

Decision How the European Commission dealt with a request for public access to documents concerning a procurement procedure related to strategic communication services (case 1838/2021/DL)

Decision

Case 1838/2021/DL - Opened on 26/10/2021 - Decision on 17/03/2022 - Institution concerned European Commission (No maladministration found) |

The complainant sought public access to documents related to a procurement procedure organised by the European Commission.

The Commission granted access to parts of the documents only. It argued that fully disclosing the requested documents would undermine the privacy and the integrity of the persons mentioned, the tenderers' commercial interests and the Commission's internal decision-making.

The Ombudsman inquiry team inspected the documents in question and found that the tender bids contained detailed information about the winning tenderer's strategies and methodologies and the key experts proposed by that tenderer. The other documents contained the Commission's evaluation of the bids. All documents contained some personal data.

In light of this, the Ombudsman considered that the Commission's refusal to grant public access to the documents was reasonable and in line with the EU legislation on public access to documents.

The Ombudsman thus closed the inquiry finding no maladministration.

Background to the complaint

1. In 2020, the Commission launched a procurement procedure for strategic communication services in Eastern neighbourhood partner countries [1] . The Commission awarded the corresponding contract in January 2021.

2. In March 2021, the complainant asked [2] the Commission to provide him with public access to several documents concerning the procurement procedure.



3. In April 2021, the Commission issued its initial decision. It identified 14 documents as falling within the scope of the request, including evaluation notes, an evaluation report concerning the tenders, individual evaluation grids, the instructions to tenderers and the proposal submitted by the winning tenderer. The Commission granted full access to the instructions to the tenderers and partial access to the evaluation report. It refused to disclose the remaining documents based on the need to protect the privacy and integrity of the evaluators and the tenderers' key experts [3] and the commercial interests of the tenderers, including their intellectual property [4]. It concluded that there was no overriding public interest in disclosure.

4. The complainant then requested the Commission to review its decision (by making a 'confirmatory application').

5. In May, June and September 2021, the Commission sent several holding replies to the complainant, saying that it was unable to reply by the deadline.

6. In the absence of a final decision, the complainant turned to the Ombudsman in October 2021. Following the Ombudsman's intervention [5], the Commission adopted its final decision in November 2021. It confirmed its initial decision to grant only limited access to the requested documents, now also invoking the need to protect its decision-making process [6].

7. Dissatisfied with the Commission's decision, the complainant turned again to the Ombudsman in November 2021.

The inquiry

8. The Ombudsman opened an inquiry into the Commission's decision to refuse access to (parts of) the documents at issue. In the course of the inquiry, the Ombudsman inquiry team inspected the 14 documents identified by the Commission as falling within the scope of the complainant's request.

Arguments presented

By the complainant

9. The complainant considers that public procurement procedures should be transparent, so as to allow for monitoring the expenditure of public money and upholding the accountability of the EU institutions. In view of this, the complainant considers that there is generally an overriding public interest in disclosure of the requested documents. [7] The complainant considers that this is even more important in light of the suspicions he raised regarding irregularities in the procurement procedure in question. [8]

10. The complainant says that he does not seek access to the names of the evaluators and to private or sensitive information concerning the key experts proposed by the tenderers. Rather, he is seeking access to the evaluations of the key experts, which were the basis for the Commission awarding the winning tenderer a multi-million Euro contract paid with EU taxpayers'



money. The complainant adds that he is already in possession of certain information as the key experts' profiles and CVs are publicly available. The complainant considers that the alleged irregularities that occurred in the procurement procedure justify the processing of personal data.

By the Commission

11. The Commission says that the documents contain the methodology and the technical and financial proposal of the winning tenderer. The documents also contain the notes on the technical evaluation and the evaluation report, including comments on the strengths and weaknesses of each proposal. Lastly, they contain the summary grids evaluating the technical and financial components of the tenders, as well as the individual evaluation grids from all three evaluators for each tenderer.

12. The Commission says that, according to EU case law, a general presumption of non-disclosure of proposals submitted by tenderers in a public procurement procedure exists. [9] Disclosure of the information contained in a proposal would give applicants in future calls the possibility to copy these applications and to use them in support of their own. Moreover, disclosure of the assessments on the strengths and weaknesses of each proposal would undermine the commercial interest of the companies concerned. As such, it had to refuse access to protect their commercial interests.

13. The Commission further argues that disclosure of the evaluation sheets and their summary would undermine the Commission's decision-making process, as it would compromise the evaluation committee's independence and would put them under external pressure. The Commission also refers to EU case law according to which disclosure of individual evaluation grids in a procurement procedure is likely to compromise the evaluation committee's independence. [10]

14. The Commission considers that general references to the principles of 'transparency' and 'sound financial management' do not constitute an overriding public interest in disclosure. [11]

15. The Commission further contends that the documents contain personal data, such as the names and initials of evaluators and of the key experts, as well as handwritten signatures.

16. The Commission does not consider that allegations of unfairness or bias in the procurement procedure constitute a 'necessity in the public interest for having the personal data transmitted' [12]. In line with EU case law [13], a general interest of the public cannot constitute a necessity.

17. The Commission considers that it is reasonable to assume that the legitimate interests of the data subjects could be prejudiced by disclosing their personal data, as there is a real and non-hypothetical risk that disclosure would harm their privacy and subject them to unsolicited external contacts [14]. The Commission also says that the complainant failed to show how transmission of the personal data contained in the documents is proportionate or how it serves the complainant's objective to gather more information on the evaluation of the tenders. The Commission thus refused access to the personal data.



The Ombudsman's assessment

Protection of commercial interests and the decision-making process

18. EU case law [15] establishes that documents submitted in a competitive tender procedure are, by their nature, likely to contain confidential technical and economic information about the successful applicant. Therefore, there is a general presumption that the disclosure of such documents would, in principle, undermine the protection of the tenderer's commercial interest.

19. General presumptions of non-disclosure can be rebutted. However, the complainant does not argue that the bids do not contain commercially sensitive information. The inspection of the proposal submitted by the winning tenderer confirmed that it contains detailed information on the implementation of the contract, such as the methodology, strategy, know-how, budget, timetables and details on proposed experts and partners. The Ombudsman therefore finds it reasonable for the Commission to consider that the general presumption that disclosure would undermine the commercial interests (of the winning bidder) applies in this case to the entire bid.

20. In addition, the evaluation report and its summary, as well as the evaluation sheets, detail the bids' strengths and weaknesses. Disclosing the merits of the individual bids could harm the reputation of the submitting companies. A negative assessment can also be used against the tenderer to its detriment, for example by a competing company. Positive aspects cannot be read or understood independently from the critical points. Partial access to the evaluation report and its summary would thus give a distorted view of the bids' assessment.

21. The Ombudsman also takes the view that anonymising the evaluation report and its summary would not prevent this harm from occurring. Even if the identities of the tenderers were not revealed, it is likely that companies in this specific field of communication, and interested parties, would be able to identify the tenderers and the corresponding evaluation. [16] This is even more so since only a few tenderers were shortlisted, and since the complainant is well aware of the identity of the other tenderers and their key experts.

22. The Ombudsman also considers it likely that disclosure of the evaluators' assessments of the tenders could give rise to pressure and unsolicited contacts to evaluators and would entail the risk of self-censorship by evaluators, thereby seriously undermining the Commission's decision-making process. For the same reasons, the Court has also found that individual evaluation grids shall not be disclosed, even partially [17] .

23. It is thus reasonable for the Commission to consider that disclosing detailed commercial information about the winning tenderer, as well as evaluation of all tender bids, could harm their commercial interests, as well as the Commission's decision-making process.

Overriding public interest in disclosure

24. The Ombudsman notes that the arguments put forward by the complainant as to why the



documents should be released are partially of a *personal* interest rather than a *public* interest, since the complainant wishes to demonstrate that another tenderer was more suited to obtain the contract in question.

25. Moreover, although the Ombudsman considers the complainant's arguments related to sound financial management to be important, they are not sufficient to establish an overriding public interest in disclosure. [18]

26. In the past, the Ombudsman has taken the view [19] that suspicion of a conflict of interest could constitute an overriding public interest when there was specific proof that such a conflict of interest could exist. In this case, however, the complainant alleges that the evaluators and the key experts may have worked together or that they may know each other. The Ombudsman considers it clear that key experts of companies that win bids for contracts with the Commission are likely to work with Commission staff over time. However, such contacts between Commission staff and personnel of outside companies are not sufficient to prove a conflict of interest.

27. The Ombudsman therefore concludes that it was reasonable for the Commission to consider that there was no specific proof brought to the Ombudsman's attention supporting the view that there is an overriding public interest justifying the disclosure of the bids or the evaluations of the bids.

The protection of the privacy and the integrity of the individual

28. The inspection of the documents at issue confirmed that they contain the names and initials of the evaluators, as well as the names, résumés and individual evaluations of the key experts proposed by each tenderer. The documents also contain handwritten signatures.

29. The Ombudsman notes that personal data is any information related to an identified or identifiable person. [20] Personal data is a very broad concept that encompasses both information related to an individual's private and professional life. [21] As such, all the above information, including the evaluation of the key experts, is personal data.

30. In line with the EU data protection law, the EU institution (in this case the Commission) should follow a three-stage analysis in considering whether it can grant public access to personal data. [22] First, the recipient needs to demonstrate the necessity for the transfer of the personal data for a specific purpose in the public interest. Second, the Commission has to establish whether such transfer might undermine the legitimate interests of the data subject. Third, the Commission needs to weigh up the various competing interest and decide whether it is proportionate to transmit the personal data for the specific purpose.

31. The complainant questions the validity of the information provided by the key experts of the winning tenderer, as well as objectivity of their evaluation. He argues that these alleged irregularities are the 'necessity in the public interest'. The complainant bases his suspicions, among other things, on information he found online, as well as through personal contacts with



key experts.

32. The Ombudsman understands that applicants can hardly ever be in a position to provide objective evidence of suspected irregularities before having had access to the requested information. Such applications are therefore based on suspicions which may be based for instance on information provided on social media platforms. [23]

33. However, any suspicions of impartiality or irregularities need to be reasonably grounded. [24] The Ombudsman finds it reasonable for the Commission to consider that the information provided as a result of the complainant's own research, as well as his general references to transparency [25] , are not sufficient to demonstrate a 'necessity in the public interest'.

34. Although it is not necessary to proceed to the second or third stage of the analysis in the absence of a 'necessity', the Ombudsman wishes to point out that she considers there to be a real and non-hypothetical risk that disclosure of the personal data could harm the key experts and evaluators' legitimate interests. This is especially the case in light of the allegations put forward by the complainant.

35. In this respect, the Ombudsman notes that the principle of proportionality requires that any transfer of personal data must be the most appropriate and least invasive means of attaining the applicant's objective, and be proportionate to that objective. In this case, the Ombudsman considers that there are other less intrusive means [26] to achieve the complainant's objective - that is, to verify whether irregularities occurred in the procurement procedure in question - which do not involve disclosing any personal data.

36. In light of the above, the Ombudsman considers it reasonable for the Commission not to disclose the personal data of the evaluators and the key experts.

Conclusion

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

There was no maladministration by the European Commission.

The complainant and the Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 17/03/2022



[1] EuropeAid/140654/DH/SER/MULTI:

<https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?ADSSChck=1585899611427&do=publi.welcome> [Link].

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

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> [Link].

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

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

[5] The Ombudsman urged the Commission to adopt a final decision without further delay in the context of this inquiry.

[6] Article 4(3) of Regulation 1049/2001.

[7] Under Regulation 1049/2001, the exceptions under Article 4(2) and 4(3) shall not prevent disclosure if 'an overriding public interest in disclosure' justifies the disclosure.

[8] The complainant refers among others to the modification of the tender requirements, alleged conflicts of interest between the members of the successful team and the evaluation committee (they have worked together and know each other), the competences of the key experts and the deficient reply to certain requests for clarifications.

[9] Judgment of the General Court (Second Chamber) of 29 January 2013, *Cosepuri Soc. Coop. pA v EFSA*, Joined Cases T-339/10 and T-532/10, paragraph 101:

<https://curia.europa.eu/juris/liste.jsf?num=T-339/10&language=EN> [Link].

[10] Judgment of the General Court (Third Chamber) of 22 May 2012, *Sviluppo Globale GEIE v Commission*, Case T-6/10, paras 79-81:

<https://curia.europa.eu/juris/liste.jsf?num=T-6/10&language=EN> [Link].

[11] Judgment of the Court (Second Chamber) of 2 October 2014, *Strack v European Commission*, Case C-127/13 P, paragraph 131:

<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/13%20P> [Link].

[12] These criteria are set out in Article 9(1)(b) of Regulation 2018/1725 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:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725> [Link].

[13] Judgment of the Court of Justice (Second Chamber) of 16 July 2015, *ClientEarth v EFSA*, Case C-615/13 P, paragraph 51:

<https://curia.europa.eu/juris/liste.jsf?num=C-615/13&language=EN> [Link].



[14] If there is the slightest reason to assume such prejudice, access has to be refused. See Judgment of the General Court (Fifth Chamber) of 15 July 2015, *Dennekamp v Parliament* , Case T-115/13, paragraph 117:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013TJ0115> [Link].

[15] Judgement of the General Court (Second Chamber) of 26 March 2020, *ViaSat, Inc. v. Commission*, Case T-734/17, paragraph 59:

https://curia.europa.eu/juris/document/document_print.jsf;jsessionid=0995D2AD2769A5C6C48737E5A2176F51?do [Link].

[16] Decision in case 393/2015/MDC on the European Commission's refusal to grant full public access to evaluation documents concerning a public procurement process, paragraph 60:

<https://www.ombudsman.europa.eu/en/decision/en/74238> [Link].

[17] *Sviluppo Globale GEIE v Commission*, paras 79-81 (see footnote 10).

[18] *ClientEarth v EFSA* , paragraph 93 (see footnote 13).

[19] Proposal for a solution in case 1794/2019/EWM on the European Commission's refusal to provide full access to documents relating to an event attended by Commission officials and by a former Commission head of unit, paras 27-20:

<https://www.ombudsman.europa.eu/en/solution/en/129972> [Link].

[20] Article 3(1) of Regulation 2018/1725.

[21] Judgment of the General Court (First Chamber) of 27 November 2018, *VG v Commission* , joined cases T-314/16 and T-435/16, paragraph 64:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=208102&doclang=EN> [Link].

[22] In line with Article 9(1)(b) of Regulation 2018/1725.

[23] Decision in case 393/2015/MDC, paragraph 33 (see footnote 16).

[24] This can be implied from *ClientEarth v EFSA* , paragraph 57 (see footnote 13).

[25] A general reference to 'transparency' is not sufficient to substantiate a need to obtain personal data. *ClientEarth v EFSA* , paras 50-52 (see footnote 13).

[26] For example, a tenderer can file a complaint to the contracting authority in line with the Practical Guide on Contract Procedures for European Union external action (PRAG). The matter can also be referred to the European Anti-Fraud Office (OLAF), which can investigate issues concerning fraud, corruption and other offences affecting the EU financial interests.