



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR RESEARCH & INNOVATION

The Director-General

06 NOV 2013

Brussels,
ACCESS DOCUMENTS-2010-2013
GestDem number 2013/3654
ARES save number

Dear Mr Raptis,

Subject: Your request for access to documents
Reference GestDem 2013/3654

We would like to refer to your email dated 30 July 2013, through which you request public access to documents, registered under the abovementioned reference number. We have taken good note of your subsequent email of 5 October 2013, in which you submitted further arguments in support of the full disclosure of some of the requested documents.

I. SCOPE OF YOUR APPLICATION

Your application concerns the following documents:

- “1. The letter notifying the contractor/beneficiary about the conduct of an external financial audit, including all annexes and the Privacy Statement;*
- 2. The article 25 of Regulation No 45/2001 prior notification applicable at the material time regarding the DG RTD external financial audits;*
- 3. The final audit report, including all annexes thereto;*
- 4. Any single one time-sheet (i.e. only one out of many), if any, held by DG RTD and collected from the field audit;*
- 5. The ‘statement of content’ (within the meaning of Case T-437/08, CDC Hydrogene Peroxide v European Commission) of the file regarding the financial audit, that is to say a list of documents held in the audit file;*
- 6. The duly signed Recover Order corresponding to the Debit Note, as provided by articles 70 to 73 of Regulation No 1065/2002 (Financial Regulation);*
- 7. The Debit Note*
- 8. Every single different version of the ‘audit manual’ handed over to the external audit firms. In case the audit manual comprises several different documents, every single constituent document falls under the scope of this request;*
- 9. Every single ‘guidance paper’ handed over to the external audit firms;*

10. *The documents setting out the roles and responsibilities of the Commission audit staff accompanying the external auditors;*
11. *The parts of the framework contracts that lay down the obligations imposed on the external audit firms with regards to the conduct of the field audit and the drawing up of the audit reports;*
12. *The documents drawn up regarding the intensification of the 'efforts to ensure that the external audit firms meet all the specific requirements set out in the framework contract for every audit assignment';*
13. *The documents drawn up regarding how those Research family DGs were to carry out the 'reviews of the working papers retained by the external audit firms will be performed';*
14. *The documents drawn up with some kind of explanation/justification of why exactly 'the Commission does not consider that straightforward application of the Auditing Standards on reliance on work of other auditors is appropriate in this case';*
15. *The documents drawn up setting out in a generic manner 'a process to provide feedback to the certifying auditors where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings';*
16. *Any there (3) letters (out of many) addressed to beneficiaries providing feedback 'to the certifying auditors where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings'; [and]*
17. *Any there (3) letters (out of many) addressed to certifying auditors providing feedback to them 'where the Commission's ex-post audits identified material differences between the certified cost statements and its own findings'."*

Your request is considered to fall within the scope of Regulation (EC) N°1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

We have noted, however, that your application contains a number of allegations on the legality of external audits. As the present reply is taken within the provisions of Regulation (EC) N°1049/2001, the merits of these matters will not be addressed.

II. IDENTIFICATION OF THE RELEVANT DOCUMENTS

1. As far as points 1, 3, 6, 7, 11 and 17 of your request are concerned, please find attached, respectively, the corresponding three Letters of Announcement, Final Audit Reports, Recovery Orders, Debit Notes, Framework Service Contracts² and standard Letters to certifying auditors.

These eighteen documents have been all expunged from personal and commercial data pursuant to the combined application of Regulation (EC) No 1049/2001 and Regulation (EC) No 45/2001. In particular names, contact details, contracts, audit references, financial figures, and other commercial information have been deleted.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document shall be refused if its disclosure would undermine the protection of privacy and the integrity of the individual. This is in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the

¹ OJ L145, 31.05.2001, p.43. (Hereinafter, 'Regulation (EC) N°1049/2001').

² As per your request, we have retained only the 'relevant parts' of these contracts with the external audit firms in relation to "the conduct of the field audit and the drawing up of the audit reports".

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 data³.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable⁴. According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the eighteen above mentioned documents requested expunged from personal data, including names, contracts and audit references.

If you wish to receive these personal data, we invite you to provide us with arguments showing the need for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

Moreover, we have expunged the above mentioned eighteen documents of certain passages which would adversely affect the commercial interests of the persons concerned pursuant to Article 4(2), first indent of Regulation (EC) N°1049/2001. Pursuant to this provision, the institutions shall indeed refuse access to a document, where disclosure would undermine the protection of commercial interests, including intellectual property, unless there is an overriding interest in its disclosure.

The exception laid down in Article 4(2), first indent of Regulation (EC) N°1049/2001 may be waived in case of an overriding public interest in disclosure. Such an interest must firstly be a public interest and secondly outweigh the harm caused by the disclosure. Having analysed your request, we have not found any elements which could in any case justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(2), first indent mentioned above.

However, in accordance with Article 4 (6) of Regulation (EC) N°1049/2001, we grant you access to the remaining parts of the above mentioned eighteen documents which are not covered by the exceptions for the protection of personal data and commercial interests provided in Article 4. ~~These documents cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.~~

2. As far as points 2, 4, 5, 10, 12, 14, and 16 are concerned there are no corresponding existing documents. As far as point 2 is more specifically concerned, please kindly note that no dedicated notification on external audit existed before 2011. Please find thus attached the versions of the notifications of before 2011 covering the system and allowing DG RTD to monitor the correct implementation of the projects under its responsibility.

³ OJ L 8 of 12.1.2001, p. 1

⁴ Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, [ECR] 2010 I-06055.

More specifically in respect to point 4, please also note for your good information, that the underlying audit evidence such as *inter alia*, time sheets, is specific to every single audit and is subject to confidentiality in line with the provisions of the FP6 contract or FP7 grant agreement.

3. As far as point 8 of your application is concerned, please find attached the expunged versions of the FP6 and FP7 Audit Manuals.

The expunged parts from both the FP6 and FP7 Audit Manuals, shown as black marking in the documents provided, fall within the following two exceptions laid down in Article 4(2), third indent and Article 4(1)(a), fourth indent of Regulation (EC)N°1049/2001, as detailed below.

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”.

The expunged parts in both the FP6 and FP7 Audit Manual contain general standards and procedures related to on-the-spot audits as well as examples of specific problems encountered. Disclosure of the expunged procedures would enable a beneficiary to pre-empt the audit by making adaptations to the accounting and supporting documentation. This would lose the potential benefits derived from audits and would, therefore, undermine the purpose of future audits. The rest of the expunged sections relates to specific potential problems, practical advice and specific occasions on which there is an element of flexibility within the guidance to allow for certain circumstances. This information goes into more detail than a standardised practice manual as it is relevant to the particular circumstances. If this were to be disclosed, it would leave the areas of flexibility open to abuse. This would undermine the audit process, and consequently defeat the primary purpose of current and future audits.

Moreover, the expunged parts in both audit manuals cannot be disclosed pursuant to Article 4(1)(a), fourth indent of Regulation (EC) N°1049/2001. Pursuant to this provision, “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: (...) – the financial, monetary or economic policy of the Community (...)”.

The Commission carries out audits with a view to protect the financial interests of the EU. Should it be disclosed, the withheld specific guidance drawn up as part of the policy to ensure a proper allocation of EU funds could result in deliberate attempts of auditees to circumvent or obstruct auditors' findings. The financial policy of the Community would consequently and inevitably be undermined.

We have examined to which extent the exception laid down in Article 4(2), third indent of Regulation (EC) N°1049/2001 may be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and secondly, outweigh the harm caused by the disclosure.

Having analysed your request, we have not found any sufficient elements that could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in this provision of Regulation (EC)N°1049/2001. The disclosure of the redacted parts of the FP6 and FP7 Audit Manuals would reveal information on the way in which audit activities are concretely carried out in very specific cases. This

would reduce the effectiveness of the audit capacity of the Commission. In this context, the arguments which you put forward in your application do not justify the existence of an overriding public interest in the sense of the regulation that would outweigh the negative impact on the EU Budget and on the audit capacity for this type of expenditure resulting from full public access to the two documents in question.

Consequently, we can only grant to you partial access to the documents requested under point 8 of your request.

4. In respect to Point 9, we have identified the following seven relevant documents:

- a) the *Guide to Financial Issues relating to Indirect Actions of the Sixth Framework Programmes*. This document is already public and can be found at:
ftp://ftp.cordis.europa.eu/pub/fp6/docs/66624121_en.pdf
- b) the *Guide to Financial Issues relating to FP7 Indirect Actions*. This document is published at:
http://ec.europa.eu/research/participants/portal/ShowDoc/Extensions+Repository/General+Documentation/Guidance+documents+for+FP7/Financial+issues/financialguide_en.pdf
- c) the document on *Acceptability criteria for average personnel costs*, which you will find attached.
- d) a Guidance Note concerning the Question on remuneration and complementary employment contracts;
- e) a Guidance Note concerning *Fair apportionment of indirect costs*;
- f) a Guidance Note concerning the *Materiality threshold for insignificant errors at the audit reporting stage*; and
- g) a document entitled *Indicative audit program for FP7 average personnel costs*

Having examined each of the last four above mentioned documents (namely the documents listed under d, e, f and g) requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we regret to inform you that none of them can be disclosed under Article 4 of Regulation (EC) N°1049/2001. Each of these four documents is indeed protected under the above mentioned exceptions of Article 4 (1) a) third indent (protection of the financial, monetary or economic policy of the Community) and Article 4 (2) third indent (protection of the purpose of inspections, investigations and audits).

Moreover, they are also protected against disclosure under the exception laid down in Article 4(3), 2, pursuant to which “[a]ccess 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”. All four documents have indeed been drafted as guidance notes for internal use only. They concern specific audit related questions which auditors have encountered during their audit work and for which the existing Audit Manuals and other

(legal) documents (e.g. Guide to Financial Issues) do not provide sufficient clarification or guidance.

These four documents give more detailed information on the approaches and methodologies that auditors could follow when confronted with particular situations. Public Disclosure of these internal documents would thus undermine protection of the financial, monetary or economic policy of the Community and the efficiency and effectiveness of the audits especially in light of the fact that the FP7 audit campaign is still on-going.

Pursuant to Article 4(6), we have considered whether partial access could be granted to the four documents concerned. This provision states that *“if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”*. However, we regret to inform you that, as far as the four above mentioned documents are concerned, such a partial access was not possible.

We have examined to which extent the exceptions laid down in Article 4(2), third indent and Article 4(3), 2 of Regulation (EC) N°1049/2001 may be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and secondly, outweigh the harm caused by the disclosure.

Having analysed your request, we have not found any sufficient elements that could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in the above mentioned provisions of Regulation (EC)N°1049/2001. The disclosure of the four documents in question would reveal information on the way in which audit activities are carried out in specific cases. This would reduce the effectiveness of the audit capacity of the Commission. In this context, the arguments which you put forward in your application do not justify the existence of an overriding public interest in the sense of the regulation that would outweigh the negative impact on the EU Budget and on the audit capacity for this type of expenditure resulting from full public access to these four documents.

5. In respect of Point 13 of your request, please find attached an expunged version of the “Audit checklist for the Review of the Audit Files”. Full disclosure of this document is prevented by the above mentioned Article 4(2) first and third indents. The expunged parts of the document give indeed details on the checks and verifications to be performed by Commission Staff to review the audits performed by external audit firms.

~~We have examined to which extent the exceptions laid down in Article 4(2) first and third indents of Regulation (EC) N°1049/2001 may be waived if there was an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and secondly, outweigh the harm caused by the disclosure. Having analysed your request, we have not found any sufficient elements that could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in these provisions of Regulation (EC)N°1049/2001.~~

6. In respect to Point 15 of your request, please find attached the template for the letter which is used in order to provide feedback to the certifying auditors. This template is self-explanatory and there are no other existing documents for that purpose.

3. MEANS OF REDRESS

We refused to grant you access to four documents, but granted to you full access to fifteen documents and partial access to twenty one documents.

Please note that these documents cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

Should you wish the position of the Commission to be reconsidered, you should send a confirmatory application to the Commission's Secretary-General at the address below within fifteen working days.

The Secretary-General will inform you of the result of such review within fifteen working days from the date of registration of your request. You will either be given access to the documents requested, or your request will be rejected, in which case you will be informed of what further action is open to you.

All correspondence should be sent to the following address:

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

We would like to sincerely apologise again for the delay in processing your initial application, and assure you that we did our utmost in order to provide you with our reply as soon as possible. However, due to the nature of the requested documents, their analysis with a view to grant you the widest possible access, has taken some time. Moreover, large files had to be examined and several services consulted.

We thank you very much in advance for your kind understanding.

Yours sincerely,

For the Director General absent
W. BURTSCHER
Deputy Director General

Robert-Jan Smits

Annexes

CC: Ms S. Gruener (M.1); S. Bojinova, C. Moal-Nuyts, G. Lucza (R.5)
Mr M. Bellens (M.1); T. Bourgeois (R.5)