

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

Through his initial application of 6 December 2021, registered under reference number GESTDEM 2021/7743 and attributed to the Directorate-General for International Partnerships, the applicant requested access to:

‘In relation to the written question: E-004340/2021 and the answer given by Mrs Urpilainen on behalf of the European Commission (3.12.2021). I request access to the annual progress and financial reports received by the Commission between 2016 and 2021 referred to in this written answer, and to the guidance documents sent by the Commission in response. I also request access to the contract mentioned in this reply from the Commissioner, between the Commission and the beneficiaries of these funds’.

The Directorate-General for International Partnerships identified 12 documents as falling under the scope of this request and provided the applicant with a list of these documents.

In its initial reply of 4 February 2022, the Directorate-General for International Partnerships, taking into account the reply of the third party (the United Nations High Commissioner for Human Rights, hereafter ‘OHCHR’) to its consultation pursuant to Article 4(4) of Regulation (EC) No 1049/2001:

- granted full access to three documents;
- granted wide partial access to one document based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- refused access to seven documents based on the exceptions of the third indent (protection of the public interest as regards international relations) of Article 4(1)(a) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001; and
- refused access to one document based on the exception of the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

In his confirmatory application, submitted on 8 February 2022 in accordance with Article 7(2) of Regulation (EC) No 1049/2001 and registered on the same day, the applicant requested a review of this position, as regards the documents that were withheld in the initial reply of the Directorate-General for International Partnerships.

On 21 June 2022, the applicant lodged a complaint with the European Ombudsman for the lack of reply to the confirmatory application.

In its final decision of 22 March 2023¹, the European Commission identified the following documents as falling under the scope of the applicant’s confirmatory application:

- ‘DOA and LOGFRAME’, registered under reference number Ares(2022)1015661 (hereafter ‘document 1.1’);

¹ C(2023) 2140.

- 'Revised budget initialled', registered under reference number Ares(2022)1015661 (hereafter 'document 1.3');
- 'Financial Identification', registered under reference number Ares(2022)1015661 (hereafter 'document 1.4');
- 'Communication and Visibility plan', registered under reference number Ares(2022)1015661 (hereafter 'document 1.6');
- 'First interim report - financial report', registered under reference number Ares(2018)182433 (hereafter 'document 2.1');
- 'First interim narrative report including annexes', registered under reference number Ares(2018)182433 (hereafter 'document 2.2');
- 'Second interim report - financial report', registered under reference number Ares(2022)1015661 (hereafter 'document 3.1');
- 'Second interim narrative report', registered under reference number Ares(2022)1015661 (hereafter 'document 3.2');
- 'Annexes to the second interim narrative report', registered under reference number Ares(2018)6660880 (hereafter 'document 3.3');
- 'Third interim report - financial report', registered under reference number Ares(2020)1946919 (hereafter 'document 4.1');
- 'Third interim narrative report', registered under reference number Ares(2020)1946919 (hereafter 'document 4.2');
- 'Annexes to the third interim narrative report', registered under reference number Ares(2022)7838820 (hereafter 'document 4.3');
- 'Fourth interim report - financial report', registered under reference number Ares(2022)1015661 (hereafter 'document 5.1');
- 'Fourth interim narrative report', registered under reference number Ares(2022)1015661 (hereafter 'document 5.2').

Following the review performed at the confirmatory stage, and taking into account the replies of OHCHR, the European Commission:

- granted partial access to documents 1.6, 2.2, 3.2, 3.3, 4.2, 4.3 and 5.2 subject to the redaction of some parts based on the exceptions of the third indent (protection of the public interest as regards international relations) of Article 4(1)(a) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001; and
- refused access to the remaining documents, namely documents 1.1, 1.3, 1.4, 2.1, 3.1, 4.1 and 5.1, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

II. EUROPEAN OMBUDSMAN'S INQUIRY AND DECISION

The European Ombudsman initially opened an inquiry into the European Commission's failure to reply to the confirmatory application. Following the adoption of the confirmatory decision, and since the applicant was dissatisfied with the level of access granted therein, the European Ombudsman continued the inquiry into the European Commission's decision to refuse access to seven documents, namely documents 1.1, 1.3, 1.4, 2.1, 3.1, 4.1 and 5.1. During this inquiry, the European Ombudsman's services reviewed the documents requested and the documentation relating to the third-party consultations.

In its decision of 25 July 2023, the European Ombudsman concluded that the decision of the European Commission to refuse access to the personal data contained in the seven documents and commercially sensitive data reflected in documents 1.1, 1.3 and 1.4 was reasonable.

However, the European Ombudsman disagreed with the assessment of the European Commission as regards the refusal to grant access to the four interim financial reports, namely documents 2.1, 3.1, 4.1 and 5.1, based on the protection of commercial interests (first indent of Article 4(2) of Regulation (EC) No 1049/2001). In particular, the European Ombudsman stated, *inter alia*, that it ‘[...] is not convinced that the general presumption of confidentiality applicable to bids submitted by tenderers extends to the financial reporting in relation to the awarded grant. As such, it is not clear to the Ombudsman how disclosure of aggregated financial information contained in the four reports - for example, the main budget lines for actual expenditure - is likely to reveal the cost structure of the third party or would allow potential grant applicants in future similar procedures to copy from these documents in support of their own grant application’.

Furthermore, the European Ombudsman argued that ‘[...] the EU Financial Regulation² establishes the principle that there should be transparency in how EU funds are spent: “citizens should know where, and for what purpose, funds are spent by the Union. Such information fosters democratic debate, contributes to the participation of citizens in the Union’s decision-making process, reinforces institutional control and scrutiny over Union expenditure, and contributes to boosting its credibility”³. In other words, the public should be adequately informed about the implementation of projects financed using public money’.

The European Ombudsman closed the inquiry with the following conclusions:

‘The considerable delay by the European Commission in issuing a confirmatory decision in this case constitutes maladministration.

The Commission’s refusal to disclose three of the seven documents at issue (documents 1.1, 1.3 and 1.4) was reasonable.

No further inquiries are justified as regards the refusal by the Commission to disclose the remaining four documents, namely the interim financial reports [...]’.

Finally, the European Ombudsman suggested: ‘[...] that the Commission grant partial access to the four interim financial reports (documents 2.1, 3.1, 4.1 and 5.1), as a minimum access to the information compiled in the confidential annex to [its] decision’.

² Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1.

³ Ibid, recital 11.

III. THE REPLY OF THE EUROPEAN COMMISSION TO THE EUROPEAN OMBUDSMAN'S DECISION

The European Commission regrets the delay in replying to the applicant and would like to refer to the detailed elements it provided in response to the European Ombudsman's strategic inquiry with reference number OI/2/2022/OAM as regards delays in the handling of confirmatory applications.

As regards documents 2.1, 3.1, 4.1 and 5.1, firstly, the European Commission recalled in its confirmatory decision that: '[t]he Courts have recognised the existence of a general presumption of non-disclosure applicable to bids submitted by tenderers under direct management of EU budget⁴'. In this respect, the European Commission would like to confirm that the general presumption was applied only in relation to document 1.1, as the other identified documents, by their nature, indeed did not meet the criteria for refusal of access based on the case-law referred to above.

The final position of the European Commission as regards access to documents 1.3, 1.4, 2.1, 3.1, 4.1 and 5.1 was thus based on an individual assessment of these documents, upon consultations with the third party from which they originate.

Secondly, the European Ombudsman took the view that, '[...] it was thus reasonable for the Commission to consider that the OHCHR's estimated budget for the project [document 1.3] was covered by this exception' and that '[...] disclosure of parts of [documents 2.1, 3.1, 4.1 and 5.1] could indeed reveal some of the information contained in document 1.3'. Therefore, as confirmed in the European Ombudsman's decision, document 1.3 constitutes commercially sensitive information warranting protection based on the first indent of Article 4(2) of Regulation (EC) No 1049/2001 as it contains detailed cost structure and budget estimates. Public disclosure of this document would undermine the commercial interests of OHCHR, as it would give other potential grant applicants in future similar calls the possibility to copy from this document and use this information to support their own applications.

In this respect, the European Commission notes that, despite limited modifications compared with document 1.3, documents 2.1, 3.1, 4.1 and 5.1 also contain commercially sensitive information, such as the detailed cost structure and budget estimates. In this particular case, in contrast to the European Ombudsman's suggestion, further detailed in the Confidential Annex to its decision, the European Commission takes the view that even the details on the total cumulated costs and budget allocations for human resources, travel costs, other costs/services and indirect costs constitute commercially sensitive information of competitive value, as it would give other potential grant applicants in future similar calls the possibility to draw conclusions from the timeframe and structure of the budgetary expenditure and use this information in support of their own applications.

Furthermore, the European Commission confirmed in its confirmatory decision that '[i]n accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting partial access to documents [...] 2.1, 3.1, 4.1 and 5.1. However, for the reasons explained above, no meaningful partial access to these documents is possible without undermining the interests described above'.

⁴ Judgment of the General Court of 29 January 2013, *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)*, T-339/10, EU:T:2013:38, paragraph 101.

As regards the corresponding recital of the EU Financial Regulation, quoted by the European Ombudsman, the European Commission considers that it has complied with the established principle that there should be transparency in how EU funds are spent by disclosing the overall financial allocation of the project and (partially) the interim narrative reports and their respective annexes (documents 2.2, 3.2, 3.3, 4.2, 4.3 and 5.2).

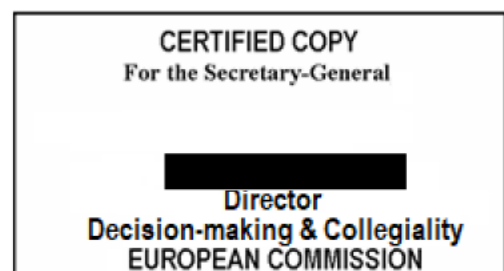
The European Commission therefore considers that the information contained in these documents, disclosed *erga omnes* under Regulation (EC) No 1049/2001, allows the public to know where, and for what purpose, funds are spent by the Union in accordance with the corresponding recital of the Financial Regulation. As recalled in the confirmatory decision, in accordance with the settled case-law⁵, given that Regulation (EC) No 1049/2001 and the Financial Regulation have different objectives and do not contain any provision expressly giving one regulation primacy over the other, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables their coherent application.

The European Commission therefore considers that compliance with the provisions of the EU Financial Regulation does not take precedence over the applicability of Article 4(2) of Regulation (EC) No 1049/2001.

IV. CONCLUSIONS

The European Commission is of the view that the refusal of access to documents 2.1, 3.1, 4.1 and 5.1, as concluded in the confirmatory decision (C(2023) 2140) of 22 March 2023, is justified and that the widest possible access has been granted to the documents requested.

For the Commission
Věra JOUROVÁ
Vice-President



⁵ Judgment of the General Court of 29 January 2013, *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)*, T-339/10, EU:T:2013:38, paragraph 85.