



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE

Director-General

Brussels,
JUST/C1/Ares(2014)

Ms Cornelia Trentea

by e-mail to ask+request-477-e12974e5@asktheeu.org

**Subject: Your application for access to information and documents – Ref GestDem
No 2014/0803**

Dear Ms. Trentea,

We refer to your e-mail dated 24 January 2014 addressed to the Secretary General Ms. Day and to the President of the Commission Mr. Barroso.

You have requested access to the following:

1. explanations about why DIHR was exempted from application of article 107(1) new FR (art. 94 in repealed FR), applicable for both, FRA procurement contracts and EC grants agreements;
2. the legal basis applied for those awarding of [DIHR]contracts;
3. any documents showing that the Highest Hierarchy in the Commission (as President, Vice-President, Secretary General) took some relevant steps, like ordering some audits, controls, etc. If this is the case, you request access to the relevant findings (these could be Audit Reports, Letters, Notes, Minutes, etc.).

As regards your request under point 1, I must inform you that this is a request for information and not for access to specific documents. This request therefore does not fall under the provisions of Regulation 1049/2001.

Concerning your request under point 2 for access to the legal basis applied for awarding the DIHR contracts, I can refer you in particular to the following Council Decisions:

√ **FRC:** Council Decision of 19 April 2007 establishing for the period 2007-2013 the specific programme Fundamental rights and citizenship as part of the General programme Fundamental Rights and Justice (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007D0252:en:NOT>)

√ **PROGRESS:** Council Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, JO L 315 of 15.11.2006 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D1672:EN:NOT>)

√ **EIDHR:** Council Regulations 975/1999 (developing countries) and 976/1999 (other third countries) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms, adopted on 29 April 1999 (OJ L 120/1 of 8.05.1999)

Finally, upon your request under point 3 we have carried out a check in our archives and we have identified the following documents as falling within the scope of request:

1. Note from the Secretary General for the attention of Ms Viviane Reding, Vice-President of the Commission, Ms Françoise Le Bail, Director General DG JUST, of 9 September 2013;
2. Note from Ms Françoise Le Bail, Director General DG JUST for the attention of the Secretary General, of 7 January 2014;
3. Note from the Secretary General for the attention of Ms Françoise Le Bail, Director-General DG JUST, of 11 February 2014.

- **Concerning document 1.**

The document concerns investigations by the European Anti-Fraud Office (OLAF) into allegations of irregularities and possible fraud in contracts and grants awarded by the Directorate-General for Justice and the EU Fundamental Rights Agency to the Danish Institute for Human Rights.

Having carefully examined your request and the document in light of the provisions of Regulation (EC) Nr. 1049/2001, I have come to the conclusion that access to this document has to be refused based on the **exception** of Article 4(2), third indent (protection of the purpose of investigations).

Recent Court of Justice case law¹ has confirmed a general presumption that disclosure of the documents forming part of the administrative file of investigations governed by specific rules resulting in restricted access to the file undermines, in principle, the protection of the objectives of that investigation. In the present case, OLAF's

¹ Judgment of the Court (Grand Chamber) of 29 June 2010 in case N-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; Judgment of the Court (Grand Chamber) of 28 June 2012 in case N-404/10 P, *European Commission v Editions Odile Jacob SAS*, paragraphs 130-131; Judgment of the Court (Grand Chamber) of 8 December 2011 in case N-477/10 P, *European Commission v Agrofert Holding, a.s* paragraph 56-59 and 64-66; Judgment of the Court of 9 September 2011 in case T-29/08, *Liga para Protecção de la natura v European Commission*, paragraph 117; Judgment of the Court in case T- 380/08, *Kingdom of the Netherlands v European Commission*, paragraph 35.

administrative procedures are regulated by Regulation 833/2013 concerning investigations conducted by OLAF².

The context and purpose of the confidentiality rules applicable to OLAF investigations imply that **confidentiality must also be ensured after the closure of the relevant investigation**. Therefore documents that record, transmit, analyse and evaluate information received in the course of an OLAF investigation, such as the document to which you seek to obtain access, come under the general presumption that disclosure would be harmful to the purpose of the investigation in the sense of Article 4(2), third indent of Regulation (EC) Nr. 1049/2001.

- *Concerning documents 2 and 3*

The documents which you seek to obtain relate to ongoing audit work in the European Agency for Fundamental Rights in 2014.

Having examined both documents in light of the provisions of Regulation (EC) Nr. 1049/2001, I regret to inform you that your application cannot be granted. The disclosure of reports, respective notes, relevant documents and information is prevented by the **exception** laid down in Article 4(2) third indent of Regulation (EC) Nr. 1049/2001.

As mentioned before, the Court of Justice has confirmed a general presumption that disclosure of the documents forming part of the administrative file of investigations governed by specific rules resulting in restricted access to the file undermines, in principle, the protection of the objectives of that investigation. In the present case, disclosure of documents 2 and 3 would undermine the **protection of the purpose of ongoing audit work**; disclosure at this point in time would unduly interfere with the contradictory procedure and may undermine the rights of the entity concerned. Therefore the exception laid down in Article 4(2) third indent of Regulation (EC) Nr. 1049/2001 applies to these documents.

The exception laid down in Article 4(2), third indent of Regulation (EC) Nr. 1049/2001 must be waived if there is an **overriding public interest in disclosure**. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(2), first and third indents of Regulation (EC) Nr. 1049/2001. Considering the confidential nature of the investigation proceedings in this case and the reputational risk for parties involved in fraud cases, I can see no public interest in the release of the three identified documents which would outweigh the protection of the commercial interests of legal persons and the protection of the purpose of the investigations.

I have also examined the possibility of granting **partial access** to the three documents, in accordance with Article 4(6) of Regulation (EC) Nr. 1049/2001. However, partial access is not possible considering that documents are covered in their entirety by the exception protecting the purpose of investigations, as explained above.

² Regulation (EU, Euratom) No 833/2013 of the European Parliament and of the Council of 11 September 2013, Official Journal and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) concerning investigations conducted by the European Anti-Fraud Office (OLAF) and No 1074/1999, Official Journal L 248 of 18 September 2013, p. 1.

In accordance with Article 7(2) of Regulation (EC) Nr. 1049/2001, you are entitled to make a **confirmatory application** requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission

Secretary-General

Transparency unit SG-B-5

BERL 5/327

B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,

A handwritten signature in black ink, appearing to read 'T. L. Bail'.

Françoise LE BAIL