



## 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

*The complaint, submitted by the NGO Access Info Europe, concerns the European Commission's allegedly wrongful refusal to grant full public access to evaluation documents concerning a public procurement process for the 'Rehabilitation and extension of the waste water treatment plant of Subotica' (Serbia). The disclosure of the documents was refused on the basis of Article 4(1)(b) (the protection of personal data), Article 4(2) (the protection of commercial interests) and Article 4(3) (the protection of the decision-making process) of Regulation 1049/2001. The complainant considered that it should be granted full access to the evaluation documents.*

*The Ombudsman inquired into the issue and found that there was no maladministration in the Commission's conduct. However, she suggests that the Commission should systematically obtain, prior to their appointment, the consent of evaluation committee members in procurement processes to the disclosure of their names. Disclosure of their names at the conclusion of the evaluation process should be considered a condition of appointment to such a committee.*

## The background to the complaint

1. The complainant, the NGO Access Info Europe<sup>1</sup>, contacted the EU Delegation to Serbia (the 'Delegation') on 16 October 2013 and requested, under Regulation 1049/2001<sup>2</sup>, access to the complete tender documentation concerning the project entitled "Rehabilitation and extension of the waste water treatment plant of Subotica [in Serbia] - the sludge line". The tender process had been launched in 2006. The Delegation replied that the 'tender dossier'<sup>3</sup> had already been forwarded to the complainant. However, it refused to grant access to the documents linked to the evaluation process (the opening report, the evaluation reports and the detailed evaluation of the offers received) on the grounds that disclosure would undermine the protection of commercial interests<sup>4</sup>. In earlier correspondence, the Delegation informed the complainant about both the name of the winning tenderer and the total contractual value of the contract.

<sup>1</sup> Access Info Europe is a human rights organisation which is based in Madrid. It is dedicated to promoting and protecting the right of access to information.

<sup>2</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145, p. 43.

<sup>3</sup> That is, the general terms of reference, the tender documents containing the instructions to bidders and the contracting rules.

<sup>4</sup> Article 4(2) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

...

unless there is an overriding public interest in disclosure."

2. The complainant then requested a review of the partial refusal, by way of a “confirmatory application”. It argued that the Delegation had failed to (i) demonstrate any reasonably foreseeable risk that the protected interest would be undermined, (ii) consider the possibility of a partial disclosure, and (iii) carry out a public interest test.

3. The Delegation replied stating that, since the evaluation documentation “contains technical and financial information set out in the respective tenders”, its disclosure would undermine the protection of commercial interests. It also stated that disclosure of the evaluation report would undermine the institution's decision-making process<sup>5</sup>, since the evaluation report contained opinions intended for internal use, such as “comments of the voting members, information on the tenderers and information sustaining the decision-making process and related award decision taking by the CA”.

4. The complainant then further challenged the application of both exceptions referred to by the Delegation. In relation to the new exception, the complainant argued that a public interest test should be carried out. Moreover, the Delegation had not adequately explained how disclosure of the documents would seriously undermine the decision-making process (and that the risk that the decision-making process would be undermined was reasonably foreseeable).

5. The European External Action Service ('EEAS') then took over the correspondence and replied to the complainant. It identified the following two documents as falling under the complainant's request for access to the evaluation documentation: (i) the tender opening report; and (ii) the approval of the evaluation report, award letter and negative letters. The EEAS decided to grant partial access to these documents. It stated that full access would undermine the protection of the commercial interests of stakeholders. Moreover, “the disclosure of certain personal data concerning the members of the evaluation committee could compromise their future work in the framework of possible other tender procedures. The exceptions laid down in Art 4.1.b and in 4.3 2<sup>nd</sup> subparagraph combined are therefore of application”<sup>6</sup>.

6. The following information was blacked out from the evaluation report: (i) details of the exchanges between the bidders and the Evaluation Committee, and (ii) the financial offers of the various bidders as well as the Committee's analysis and justification of the calculation corrections applied. The EEAS explained that this information might reveal the commercial and bidding strategies of the bidding companies and its disclosure could undermine the protection of their commercial interests. The EEAS did not consider that an overriding public interest could justify disclosure of that information. In addition, the EEAS stated that it had blacked out from both documents any personal data relating to the stakeholders involved in the evaluation process. It explained that “the personal data concerning the members of the evaluation panel are to be protected in the framework of the rights of the individual in accordance with Reg. 45/2001 [...], in the absence of an unambiguous consent of the data subject and of a clear indication that disclosure of this personal data is adequate, relevant and not excessive in relation to the purposes for which they were collected, i.e. the tender

<sup>5</sup> The Delegation referred to the second paragraph of Article 4(3) of Regulation 1049/2001, which provides as follows: “[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.”

<sup>6</sup> Article 4(1) provides as follows: “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of:

...  
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”

*evaluation procedure.*" The EEAS considered that its decision struck a fair balance between the different interests at stake.

7. Since the complainant was dissatisfied with the EEAS's reply, it submitted a complaint to the European Ombudsman on 3 March 2015.

## The inquiry

8. The Ombudsman opened an inquiry into the complaint and requested the EEAS to provide an opinion. The EEAS informed the Ombudsman that it considered that the subject matter of this case fell within the competence of the European Commission and that the latter had agreed that the case be transferred to it. The Ombudsman therefore asked the Commission to submit an opinion on the following allegation and claim:

1) The Commission wrongly denied access to (i) the names of the companies that had submitted bids in response to the procurement notice, (ii) the names of the Committee members who had decided upon the winning bid, and (iii) the details of the companies and their assessment.

2) The Commission should provide full access to the redacted documents.

9. In support of the allegation, the complainant put forward the following arguments:

1. The Commission failed to specify what the harm to commercial interests would be and to demonstrate a reasonably foreseeable risk to commercial interests in the event of disclosure of the companies' names, details and assessment.

2. An evaluation document is inherently not a document containing opinions for internal use as part of deliberations or preliminary consultations because it is produced after the decision has been taken. The Commission failed to demonstrate a real risk that the decision-making process would be seriously undermined.

3. The Commission failed to apply the public interest test. The verification that public funds are being spent correctly is in the public interest and consequently, there is a strong public interest in disclosure. There is also a strong public interest regarding access to water.

4. The publication of the names of the members of the Evaluation Committee is essential as this enables full accountability of the process, in particular when there exist clear concerns regarding corruption and fraud in EU accession countries such as Serbia.

5. It is not clear whether the Institution tried to seek the consent of the members of the Evaluation Committee to the disclosure of their names. The disclosure is not only warranted, relevant and proportionate to the purposes for which the personal data was collected but necessary for the transparency and legitimacy of the evaluation process.

10. In her letter asking the Commission to submit an opinion on the allegation and claim mentioned above, the Ombudsman also asked the Commission to address the following points:

1. Could the Commission confirm that the Commission or the EEAS are not in possession of any other evaluation documents?

2. Could the Commission identify the parts of the evaluation documents which are covered by the exception relating to the decision-making process? Could the Commission explain why it considers that disclosure of these parts would **seriously** undermine the institution's decision-making process?

3. Could the Commission clarify why it considers that the conditions set out in Regulation 45/2001<sup>7</sup> do not authorise it to disclose personal data contained in the evaluation documents? Could the Commission consider the request for access under Article 8 of Regulation 45/2001?<sup>8</sup>

4. Could the Commission clarify why it considers that the parts of the evaluation documents specifying the prices offered and their modifications (reductions, corrections) cannot be disclosed? Would the Commission consider that non-disclosure is justified also in the event that the names of the companies concerned remain confidential? Could the Commission take into account the fact that non-disclosure of this information means that the public is entirely prevented from verifying that the lowest price offered was accepted in the context of the tender procedure?

11. In the course of the inquiry, the Ombudsman received the opinion of the Commission and, subsequently, the comments of the complainant in response to the Commission's opinion. Her services also carried out an inspection of the non-redacted version of the evaluation documents. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Alleged wrong denial of access to (i) the names of the companies that submitted bids in response to the procurement notice, (ii) the names of the Committee Members who decided upon the winning bid, and (iii) the details of the companies and their assessment and the related claim**

### **Preliminary remarks**

12. In the interest of avoiding repetition, in so far as the Commission's replies to the Ombudsman's questions may be considered to supplement its response to the supporting arguments, the replies will be reported under the heading relating to the relevant supporting argument. Moreover, the Ombudsman's assessment concerning each supporting argument will be presented immediately after referring to the parties' arguments concerning each supporting argument.

13. The Ombudsman notes that in reply to her first question, the Commission confirmed that it is not in possession of any other evaluation documents.

<sup>7</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

<sup>8</sup> See the judgment of the Court of Justice of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, ECLI:EU:C:2010:378, paragraphs 63-65.

# The harm to commercial interests

## Arguments presented to the Ombudsman

14. The Commission explained that the name of the winning tenderer was disclosed. However, disclosure of the names of the losing tenderers and the grounds for their exclusion could be harmful to their commercial interests. The disclosure of some of the reasons for their exclusion, such as lack of experience, could have a negative impact on their public perception as well as their ability to take part in subsequent tenders. Furthermore, some of the information contained in the tenderers' offers, and to a certain extent quoted in the evaluation report, relates to the tenderers' business and industrial processes and costs. The Commission contended that this type of information is specifically protected by Article 339 of the Treaty on the Functioning of the European Union (TFEU), which provides that the obligation of professional secrecy applies in particular to "*information about undertakings, their business relations or their cost components*"<sup>9</sup>. The Commission argued that the disclosure of such information could harm the tenderers concerned commercially and disadvantage them with respect to competitors. It stated that "*this is especially the case in the area of waste or drinking water, where the technology process impacts heavily on the price of the plant and the relevant operational and maintenance costs.*"

15. When replying to the fourth question, the Commission reiterated that price-related information is commercially sensitive, as it reflects the costs and price policies of the tenderers. Moreover, as regards the possibility for the public to verify that the lowest price offered was accepted in the tender procedure, the Commission stated that, "*while the financial aspect is indeed a very relevant one, it is by no means the only salient one: in tenders for services under EU external aid procurement, for instance, price only weights 20% of the scoring while the technical quality affords 80%. In supplies and works, before analysing the financial proposal, all offers are subject to a detailed analysis of their compliance with the tender's technical requirements, which are, in most cases, of fundamental importance. Thus, public disclosure of the different price offers, even without mentioning the names of the respective tenderers, would only allow a very superficial control over the tender process.*"

16. In its observations, the **complainant** noted that the Commission failed to distinguish between the different elements of the redacted information, which include the name of the winning tenderer and the names of the losing tenderers, as well as other information such as the bids they submitted and their assessment.

17. With respect to the names of the tenderers, the complainant contended that the Commission had failed to explain how publishing them would necessarily result in a "*negative impact on their public perception as well as their ability to take part in subsequent tenders*" and therefore harm their commercial interests. It argued that "*bidding for and losing contracts is part of the cut and thrust of business life and it is often common knowledge between those working in the same field and more widely, and hence it will be known who won and who lost*". The complainant stated that the fact that a company is ready to participate in such processes might even be perceived as positive. Thus, losing one bid should not prevent it from participating in another tender process. It added that in many European countries, the names of all those participating in public procurement tender processes are routinely made public, often before the tender is finally decided. It contended that there is no

<sup>9</sup> Article 339 TFEU stipulates that "[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."

evidence that the publication of names alone has negative consequences or that it deters companies from participating. On the other hand, "*there is a countervailing public interest in accountability of such processes*". The complainant stated that when a company puts forward a bid for access to public funds, it needs to assume that this will entail a certain level of public scrutiny.

**18.** The complainant maintained that at the EU level, there are many areas (such as that of antitrust investigations) where the names of companies are made public merely because they are part of various legal processes. Following the logic of the Commission's arguments in this case, if the mere publication of the name of the company could also lead to a negative impact on its public perception, then any action taken by the Commission against a company would also need to be kept secret. Moreover, the complainant argued that it is not clear on what evidence the Commission based its assumption that members of the public will perceive a company negatively simply because it lost a tender. It stated that members of the public will generally be aware that tenders are won or lost based on a series of technical and economic criteria, and that these are competitive processes.

**19.** With respect to the obligation of confidentiality concerning the details of the bid, the complainant considered that the Commission erred in invoking Article 339 TFEU because that article applies to those working for the EU during and after their professional engagement. It stated that "*to the extent that an official is provided with information that is confidential, they must respect that confidentiality. It may be that the Commission has rules on confidentiality with respect to tender processes... In this case, however, the role of the Commission officials handling this particular request for documents is to determine whether or not the information that they hold may be released under the obligations under the TFEU to uphold the right of access to documents (TFEU 15) with all but limited exceptions, which should be balanced against a public interest test on a case-by-case basis.*"

**20.** As for the question of whether the publication of the details of the bids should be excluded in the interest of protecting the commercial interests of the tenderers, the complainant stated that the Commission appears to imply that information about pricing would in turn reveal information about the technological processes. The complainant contended that the publication of data about pricing and technical solutions cannot possibly harm the commercial interests of the tenderers if their names are not also made public. Therefore, although the complainant believes that the names of the tenderers should be divulged, it stated that it should at least be possible for the Commission to provide the information about pricing and technical solutions without divulging the names of the tenderers. The complainant added that "[t]he next question, then, is whether publishing both names and tender details would indeed cause harm and whether there is a countervailing public interest."

**21.** The complainant contended that the Commission did not explain precisely how the publication of information about technical processes would result in such harm. It conceded that disclosure of such information could mean that competitors would find out about the technical capacities of other companies. However, it added that it would be surprising if such information would not already be available in a particular business sector. Moreover, it may be presumed that any work to be carried out by these companies in the private sector would be evaluated based on their actual capacity. Hence, were this information to be in the public domain, this would have little relevance because in all likelihood, other clients would insist on being given such information.

**22.** With respect to pricing, the complainant argued that it is true that if competitors were to be aware of the financial offers and how the tenderers have priced their products, this might affect the pricing strategies of competitors. However, it is widely known in the business world that the prices quoted in a public tender process do not necessarily reflect the prices that would be charged to other clients, since each offer is tailor-made to each

client. It added that bids are sealed so that such information does not become public before the tender is closed. However, once the bidding period is over, it is a different matter.

**23.** The complainant went on to state that there is also public interest in knowing what the financial offers were, whether the economic evaluation of the bids was carried out correctly and whether the public is getting value for money. This can be assessed only if the financial data related to the bids are disclosed. The complainant noted that such information is often made public at the national level across Europe<sup>10</sup>. The Commission itself stated that both technical details and pricing are part of the evaluation of the bid. Hence, all such information should be made available to ensure full accountability to the public.

**24.** With respect to the assessment of the bids, the complainant contended that the publication of the evaluation reports would not discourage bidders from participating in subsequent tender procedures. It stated that "*[s]urely a company's only restriction to taking part would be its own ability to allocate resources to creating and submitting a bid. If for each tender, the submissions are assessed on a case-by-case basis against the objective criteria for each tender, the publication of the evaluation of the bids for one tender should not affect any other tenders.*"

**25.** As for the Commission's argument that the publication of the evaluation reports would negatively affect the public perception of the bidders, the complainant stated that if, for example, the assessment reveals that a company lacks experience in a particular area, that is simply a fact about the company. It contended that there are other facts about a company which are much more likely to harm public perception, such as the way it treats its customers, whether it has broken the law, or if it has harmed the environment. Nevertheless, it is widely understood that such information belongs in the public domain.

**26.** The complainant added that "*if the tender at issue was carried out according to professional, technical, impartial criteria, and if the results of the evaluations by the experts are against these criteria, then there should be no particular difficulty in making this public. If of course the evaluation was not carried out against these rigorous independent criteria, then there might be consequences to making this public, but this is something that the public should also have a right to know about.*" The complainant concluded that the Commission failed to demonstrate that the risk that commercial interests would be undermined was reasonably foreseeable and not purely hypothetical, as required by case-law<sup>11</sup>.

### **The Ombudsman's assessment**

**27.** The Ombudsman notes that, in accordance with Article 4(2) of Regulation 1049/2001, "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of:

- *commercial interests of a natural or legal person, including intellectual property, ...*

*unless there is an overriding public interest in disclosure.*"

<sup>10</sup> By way of example, the complainant stated that in 2003, the Irish Freedom of Information Commissioner ruled that information in contracts between the government and private companies could be made public, even if it had the potential to damage the competitive edge of that company, precisely because of the public interest in being given such information and in knowing how public funds were being spent.

<sup>11</sup> Judgment of the Court of Justice of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, ECLI:EU:C:2013:671.

**28.** In view of the objectives pursued by Regulation 1049/2001, in particular the aim of ensuring the widest possible access to documents held by the Council, the Parliament and the Commission<sup>12</sup>, any exceptions to this principle have to be interpreted strictly<sup>13</sup>. Furthermore, the principle of proportionality requires that exceptions to the general rule, that access must be given, remain within the limits of what is appropriate and necessary for protecting the defined objective public and private interests which are set out in those exceptions<sup>14</sup>.

**29.** As has been pointed out by the complainant, the Court of Justice has held that "*the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document ... against the general interest in the entire document being made accessible*"<sup>15</sup>.

**30.** The complainant argued that the Commission had failed to explain how publishing the names of the losing tenderers would necessarily result in a "*negative impact on their public perception as well as their ability to take part in subsequent tenders*".

**31.** The Ombudsman considers that it is reasonable to assume that if a company is described as, for instance, lacking experience, the public's trust in it would diminish. Even the simple fact of losing a tender may tarnish a tenderer's reputation because potential clients may presume that the losing tenderer's products or services do not constitute the best option in terms of quality and price. Moreover, the complainant itself conceded that the publication of information about technical processes could mean that competitors would find out about the technical capacities of the tenderers and that if competitors were to obtain information about the pricing of products by the tenderers, this might affect the pricing strategies of the competitors. The Ombudsman points out that Article 4(2) of Regulation 1049/2001 does not require disclosure to **seriously** undermine the protection of commercial interests. It is sufficient to establish that disclosure would undermine the commercial interests of the concerned parties.

**32.** In its judgment in case *Cosepuri v EFSA*<sup>16</sup>, the General Court acknowledged that EFSA could rely on a general presumption that granting access "*to the bids submitted by the other tenderers would, in principle, undermine the interest protected*". The Court went on to state that "*[t]he applicant has not put forward any evidence to justify the conclusion that, in the present case, that presumption did not apply to the documents disclosure of which was requested.*" The complainant in this case has not furnished such evidence either.

**33.** The Ombudsman considers that the Commission has shown that granting access to both the names of the tenderers, on the one hand and information about the tenders (that is the pricing, technical processes etc.) and their evaluation on the other, could specifically and effectively undermine the protection of the commercial interests of the tenderers and

<sup>12</sup> Article 1(a) of Regulation 1049/2001.

<sup>13</sup> Judgment of the Court of Justice of 18 December 2007, *Sweden v Commission*, C-64/05 P, ECLI:EU:C:2007:802, paragraph 66 and judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 63.

<sup>14</sup> Judgment of the Court of Justice of 6 December 2001, *Council v Hautala*, C-353/99 P, ECLI:EU:C:2001:661, paragraph 28.

<sup>15</sup> Judgment in *Council v Access Info Europe*, cited above, ECLI:EU:C:2013:671, paragraph 11 (emphasis added).

<sup>16</sup> Judgment of the General Court of 29 January 2013, *Cosepuri v EFSA*, T-339/10 and T-532/10, ECLI:EU:T:2013:38.



that such a risk is reasonably foreseeable. Moreover, the Ombudsman considers that the protection of the commercial interests of the tenderers would be undermined by the disclosure of information about the tenders (pricing, technical process etc.) and their evaluation even if the tenderers' names are not divulged. Competitors would benefit from the disclosure of information about the tenders to the detriment of the tenderers, regardless of whether their identity is known, as explained in paragraph 31 above. Furthermore, if competitors are aware of the precise prices and products which the tenderers offered, this could create the conditions for a *de facto* cartel in a future similar tender process. For that reason, tenderers are normally expressly prevented from exchanging such information. As for the disclosure of the assessment of the tenders, this could harm the commercial interests of the tenderers even if their identities are not revealed because one can never be certain that the players in the industry and interested parties would not be able to determine who the bidders were and which evaluation corresponds to which bidder, especially in a procurement process involving such a small number of bidders as the one at issue. It is also reasonably foreseeable that competing companies would use any negative assessment of a bidder against it and, therefore, to its detriment.

**34.** Since it has been established that full disclosure of the requested documents would harm the commercial interests of the bidders, it remains to be seen whether there is an overriding public interest in their full disclosure. The issue as to whether the names of the Evaluation Committee members should remain confidential will be assessed separately.

## The public interest test

### Arguments presented to the Ombudsman

**35.** The **Commission** argued that the exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure. It stated that the objective of ensuring that public funds are correctly spent is effectively and fairly guaranteed by the process of administrative and judicial scrutiny of public tender procedures. It is also possible for third parties and the public in general to oversee public procurement processes sufficiently, without the need to publicly expose the names and reasoning of the Committee members and the names of losing bidders. They can do so by, for instance, checking contract award notices on EU public tenders, consulting the annual reports of the Commission and the budgetary authority on contracts, or consulting the reports of the European Anti-Fraud Office (OLAF) and the European Court of Auditors. The Commission took the view that these procedures and safeguards sufficiently ensure that the objectives of transparency and of ensuring that public funds are correctly spent in tender procedures are met. It stated that whilst it understands that there can be public interest in the Commission's decision-making process being transparent, that public interest does not offset the negative impact that disclosure of the requested data might have on the commercial interests of the bidders and on the decision-making process.

**36.** The Commission also took the view that the fact that there is a strong public interest regarding access to water does not imply that the evaluation process of tender procedures concerning water projects should be fully disclosed to the public. It stated that "[t]he cause-effect relationship between the two objectives is, at best, very distant."

**37.** The **complainant** noted that in the Commission's response to its confirmatory application, the institution failed to apply the public interest test. It stated that in making these two new arguments, "*the Commission is missing the point about the nature of the public interest test and the way in which it should be applied. It is of course laudable that there are series*

*of oversight, control and proactive transparency measures, and [the complainant] notes that such internal controls and such proactive publication are essential features of a modern democratic society. There is however, a distinction to be made between such measures and the application of the public interest test to a specific document in a specific instance."*

**38.** The complainant also contested the Commission's assertion that the strong public interest in access to water does not imply that there should be full disclosure of the evaluation process. It stated that there is public interest in ensuring that all procurement processes are carried out properly, and that transparency permits the public to verify this. The complainant referred to Regulation 1306/2013<sup>17</sup>, in which, according to the complainant, the legislature specifically argues in favour of transparency since it notes in recital 76 that "*the role played by civil society, including by the media and non-governmental organisations and their contribution to reinforcing the administrations' control framework against fraud and any misuse of public funds, should be properly recognised.*"

**39.** The complainant argued that transparency complements the EU's checks and permits the public both to be assured that the EU's own checks function well and to identify any areas where problems might have been missed. The complainant stated that there is strong public interest in issues relating to water quality and reversing environmental degradation. That is why there are many specific rules about access to environmental information.

**40.** The complainant also noted that "*there are particular concerns about the Subotica project which make it a matter of public interest. There have been concerns about the way in which the project has been developed, about the escalating cost, and about the transparency and probity of the various procurement processes around it*". It referred to the concerns raised by the civil society organisation BankWatch in a report<sup>18</sup>.

### **The Ombudsman's assessment**

**41.** The Ombudsman points out that, according to established case-law, a general reference to "transparency", is not sufficient to substantiate an overriding public interest. As the Court of Justice held in its judgment in case *Sweden and Others v API and Commission*<sup>19</sup>, "*it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001*".

**42.** The Ombudsman considers that the concerns voiced by the complainant and mentioned in paragraph 40 above are not sufficiently substantiated. The report by Bankwatch which the complainant referred to was drawn up in 2005, whereas the procurement process at issue was launched in 2006 and the evaluation completed in January 2007. The complainant has not put forward any media reports or other evidence which could give rise to serious suspicions that the particular procurement process to which the requested documents relate was tainted by, for instance, corruption, fraud or

<sup>17</sup> Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, OJ 2013 L 347, p. 549.

<sup>18</sup> [http://bankwatch.org/documents/bridging\\_gap\\_05\\_05.pdf](http://bankwatch.org/documents/bridging_gap_05_05.pdf) (pages 13-15).

<sup>19</sup> Judgment of the Court of Justice of 21 September 2010, *Sweden and others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:541, paragraph 156.

conflicts of interest. Therefore, the complainant has not established that "*the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose*" the names of the tenderers, information about the tenders and the assessment of the tenders<sup>20</sup>.

**43.** The Ombudsman also notes that companies that do not win the contracts are awarded no public money. Thus, disclosure of their commercial information does not directly contribute to accountability by revealing how public money is spent.

**44.** As regards the issue of whether the public interest in access to water overrides the interest in protecting the commercial interests of the tenderers, there is no reason to believe that access to the requested information is necessary to ensure or enhance public access to water rights.

**45.** Thus, no overriding public interest in full disclosure (as opposed to the partial disclosure already secured) has been established. The Ombudsman notes also that the balance of withheld information which could theoretically be subject to disclosure on public interest grounds is minimal in this case.

**46.** Since it has been established that granting full access to the evaluation documents would undermine the protection of the commercial interests of the tenderers, and that, therefore, the Commission could deny full access to those documents on the basis of Article 4(2) of Regulation 1049/2001, there is no need for the Ombudsman to assess whether the Commission was right in invoking also Article 4(3) (relating to the protection of the decision-making process) of Regulation 1049/2001.

## The publication of the names of the Evaluation Committee members

### Arguments presented to the Ombudsman

**47.** The **Commission** contended that "*the protection of personal data is particularly important in the case of members of an evaluation committee, where there is a real and non-hypothetical risk for them of being subject to unsolicited contacts and/or pressure from unsuccessful, current or future tenderers. Moreover, exposing the identity of evaluation committee members could hamper their ability to provide independent professional assessments and their willingness to take part in committees*". It added that it is not necessary to disclose the identity of Evaluation Committee members in order to ensure accountability of the process. The Commission and its staff at all levels are fully accountable for the sound financial management of its operational and financial activities. The declarations of confidentiality and of no conflicts of interest of the Evaluation Committee members and their *résumés* are thoroughly scrutinised.

**48.** After citing Article 4(1)(b) of Regulation 1049/2001<sup>21</sup> and Article 2(a) of Regulation 45/2001<sup>22</sup>, the Commission referred to the judgment of the Court of Justice in Case

<sup>20</sup> Judgment in *Sweden and others v API and Commission*, cited above, ECLI:EU:C:2010:541, paragraph 158.

<sup>21</sup> Article 4(1)(b) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: ... privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

<sup>22</sup> Article 2(a) of Regulation 45/2001 stipulates that "'personal data' shall mean any information relating to an identified or identifiable natural person."

*Österreichischer Rundfunk and others*<sup>23</sup>, in which the Court confirmed that "there is no reason of principle to justify excluding activities of a professional ... nature from the notion of private life."

**49.** In reply to the third question, the Commission stated that the names and signatures of the Evaluation Committee members clearly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001 (the 'Data Protection Regulation'). It added that in its judgment in the *Bavarian Lager* case<sup>24</sup>, the Court of Justice ruled that when a request for access to documents containing personal data is made, the Data Protection Regulation becomes fully applicable. The Commission explained that Article 8 of Regulation 45/2001 provides that personal data shall be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46 only if a) the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of a public authority, or b) the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

**50.** The Commission contended that the complainant did not establish that it is a recipient under the national law adopted for the implementation of Directive 95/46. Moreover, as for point a), the Commission stated that "*[i]n order to perform a task in the public interest the complainant would need to either act as a public authority or be authorized by a public authority to perform the task. The complainant is an NGO incorporated in Spain, and does not perform any task in the public interest nor exercises a public authority.*" As for point b), the Commission stated that the complainant's objective in obtaining disclosure of this personal data is to ensure accountability of the tender process and the avoidance of possible risks, such as fraud or conflict of interest. However, besides the fact that such disclosure **might prejudice the Evaluation Committee members' legitimate interests** (as explained above), disclosure of the names of the Committee members **cannot be considered to be necessary** to achieve the said objective, in view of the Commission's own internal rules and checks over the Committee members' declarations of conflict of interests.

**51.** The Commission concluded that access to the personal data included in the document requested had to be refused, since the complainant did not establish the need for public disclosure of these personal data, and it could not be assumed that the disclosure thereof would not prejudice the legitimate rights of the individuals concerned.

**52.** The **complainant** argued that, since it sought to obtain solely the names "*and perhaps the professional affiliations of the Committee Members*", the judgment in Case *Österreichischer Rundfunk and others* cited by the Commission was irrelevant. That case related to the possible harm to an individual by the disclosure of financial information related to the person's role in a public authority. On the other hand, the complainant's request was aimed at finding out who is responsible for taking a particular decision (in which there is strong public interest) on behalf of the European Union.

**53.** The complainant stated that the Committee members, who are independent experts, are expected to be impartial irrespective of whether or not their names are made public. It added that "*[i]t is unclear how, given the Commission's own assertion that they thoroughly scrutinised conflict of interest declarations, the transparency of the process would mean panel members would not be able to make independent professional assessments. If anything, transparency around the process would ensure that opinions and assessments are professionally*

<sup>23</sup> Judgment of the Court of Justice of 20 May 2003, *Österreichischer Rundfunk and others*, C-465/00, C-138/01 and C-139/01, ECLI:EU:C:2003:294, paragraph 73.

<sup>24</sup> Judgment of the Court of Justice of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, ECLI:EU:C:2010:378.

*expressed with reasoned argumentation, rather than more informal opinions that could be questionable and negatively influence potential bidders in a way that would unfairly prejudice their bid submission."*

**54.** The complainant stated that unsolicited contacts are possible, and added that such a danger exists independently of whether the names of the Committee members are made public. *"That is why it is important – just as the Commission asserts – that it selects individuals of the highest levels of personal integrity."* However, with respect to this particular request, this danger does not arise since the tender process has ended. The complainant added that publishing the names of the Committee members is essential *"in order to determine whether their assessment of bids may have been influenced by third parties and/or reflects a non-independent opinion that would have led to the Authorising Officer making a final decision that would not be able to be justified fully."*

**55.** The complainant concluded that the need for independent professional assessments in a public tender process is vital for the successful performance of the process and for a correct decision on the award of the tender. It stated that its position is supported by recent jurisprudence<sup>25</sup> which lays down that *"transparency around a process is necessary, where information (concerning persons who took part in a decision-making process) needs to be disclosed in order to ensure the transparency of a decision-making process which is likely to have an impact on the activities of economic operators"*. The Court held that transparency is needed in order to appreciate how the form of participation by each expert in that process might, through that expert's own opinion, have influenced the decision.

#### **The Ombudsman's assessment**

**56.** The Ombudsman agrees with the Commission that the names and signatures of the Evaluation Committee members clearly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001 and that, in accordance with case-law, the Data Protection Regulation is therefore fully applicable.

**57.** Article 8(b)<sup>26</sup> of Regulation 45/2001 lays down two cumulative conditions to which the transfer of personal data is subject<sup>27</sup>. Personal data may be transferred only (a) if the recipient establishes the necessity of having the data transferred, and (b) if there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. As the Court of Justice has held<sup>28</sup>, whoever requests such a transfer must first establish that it is **necessary**. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is **no reason to assume that that transfer might prejudice the legitimate interests of the data subject**. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must **weigh the various competing interests** in order to decide on the request for access.

<sup>25</sup> Judgment of the Court of Justice of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, C-615/13 P, ECLI:EU:C:2015:489.

<sup>26</sup> The Ombudsman's assessment will focus on Article 8(b) of Directive 45/2001.

<sup>27</sup> See the judgment in *ClientEarth and PAN Europe v EFSA*, cited above, ECLI:EU:C:2015:489, paragraph 46.

<sup>28</sup> See the judgment in *ClientEarth and PAN Europe v EFSA*, cited above, ECLI:EU:C:2015:489, paragraph 47 and the case-law cited therein.

## The necessity of having the data transferred

**58.** The complainant argued that the disclosure of the names of the Evaluation Committee members is necessary in order to allay concerns regarding corruption and fraud and to ensure transparency in the decision-making process. It wanted to find out who was responsible for a decision in which there is strong public interest. It also wanted to ensure that the Committee members had been impartial and that the assessment was not tainted by undue influence.

**59.** The Commission submitted that the need for public disclosure of the personal data in question has not been established and that disclosure of the names of the Committee members cannot be considered to be necessary to achieve the objective of ensuring accountability, in view of the Commission's own internal rules and checks on the Committee members' declarations of conflict of interests.

**60.** The Ombudsman understands that the difficulty presented by situations such as the one at issue is that applicants can hardly ever be in a position to provide objective evidence of corruption, fraud, lack of impartiality or undue influence before they have been provided with the information they seek. Their requests are therefore necessarily based on more or less qualified suspicions which may be based for instance on information, accurate or not, communicated by the media. However, as stated by the Court of Justice in Case *Commission v Bavarian Lager*, applicants must provide "*express and legitimate justification[s] or ... convincing argument[s] in order to demonstrate the necessity for those personal data to be transferred*"<sup>29</sup>.

**61.** In its judgment in Case *ClientEarth and PAN Europe v EFSA*<sup>30</sup>, the Court of Justice held that a general reference to 'transparency' is not sufficient to substantiate a need to obtain personal data. On the other hand, the Court also stated that there is no need for applicants to voice specific suspicions concerning well-identified individuals (in that case experts). However, the Court also implied that suspicions of impartiality or of the existence of conflicts of interest **need to be reasonably grounded**.

**62.** The Ombudsman must therefore examine whether the complainant has at least established that there exist **reasonably grounded suspicions of corruption**, fraud, lack of impartiality or undue influence on the part of the members of the Evaluation Committee. Based on her assessment in paragraph 42 above, the Ombudsman concludes that the complainant has not done so in any way. Therefore, the complainant has not established the necessity of having the data transferred to it.

**63.** Since the complainant has not established the need to have the data transferred, the Ombudsman does not need to examine the issue of the absence of harm to the data subjects' legitimate interests.

**64.** In these circumstances, the Ombudsman considers that the Commission's refusal to disclose the names of the Evaluation Committee members does not amount to maladministration.

<sup>29</sup> Judgment in *Commission v Bavarian Lager*, cited above, ECLI:EU:C:2010:378, paragraph 78.

<sup>30</sup> Judgment in *ClientEarth and PAN Europe v EFSA*, cited above, ECLI:EU:C:2015:489. See, in particular, paragraphs 50 - 53 and 57.

# Consent to the disclosure of personal data

## Arguments presented to the Ombudsman

**65.** The **Commission** stated that the consent of the Committee members to the disclosure of their names was not sought. It contended that there is no such obligation and explained that the Commission generally considers that the members of evaluation committees have a right to protect their personal data, for the reasons explained in its comments on the previous supporting argument. It concluded that the partial access granted by the EEAS to the evaluation documents is justified under the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001.

## The Ombudsman's assessment

**66.** The Ombudsman agrees with the Commission that it was under no **legal obligation** to seek the consent of the Committee members to the disclosure of their names. However, the Ombudsman considers that, in order effectively to guarantee transparency and maintain public trust in the EU administration, it would constitute **good administrative practice** if, prior to appointing persons to a procurement evaluation committee, the Commission were to systematically obtain their consent to the disclosure of their names. Disclosure of their names at the conclusion of the evaluation process should be considered a condition of appointment. This would have the effect of building public trust, whilst complying fully with the applicable law. The Ombudsman will make a suggestion to this effect below.

## Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**There was no maladministration in the Commission's conduct.**

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

## Suggestion for improvement

**In order effectively to guarantee transparency and maintain public trust in the EU administration, it would constitute good administrative practice if, prior to appointing persons to a procurement evaluation committee, the Commission were to systematically obtain their consent to the disclosure of their names. Such disclosure at the conclusion of the evaluation process should be considered a condition of appointment.**

Emily O'Reilly

Strasbourg, 19/12/2016