

Decision on how the Executive Agency for Small and Medium-sized Enterprises (EASME) handled a request for public access to documents related to a project funded under Horizon 2020 (case 46/2021/OAM)

Decision

Case 46/2021/OAM - Opened on 20/01/2021 - Decision on 08/07/2021 - Institution concerned European Innovation Council and SMEs Executive Agency |

The case concerned the partial refusal by the Executive Agency for Small and Medium-sized Enterprises (EASME) to grant public access to documents related to a project funded under Horizon 2020. The documents in question concerned deliverables and amendments to the original grant agreement. EASME provided partial access to three amendments to the grant agreement but refused to disclose the rest of the documents identified, relying on the need to protect personal data, the need to protect the commercial interests of the beneficiary, and the need to protect its decision-making.

The Ombudsman's inquiry team inspected the documents. On this basis, the Ombudsman considered that EASME's refusal to disclose the documents concerning deliverables was justified, given that the deliverables in question had been deemed confidential in the grant agreement. Concerning EASME's partial refusal to disclose the amendments made to the grant agreement, the Ombudsman proposed that EASME grant wider access, given that the beneficiary itself had published the original grant agreement and that there were therefore no commercial interests to be protected with respect to those parts of the agreement which had remained unchanged.

In reply, the European Innovation Council and SMEs Executive Agency (EISMEA), which succeeded and replaced EASME on 1 April 2021, maintained the view that access had to be denied at the time. However, it stressed that a new public access request would be assessed in light of the new circumstances, which may lead to a wider disclosure of the documents at issue.

The Ombudsman regrets that EISMEA did not accept her proposal for a solution and finds its explanations unconvincing. She finds it sufficient to put these views on the record and to close the case, given that pursuing it would have no practical implications for the complainant. She trusts that EISMEA will deal promptly with any follow-up request from the complainant to the documents in question and, more generally, will uphold its publication obligations in line with the grant agreement. This will help secure the right of the public to be adequately informed about the implementation of EU funded projects.



Background to the complaint

1. The access request concerns documents related to a Horizon 2020 grant agreement between the Executive Agency for Small and Medium-sized Enterprises (EASME) and a UK-based company (hereafter, 'the beneficiary') to fund a project to develop an ultra-low water flush toilet. [1]

2. In August 2020, the complainant, a former staff of the beneficiary, asked EASME for public access [2] to *"copies of all reports and assessments filed in relation to this project since its commencement, including any changes to the scope of the project and the deliverables (including the outputs of all 9 Work Packages and details of any work packages added or abandoned)"*.

3. EASME replied that it had identified four categories of documents related to the project (namely 'reports', 'review reports', 'deliverables' and 'amendments'), and provided partial access to all (three) documents from the category amendments. It refused to disclose the remaining documents based on various exceptions contained in the public access rules. More specifically, EASME said that disclosure would undermine the protection of privacy and the integrity of the individual, [3] the protection of the commercial interests of the beneficiary, [4] and the protection of its decision-making. [5]

4. In September 2020, the complainant asked EASME to review its decision (making what is known as a 'confirmatory application') with respect to the documents in the categories deliverables and amendments.

5. EASME replied, maintaining that no further access could be granted. With respect to the deliverables, it explained that Annex 1 of the grant agreement identified 21 such deliverables, out of which five had been submitted by the beneficiary at that time (and therefore fell within the scope of the request). While one deliverable - a report - was publicly available, [6] the other four were submitted under "confidential dissemination level" and could not be disclosed, based on the exceptions to public access set out in EASME's initial reply, namely, the protection of commercial interests and the protection of the decision-making. Concerning the amendments, the original grant agreement between EASME and the beneficiary, as well as its Annex 1 (which includes the project description), had been amended three times at the time of EASME's final decision. EASME had provided partial access to the three amended grant agreements in its initial reply. However, it confirmed that no further access could be granted due to the reasons stated in the initial reply, namely, the protection of privacy and the integrity of the individual and the protection of commercial interests.

6. Dissatisfied with the reply, the complainant turned to the Ombudsman on 31 December 2020.



The Ombudsman's proposal for a solution

7. The Ombudsman's inquiry team inspected copies of the documents falling within the categories deliverables and amendments.

8. The Ombudsman's inquiry team also met with EASME representatives to obtain further information on EASME's decision not to fully disclose the respective documents.

9. On 26 March 2021, the Ombudsman proposed a solution to EASME. In her solution proposal, the Ombudsman noted that:

- As regards the **deliverables**, EASME had explained that the number of deliverables has remained unchanged despite the amendments to the grant agreement. Some of the deliverables are meant for public dissemination and will gradually be made public upon receipt and evaluation by EASME, while others are confidential and therefore cannot be disclosed. EASME's decision not to disclose the four confidential deliverables falling within the scope of the request was therefore justified.
- As regards the **amendments** to the grant agreement, at the time of the complainant's request, the original grant agreement had been amended three times. The changes concerned the duration of the action and the timeline, and were reflected in two parts of the grant agreement ('Terms and conditions' and 'Annex 1 - Description of the action'). [7]
- For each of the three amendments, EASME provided full access to the part 'Terms and conditions' and partial access to 'Annex 1'.
- The original version of the grant agreement between the agency and the beneficiary was made publicly available in its entirety by the beneficiary. There were therefore, in this case, no commercial interests to be protected with respect to those parts of the grant agreement that have remained unchanged. The parts that were changed could have still been withheld, if relevant exceptions under Regulation 1049/2001, such as protection of commercial data (the detailed new time schedule) and personal data, still applied.

10. In view of the above, the Ombudsman proposed to EASME to reconsider its position as regards the amended Annex 1 to the grant agreement, with a view to granting the widest possible public access through further partial disclosure of this document .

11. The European Innovation Council and SMEs Executive Agency (EISMEA), which succeeded and replaced EASME on 1 April 2021, rejected the Ombudsman's proposal for a solution.

12. EISMEA pointed out that its decision on the access request had been taken in light of the specific circumstances when the complainant's request had been made. Namely, at the time when the project was still ongoing, not all deliverables had been submitted and having respected the legitimate expectations of the beneficiary to have its commercial interests protected, following its consultation.

13. EISMEA took the view that it cannot reconsider its decision unless new legal or factual circumstances are invoked, in line with the principle of legal certainty. Should the complainant



make a new request for access to documents concerning the project, it would assess this request in light of the changed circumstances. This would require a new decision that may lead to a wider disclosure of documents.

14. The complainant was provided with a copy of the solution proposal and EISMEA's reply to it. He pointed out that although the project has now come to an end, the deliverables meant for public dissemination are still not available.

The Ombudsman's assessment after the proposal for a solution

15. The scope of the Ombudsman's inquiry was to assess whether EASME's decision not to disclose the documents at issue, at the time of its adoption, was justified.

16. As stated in the proposal for a solution, the Ombudsman considers that the agency was justified in refusing to disclose the four documents containing information on the deliverables available at the time of the request. The respective deliverables are listed as confidential, and therefore are restricted in accordance with the provisions in the grant agreement. [8]

17. As regards the amendments, the circumstances at the time of the request were such that, although the project was ongoing, the beneficiary had published the grant agreement in its entirety. The beneficiary, therefore, did not consider that the publication of the grant agreement undermined its legitimate commercial interests. The complainant informed the agency of this fact when making his request for access. The agency was thus well aware of it when it refused to grant access. Therefore, the Ombudsman considers that EISMEA could have disclosed further parts of 'Annex 1' of the amended grant agreement, without undermining the beneficiary's commercial interests.

18. EISMEA has reconsidered the matter, and, despite the above, has come to the same conclusion the agency adopted originally. The Ombudsman regrets that EISMEA did not accept her proposal for a solution and finds its explanations unconvincing.

19. The Ombudsman notes that the project under the grant agreement has now come to an end. EISMEA stated that it would assess a new request for access to documents by the complainant in light of the new circumstances, with the prospect of wider disclosure. While the Ombudsman welcomes the fact that EISMEA seems willing to grant wider access should a new request for access be submitted to it, she also notes that the key fact in her solution proposal, namely the fact that the beneficiary had published the grant agreement, was already known to the agency when it refused to grant further partial access.

20. The Ombudsman is of view that an EU institution or agency should not refuse access to a document to protect the commercial interests of a third party when that third party has published the very same document. In the current case, however, there is no useful purpose for the Ombudsman to pursue the case by making a formal finding of maladministration and a



corresponding recommendation. The complainant is aware of the content of the original grant agreement (following its publication by the beneficiary) and the amendments concern only the duration of the action and the timeline. Therefore, in these circumstances, the Ombudsman closes the case.

21. More generally, the Ombudsman considers that the public has a right to be adequately informed about the implementation of projects financed using public money. Updates on the development of such projects should be made available in a timely manner.

22. The project in question started on 1 October 2017. In the course of the project, the grant agreement was amended four times to extend the duration of the action, which ended on 31 March 2021. The overall EU contribution was EUR 890 250. The information on the status of the implementation of the project seems not to have been updated since September 2020; from the deliverables meant for public dissemination, only one is published. The Ombudsman therefore calls on EISMEA to follow-up with the necessary publication obligations under the grant agreement. This would be in line with the agency's commitment to the principles of good administration, including the principles of openness and transparency and would ensure public confidence in how it handled the project.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

While the Ombudsman regrets that EISMEA did not accept her solution proposal, she is of the view that no further inquiries are justified.

The complainant and the European Innovation Council and SMEs Executive Agency will be informed of this decision.

Emily O'Reilly European Ombudsman

Strasbourg, 08/07/2021

[1] For more information on the project see <https://cordis.europa.eu/project/id/778742> [Link].

[2] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission

documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link],



applicable to EASME pursuant to Article 23(1) of Council Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R0058> [Link].

[3] In accordance with Article 4(1)(b) of Regulation 1049/2001.

[4] In accordance with Article 4(2), first indent, of Regulation 1049/2001.

[5] In accordance with Article 4(3) of Regulation 1049/2001.

[6] See <https://cordis.europa.eu/project/id/778742/results> [Link].

[7] See for illustrative purposes the Commission's Model Grant Agreement for the Horizon 2020 Programme, available at:

https://ec.europa.eu/research/participants/data/ref/h2020/mga/sme/h2020-mga-eic-sme-mono_en.pdf [Link].

[8] See Article 36 - 'Confidentiality' of the Horizon 2020 model grant agreement.