

Reply by the European Commission to the recommendation from the European Ombudsman on how the European Commission dealt with a request for public access to documents related to an EU-funded project aimed at assessing the risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence ('Mobi-Kids' project)

- Complaint by [REDACTED], ref. 2022/2103/MIG

I. BACKGROUND

The applicant requested access to documents related to an EU-funded project aimed at assessing the risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence (the 'Mobi-Kids' project). At initial stage, the Directorate-General for Research and Innovation of the European Commission identified 29 documents in the scope of the request and gave wide partial access to most of them. However, the Directorate-General for Research and Innovation refused in full access to three documents (a 'periodic report' from 2016 and two 'deliverables' setting out the preliminary findings of the project from 2011). The applicant subsequently submitted a confirmatory application to the Secretariat-General to contest this position.

Upon receipt of the confirmatory application and since the documents originated from a third-party, the Mobi-Kids consortium, the Secretariat-General engaged in numerous consultations with the third-party originator, in accordance with Article 4(4) of Regulation (EC) No 1049/2001. Indeed, the content of the documents in question (project report and deliverables) is complex, containing technical and scientific data potentially covered by intellectual property and a consultation of the third-party was therefore required.

In the context of the consultations, the third-party originator opposed partially the disclosure of the periodic report and fully to the disclosure of the two deliverables, arguing, *inter alia*, that the '[...] the results [of the project] were preliminary and unvalidated and are superseded by results of analyses conducted since then with additional funding and data, and the final results and products are being prepared for publication. Thus, making the results of these deliverables and report public would jeopardise the publications of the study results (the intellectual property) as well as disseminate information which is not validated or up to date'.

Following the consultations and based on its own assessment, in its confirmatory decision of 10 August 2022, the Commission granted partial access to one of the documents (the periodic report), while redacting some parts to protect the personal data in accordance with Article 4(1)(b) and the commercial interests – more precisely as far as details on the tasks, the planned and reported efforts for the project of the parties involved and the planned budget costs are concerned – based on the first indent of Article 4(2) of Regulation (EC) No 1049/2001. It refused access to the remaining two documents (the two 'deliverables' setting out the preliminary findings of the project from 2011) in their entirety, based on the first indent (protection of the commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001.

Dissatisfied with this decision, the complainant turned to the European Ombudsman who opened an investigation on 1 December 2022.

II. THE EUROPEAN OMBUDSMAN'S INQUIRY AND THE RECOMMENDATION

In the course of its inquiry, the Ombudsman examined the three documents concerned. On 21 April 2023, the inquiry team met with representatives of the Commission. The report of the meeting was published on 21 October 2023¹.

On 18 October 2023, the Ombudsman sent a letter to the Commission asking the latter to reconsider its confirmatory decision on this public access request, with a view to disclosing the documents in question to the widest extent possible. In the Ombudsman's view, the documents date from 2011 (the two deliverables) and 2016 (the periodic report) and the Mobi-Kids project ended in 2016.

In addition, the Ombudsman argued that the EU case-law has recognised that information which is more than five years old is presumed to be no longer commercially sensitive and that it could be protected over longer periods, only if the Commission can clearly show that, despite how old it is, the information can still be commercially sensitive. However, the Ombudsman is not convinced the information is deserving of this protection.

III. THE REPLY OF THE EUROPEAN COMMISSION TO THE RECOMMENDATION OF THE EUROPEAN OMBUDSMAN

The Commission underlines that the confirmatory application for public access to documents concerned three documents, since the majority of the documents identified in the scope of the request had already been largely disclosed at initial stage. Upon receipt of the confirmatory application, the Secretariat-General engaged in extensive consultations with the third-party originator of the three documents, in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

The arguments provided by the Commission in the confirmatory decision took duly into account the justification provided by the third party, the applicable case-law, and administrative practice. Based on these elements, and after careful consideration of the interests at stake, the Commission issued a confirmatory decision which further granted access to one document, while maintaining the refusal to disclose the two deliverables.

While the Commission is of the view that its position expressed in the confirmatory decision of 10 August 2022 was legally and factually correct at the time of its adoption, in the spirit of furthering transparency, the Commission has re-assessed the application of the relevant exceptions to the documents at stake taking into account the current factual and legal circumstances following the letter of the Ombudsman, including the lapse of time and the risk to the protection of the commercial interests of third parties in the current context.

¹ <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/176841>.

Against this background, the Commission took the decision to re-consult the third-party originator on the disclosure of the documents. The third-party originator has agreed to further disclose the documents. Regarding the project report, the third party has only objected to the disclosure of the personal data of people who were not the project's principal investigators or part of the core team of the MOBI-Kids study and coauthors of the main publications (whose names are in the public domain), such as research assistants, project managers, secretaries, etc., who did not participate in the decisions related to the conduct of the study. Regarding the two deliverables, the third party has agreed to disclose them, with the exception of the brand names and models of the mobile phones used for the purposes of the study as the disclosure of this specific information is likely to undermine the reputation of the manufacturers.

Taking the above-mentioned into account, and following its own assessment, the Commission has concluded that further access can be granted to the documents outlined in the letter of the Ombudsman, with the exception of the personal data of persons who are not the principal investigators, nor are part of the core team of the MOBI-Kids study and of staff members of the Commission who do not form part of the senior management of the institution, which should remain protected on the basis of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 (document 1).

Regarding the brand names and models of the mobile phones used for the study, the Commission considers the arguments of the third party to be sufficiently valid, since it cannot be excluded that the reputation of the manufacturers would be undermined by the disclosure of this information, considering the subject matter of the study in question, namely the risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence. Consequently, the brand names and models of the mobile phones should remain protected on the basis of the exception provided for in the first indent (protection of commercial interests, including intellectual property) of Article 4(2) of Regulation (EC) No 1049/2001 (documents 2 and 3).

With the present letter, the Commission sends the documents concerned, to which wider partial access is hereby granted. The Commission understands that the Ombudsman will communicate the present reply to the complainant and hereby agrees with the transmission to the applicant of the documents.

For the Commission
Věra JOUROVÁ
Vice-President

