Financial Regulation requiring the need for the information about the identity of unsuccessful tenderers to be publicly available¹².

It follows from the above that the names of unsuccessful tenderers can be protected under the first indent of Article 4(2) of Regulation (EC) No 1049/2001 and that a public release of the information requested would result, *de facto*, in circumvention of the specific confidentiality rules of the Financial Regulation, the purpose of which is first and foremost to protect the commercial interests of tenderers, including their reputation.

Consequently, there is a real and non-hypothetical risk that public disclosure of the information requested would undermine the commercial interests of the economic operators concerned.

The Secretariat-General must conclude, therefore, that the requested names or identity of unsuccessful tenderers must be protected based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001, interpreted in light of Article 339 of the Treaty on the Functioning of the European Union and Article 170 of the Financial Regulation.

¹¹ Judgment of the General Court of 29 January 2013, *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)*, Joined Cases T-339/10 and T-532/10, EU:T:2013:38, paragraph 85.

¹² Judgment of the General Court of 29 January 2013, *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)*, Joined Cases T-339/10 and T-532/10, EU:T:2013:38, paragraph 49.

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. It is for the applicant to put forward specific circumstances that show that there is an overriding public interest, which justifies the disclosure of the documents concerned¹³.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal¹⁴.

The Secretariat-General considers that the arguments stated in your confirmatory application, as quoted above, do not demonstrate an existence of an overriding public interest in disclosure of the information requested. The mere fact that the information requested is of interest to wider public does not mean that its disclosure cannot have any impact on the commercial interests of the economic operators concerned, nor does it mean that there is an overriding public interest in disclosing the documents.

In this context, please note that general considerations or references to transparency do not demonstrate a pressing need for the disclosure of the information requested and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the information contained in the documents in question¹⁵.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the interests protected by the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

The Secretariat-General concludes therefore that an overriding public interest has not been demonstrated in this particular case.

¹³ See e.g. judgment of the General Court of 5 December 2018 in Case T-312/17, *Campbell v Commission*, EU:T:2018:876, paragraph 58.

¹⁴ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

¹⁵ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to documents containing the information requested. However, for the reasons explained above, no meaningful partial access to the requested information contained in these documents is possible without undermining the interests described above.

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
Ilze JUHANSONE
Secretary-General

