



European Research Council
Executive Agency

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Mr Alexander James Nicoll
Flat 3, 291 St Ann's Road
London N15 3TR
United Kingdom

Sent by: Registered Letter
Advanced copy by e-mail: ask+request-7221-328f38c6@asktheeu.org

Subject: Your request concerning any documents relating to the “INCLUDE (Grant agreement ID: 681518) – Indigenous Communities, Land Use and Tropical Deforestation” project including, but not limited to, the original initiating documents, ethical statements and subsequent progress reports

Dear Mr Nicoll,

We hereby refer to your request received on the 18 August 2019 and registered on the 20 August 2019, following the confirmation of the mail address, under reference number Ares(2019)5306588 and in which you were asking for access to the following:

“All and any documents relating to the “INCLUDE (Grant agreement ID: 681518) - Indigenous Communities, Land Use and Tropical Deforestation” project including but not limited to the original project initiating documents, ethical statements and subsequent progress reports”

Please, note that we have considered your request as a request for access to documents under Regulation (EU) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents (herein under referred to as the public access to documents Regulation)¹.

In the absence of a specific indication, we understood that your request was referring to the documents related to the project INCLUDE from the scientific proposal submitted by the

¹ OJ L 145, 31.5.2001, pp. 43-48.

applicant, to the signed grant agreement. We also included within the scope of the request the evaluation dossier, which contains inter alia individual assessments of the reviewers, which were delivered to applicants at the end of the peer review evaluation process and the ethics assessment. We also considered that the progress reports mentioned in your request refer to the implementation of the signed grant agreement.

We have therefore proceeded to the identification of the following documents:

- Part B1 and B2 of the research proposal (hereinafter “scientific proposal”);
- Evaluation Report;
- Ethics Summary Report;
- Signed grant agreement with its annexes, including the description of the action, and two amendments (hereinafter “grant agreement”);
- A scientific report and a periodic report related to the financial implementation of the project (hereinafter “progress reports”).

We would like to start by informing you that the ERCEA is bound to ensure the confidentiality of all the applications it receives in the context of Horizon 2020, as foreseen in the applicable ERC rules for submission of proposals and the related evaluation, selection and award procedures relevant to the specific programme of Horizon 2020 (herein under referred to as the ERC rules for submission)². The applicants, therefore, have a legitimate expectation of confidentiality when they submit their proposals, the breach of which could cause significant damages to the reputation of both the ERCEA and the applicant.

The confidentiality expectation does not, however, preclude the need for transparency which derives from the European Commission's commitment to providing the general public with information on EU-funded research projects and projects results. In this regard, in the case of the successful applications, the ERCEA publishes on the ERC website, in accordance with the terms of the grant agreement, the summaries of the proposals, which are based on the abstracts of the submitted applications, the identity of the respective grantee, the host institutions as well as the start and end dates of the projects.

Furthermore, the ERCEA is also bound by the confidentiality obligations arising from the contracts with the peer reviewers³, i.e. the independent experts who evaluate the ERC applications and who submit the results of their assessments in the form of an evaluation report. In this respect, the applicable ERC rules for submission also provide that the names of the independent experts assigned to individual proposals are not made public⁴.

² ERC rules for submission (Commission Decision C(2015)4975 of 23.7.2015):

Introduction:

Confidentiality. *All proposals and related data, knowledge and documents communicated to the ERCEA must be treated in confidence.*

³ Article 3.1 of the Annex I *"Code of Conduct"* to the Expert Model Contract (Commission Decision C(2013)8373 of 11.12.2013 on the Model Contract for Experts for Horizon 2020 – the Framework Programme for Research and Innovation of the European Union (2014-2020):

"The contracting party or relevant service and the expert must treat confidentially any information and documents, in any form (i.e. paper or electronic), disclosed in writing or orally in relation to the performance of the Contract."

⁴ See section 3.2 *"Selection and appointment of independent experts"* of ERC rules for submission.

Taking the above into account, we have verified whether any of the exceptions foreseen in Article 4 of the public access to documents Regulation would apply to the disclosure of the identified documents.

Protection of privacy and integrity of the individual

Article 4(1) (b) of the public access to documents Regulation foresees that the institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.⁵ The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (hereinafter referred to as the "Data Protection Regulation")⁶. When access is requested to documents containing personal data or whose content may identify an individual, this Regulation becomes fully applicable⁷.

Application of privacy exception to the scientific proposals, grant agreement and progress reports of the mentioned ERC project

We consider that the Article 4(1) (b) of the public access to documents Regulation exception applies to the scientific proposal, grant agreement and progress reports, since they contain personal data of the Principal Investigator (hereinafter referred to as the PI) and other individuals (i.e. team members and collaborators) the PI worked or collaborated with in the past and/or is planning to do so in the course of the project implementation that should be preserved. While the name of the PI is publicly available, other personal data relating to him (e.g. the PI's CV or the description of his career and achievements) present for instance in the scientific proposal that are also part of the grant agreement should not be disclosed to the public.

It shall also be noted that according to Article 9(1) (b) of the above mentioned Data Protection Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transmitted for a specific purpose in the public interest and if the controller establishes that there is no reason to assume that the data subject's legitimate interests might be prejudiced and it is proportionate to transmit the personal data for the specific purpose after having demonstrably weighted the various competing interests.

⁵ Article 4(1) of the public access to documents Regulation: *"The institutions shall refuse access to a document where disclosure would undermine the protection of:*
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

⁶ OJ L 295, 21.11.2018, p. 39-98.

⁷ Judgment of the European Court of Justice of 29 June 2010 in Case C-28/08 P, Commission v Bavarian Lager.

We consider that these two conditions, which are cumulative⁸, have not been established in your case.

Partial access

We have considered if a partial access to those documents could be granted, but this option must be excluded, as after expunging all names it would still be difficult to completely anonymise these documents. Furthermore, the other applicable exception would anyhow prevent the disclosure of the expunged applications (see *Protection of commercial interests* below).

The privacy exception is deemed to apply to the entirety of the above-mentioned documents.

Application of privacy exception to the evaluation report and the ethics summary report of the mentioned ERC project

The privacy and integrity of the individual exception is also relevant for the evaluation report and the ethics summary report prepared by the peer reviewers and ethics experts participating in the evaluation of an ERC application, because their identity/possible identification could also be at stake. The evaluation provided by an expert constitutes information that may identify him or her as a person. Writing style or actual expertise revealed in the comments, following the “direct or indirect identification” criteria make it possible to attribute a particular observation to a given expert. This is even more the case as the list of Panel members for the Call in question is made public. This implies the possible identification of a natural person according to Article 3(1) of the Data Protection Regulation. It is also established case law that observations, which can be attributed to identifiable persons, are personal data⁹.

In addition, ERC peer reviewers, as already mentioned, are providing their assessment with an expectation of confidentiality, which stems from the contract signed with the ERCEA, and disclosing those assessments could indirectly concern their reputation (by way of example, reviewers should be able to provide their views freely without concern that this could affect their reputation and/or career in the future depending on the assessment they provide).

Moreover, the evaluation report and the ethics summary report contains the reviews and the assessment of the mentioned ERC proposal which are considered personal data of the applicant PI in the meaning of the applicable Data Protection Regulation. In fact, it may not be excluded the risk of the direct or indirect identification of the PI or persons mentioned in there. In addition, the reviews of the application contain reference to the concept and ideas expressed in the proposal, which are personal data of the PI.

We have also examined and concluded that the above-mentioned cumulative conditions under Article 9(1) (b) of the Data Protection Regulation have not been established in your case.

⁸ Judgment of the European Court of Justice of 29 June 2010 in Case C-28/08 P, *Commission v Bavarian Lager*.

⁹ C-615/13 P, *ClientEarth v EFSA*, para.28.

Therefore, we have concluded that also for the case of the evaluation report and ethics summary report, the exception of Article 4(1) (b) fully applies.

Partial access

In this context, it should be noted that anonymised evaluation report and ethics summary report (giving a partial access to the documents) clearly do not eradicate the risk that the experts are identifiable through their individual comments and/or the list with the members of all ERC Panels which is made public at the end of every Call on ERC website and other relevant sources¹⁰.

Protection of commercial interests

The first indent of Article 4(2) of the public access to documents Regulation foresees 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 on the content of their applications.¹¹

This approach is in line with Article 339 of Treaty on the Functioning for the European Union (TFEU), 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.

Indeed, the ERC applicants PI and host institutions have legitimate expectations on the protection of the methodologies used for their research work and their intended results, which are described in detail in the scientific proposal of their application and in the progress reports, and must be safeguarded by the Agency.

Application of commercial interests' exception to the scientific proposals, evaluation report, grant agreement and progress reports of the mentioned ERC project

After analysing these identified documents, we have concluded that their disclosure would seriously undermine the commercial interests of the applicant PI and host institution who submitted them and obtained an ERC Grant, as it would affect their intellectual property rights and know-how (including copyright). Technical information contained in the scientific proposal and consequently in the evaluation report, grant agreement and progress reports related to the implementation of the project (for example the description of the action's overall aim, objectives and methodology of the project) constitute commercially sensitive information. This information corresponds to the know-how of the applicant and contributes to the uniqueness and attractiveness of the application in the context of calls for proposals. Releasing such commercially sensitive information into the public domain might give the competitors of the applicant an unfair advantage, as the former would be

¹⁰ See in this respect, Article 2 of above mentioned data protection Regulation, with regard to "personal data" definition:

"(...); an identifiable person is one who can be identified, directly or indirectly in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"

¹¹ Article 4(2), first indent, of the public access to documents Regulation:

"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,"

able to use this sensitive commercial information in their favour. They, could namely, anticipate the applicant's strategies and weaknesses, including when competing in other calls for proposals.

Moreover, the ERC is precisely known for supporting cutting-edge and frontier research. This implies that very often ERC funded proposals are characterised by their originality and novelty, whose protection is essential to help in bringing about new and unpredictable scientific and technological discoveries.

The Article 4(2) exception can be overruled whenever there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. In the present case, you have not submitted any arguments in your application justifying the existence of such an overriding public interest in the sense of the public access to documents Regulation.

Partial access

No partial access to the identified scientific proposal, evaluation report, grant agreement and progress reports of the concerned project is possible without undermining the interests of applicant as described above.

Conclusion

As a result of the above considerations, we regret to inform you that on the basis of the relevant exceptions of the public access to documents Regulation, it is not possible for ERCEA to give you access to any of the above-mentioned documents related to the ERC project you mention in your request. These exceptions apply in the following way:

- Article 4(1) (b) applies fully to the scientific proposal, grant agreement, the evaluation report and ethics summary report;
- Article 4(2) applies fully to the scientific proposal, grant agreement and progress reports.

As already indicated in the sections above and for the explained reasons also a partial access to the requested documents in accordance with Article 4(6) of the public access to documents Regulation cannot be granted.

Consequently, our conclusion is that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

Means of Redress

Pursuant to Article 7(2) of the public access to documents Regulation, you are entitled to make a confirmatory application requesting the Agency to review this position. If you wish so, you should write to the ERCEA's Director at the address below, confirming your initial request, within 15 working days from receipt of this letter. Otherwise, your initial request will be deemed to have been withdrawn.

The ERCEA Director will inform you of the result of this review within 15 working days from the registration of your request, either granting you access to the requested documents or confirming the refusal. In the latter case, you will be informed of how you could take further action, if interested.

Your confirmatory request should be sent to the following address:

European Research Council Executive Agency (ERCEA)
Waldemar Kutt, (*acting*) Director
COV2 - Place Rogier 16
BE-1049 Brussels
Belgium

or to the following e-mail address: erc-access-to-documents@ec.europa.eu.

Yours sincerely,



Georges-Eric Te Kolsté
Head of Department

