

Reply of the European Commission to the proposal for a solution from the European Ombudsman regarding the European Commission’s refusal to give full public access to documents concerning a mineral exploration research project funded under the Horizon 2020 programme

- Complaint by Mr ██████████ on behalf of Montescola Foundation, cases 1132/2022/OAM and 1374/2022/OAM

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 10 September 2021, the complainant submitted an initial application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’)¹. The complainant’s request was registered under reference GESTDEM 2021/5420.

In his initial application, handled by the European Commission’s Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the applicant requested access to documents concerning a Horizon 2020 research project in the field of mineral exploration, namely New Exploration Technologies (NEXT). In particular, he requested access to documents concerning the San Finx mine, located in the north-west of Spain.

In its initial reply of 20 October 2021, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to these documents based on the exception of the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001, upon consultations with the coordinator of the research project, in accordance with Article 4(4) of the same Regulation.

At the confirmatory stage, the European Commission identified five documents as falling within the scope of the request. It re-consulted the coordinator of the project and examined the arguments provided by the third party.

Based on this assessment, the European Commission granted partial access to one document subject only to the redaction of personal data based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. It granted partial access to three documents based on Article 4(1)(b) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001. It refused access to one document based on Article 4(1)(b) and the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The complainant lodged a complaint with the European Ombudsman, first regarding the document that had been refused by the European Commission, and then in relation to the documents to which the European Commission granted partial access.

¹ OJ L 145 of 31.5.2001, p. 43.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

The European Ombudsman opened two inquiries into the complaints, which it treated jointly. The Ombudsman's inquiry concerned four documents identified as part of the complainant's request. It did not concern the document to which partial access was granted by the European Commission subject only to the redaction of personal data.

In the course of the European Ombudsman's inquiry, the European Commission provided to the European Ombudsman the documents requested and the documentation concerning the consultations with the third party.

The European Ombudsman considers that the European Commission should review its position with a view to granting the widest possible public access to the documents requested.

IV. THE EUROPEAN COMMISSION'S POSITION ON THE PROPOSAL FOR A SOLUTION

The European Commission hereby submits the following comments regarding the European Ombudsman's proposal for a solution.

The documents requested relate to a grant agreement funded under the Horizon 2020 programme. The project, which ran from 1 May 2018 to 30 September 2021, aims at developing 'new geomodels, novel sensitive exploration technologies and data analysis methods'. The documents requested concern a deliverable of the project ('deliverable 8.3') that was marked in the grant agreement as 'confidential, only for members of the consortium (including the Commission Services)'. The information contained in the documents originates from a third party and is more detailed than publicly available information about the project.

The grant agreement with the confidentiality marking was signed both by the beneficiary and the European Commission. The documents were thus provided to the European Commission in the understanding that the confidentiality requirement would be respected.

The documents must be analysed in light of the confidentiality requirements and the applicable legal framework. In particular, when handling the confirmatory application, the European Commission was obliged to apply Regulation (EC) No 1049/2001 in a way which is consistent with the confidentiality obligations laid down in the grant agreement, read in conjunction with Article 3 of Regulation (EU) No 1290/2013, which provides that '[s]ubject to the conditions established in the implementing agreements, decisions or contracts, any data, knowledge and information communicated as confidential in the framework of an action shall be kept confidential, taking due account of Union law regarding the protection of and access to classified information'.

Article 36.1 of the grant agreement lays down the obligation to maintain confidentiality of documents and other material of the project identified as confidential. It provides that '[d]uring implementation of the action and for four years after the period set out in Article 3, the parties must keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed'. As the period of four years after the duration of the action had not expired at the time of the adoption of the confirmatory decision, the information related to this deliverable was (and still is) covered by the confidentiality requirement.

The legal framework laid down by the specific provisions governing the rules concerning grant agreements are relevant in the application of the rules concerning public access to documents, as it has been underlined by the relevant case-law². The European Commission was obliged to apply this framework when processing the complainant's request for public access to these documents.

In her proposal for a solution, the European Ombudsman argues that 'the mere fact that documents are considered as "confidential" pursuant to [the Horizon 2020 Regulation] constitutes only an indication that their content is sensitive. That is not, however, sufficient to justify the application of the exception referred to in the first indent of Article 4(2) of Regulation 1049/2001, namely the need to protect commercial interests'.

The European Ombudsman acknowledges that parts of the documents contain information that, if disclosed, would undermine the commercial interests of the third party concerned. In particular, the European Ombudsman considers that public access to document 2.1 (in its entirety), and parts of documents 1.1 (including all the annexes), documents 2 and 3, is not justified. However, the European Ombudsman takes the view that some information in document 1.1 can be understood as 'environmental information' in the sense of Regulation (EC) No 1367/2006 ('the Aarhus Regulation')³, and information relating to emissions into the environment.

The European Commission agrees that, in the framework of a project, the classification of certain information as confidential is not sufficient, by itself, to justify the application of the exception protecting commercial interests⁴. However, this classification constitutes an indication that shall form the basis for the specific assessment performed by the institution when examining a request for public access to documents⁵.

Consequently, in the case at stake, the European Commission analysed each document based on the legal framework and the opinion of the author.

On the one hand, the European Commission concluded that four documents could not be fully covered by the protection of commercial interests (first indent of Article 4(2) of Regulation (EC) No 1049/2001, read in conjunction with the above-referred confidentiality requirements, as parts of these documents do not contain business sensitive information. Therefore, despite the objections of the third-party originator of the documents that considered the documents to be fully covered by the relevant exception, the European Commission granted partial access to the documents pertaining to the confidential deliverable 8.3, overruling the position of the third-party originator.

On the other hand, other parts of the documents requested contain information about workforce and costs linked to the project, the operational issues encountered by the third parties concerned and how they affect the technical and management aspects of the company and its business. Therefore, they concern information about permitting procedures, investments and commercial relations of the third party concerned whose disclosure could undermine the third-party's legitimate commercial interests.

² See judgment of the General Court of 17 December 2021, *Patrick Breyer v Research Executive Agency*, T-158/19, EU:T:2021:902, paragraphs 67-69.

³ OJ L 264, 25.9.2006, p. 13.

⁴ Judgment in Case T-158/19, *Patrick Breyer v Research Executive Agency*, cited above, paragraph 71 .

⁵ *Ibid.*, paragraph 70.

In the context of the handling of the confirmatory application, the European Commission invited the third party to consider the partial disclosure of the documents. However, as explained above, the third party opposed such partial disclosure referring to the confidentiality requirements of the grant agreement. Taking into account the obligation of confidentiality, and the nature of the information at stake in the specific parts of the documents, the European Commission considered that there were enough elements to conclude that the relevant parts are covered by the exception under the first indent of Article 4 (2) of Regulation (EC) No 1049/2001.

Furthermore, the European Commission took into account in its assessment the arguments raised by the applicant concerning the application of the Aarhus Regulation and the conclusion was that the considerations put forward by the applicant were not supported by the actual assessment of the withheld parts of the documents.

Firstly, the documents requested do not concern information such as policies, legislation, programmes, environmental agreements or measures or activities designed to protect elements of the environment. It is unclear how the disclosure of information about the know-how and the business activity of the company concerned, such as the choice of software, materials and methods used to support research activities, or information on administrative concessions, would qualify as environmental information in the sense of the Aarhus Regulation.

Secondly, even if the information at stake could be considered as environmental information in the sense of that Regulation, it is to be noted that an overriding public interest in disclosure is deemed to exist only with regard to information about emissions into the environment⁶. As explained in the confirmatory decision, the European Commission takes the view that the redacted parts of the documents do not contain information related to emissions into the environment in the sense of Article 6.1 of Regulation (EC) No 1367/2006.

Thirdly, the European Commission wishes to recall that it is for applicants to demonstrate the existence of an overriding public interest in the disclosure of the documents. In this case, the complainant did not put forward arguments capable of justifying the existence of any such overriding public interest. For the reasons explained above, the European Commission cannot agree with the applicant's assertion that the documents 'have as their main subject the emissions into the environment from the San Finx mine'.

Consequently, the European Commission maintains its view that it interpreted Regulation (EC) No 1290/2013 and Regulation (EU) No 1049/2001 in a compatible and consistent way by granting partial access to the documents concerned by the inquiry of the European Ombudsman. Further public access to the documents at this stage, while the confidentiality period outlined above has not yet expired, would essentially deprive the confidentiality requirements of their purpose. Such disclosure is not justified in view of any alleged overriding public interest in the disclosure of the redacted parts of the documents.

⁶ Article 6(1) of Regulation (EC) No 1367/2006.

IV. CONCLUSIONS

For the reasons set out above, the European Commission considers that its confirmatory decision was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken.

For the Commission

Věra JOUROVÁ

Vice-President