EUROPEAN COMMISSION

Brussels, 2.6.2022
C(2022) 3799 final

Mr Xoan Evans Pin
[redacted]
A Coruña
Spain

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/5420**

Dear Mr Evans Pin,

I refer to your letter of 7 November 2021, registered on 8 November 2021, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 10 September 2021, handled by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to, I quote:

'1- Ares(2021)1295662, 16 February 2021, NEXT: San Finx operations - report;

2- Ares(2021)3979485, 17 June 2021, NEXT: San Finx - further clarifications;

3- Ares(2021)4581553, 12 July 2021, NEXT: Explanations - San Finx documentation'.

In its initial reply of 20 October 2021, the European Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified, as falling within the scope of your request, the following documents registered with reference Ares(2021)6882547:

[1] OJ L 345, 29.12.2001, p. 94.
[2] OJ L 145, 31.5.2001, p. 43.

- e-mail from the Geological Survey of Finland (GTK) to the Executive Agency for SMEs (EASME), 16 February 2021 (hereafter 'document 1'), which includes one attachment:
    - document entitled 'San Finx mine and the NEXT Update', February 2021 (hereafter 'document 1.1');
- e-mail from the Geological Survey of Finland (GTK) to European Health and Digital Executive Agency (HaDEA), 17 June 2021 (hereafter 'document 2'), which includes one attachment:
    - San Finx documentation (hereafter 'document 2.1'); and
- e-mail from the Geological Survey of Finland (GTK) to European Health and Digital Executive Agency (HaDEA), 12 July 2021 (hereafter 'document 3').

The European Commission's 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 Geological Survey of Finland (GTK) (hereafter 'the coordinator of the project'), as the documents originated from this entity.

In your confirmatory application, you request a review of this position except for personal data contained in the documents. The arguments that you put forward in support of your application have been considered in this assessment, set out in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Under the provision of Article 4(4) of Regulation (EC) No 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, a renewed third-party consultation of the coordinator of the project was initiated by the Secretariat-General at the confirmatory stage. When providing its reply to the consultation of the European Commission, the coordinator of the project took into account the views of Valoriza Mineria and the San Finx mine.

In its reply to the consultation of the European Commission, the coordinator of the project referred to the protection of commercial interests of the first indent of Article 4(2) of Regulation (EC) No 1049/2001, as well as the protection of privacy and the integrity of individuals under Article 4(1)(b) of the same Regulation. The coordinator of the project underlined that the requested documents concern a deliverable (8.3) that was submitted on the understanding that it was classified as confidential.

The Secretariat-General has examined the arguments provided by the third party. Following its assessment, I conclude that the arguments put forward by the third party justify the application of the exception laid down in the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001 to parts of the requested documents.

However, other parts of the documents are not protected under the exception of the first indent of Article 4(2) of Regulation (EC) No 1049/2001 or any other exception of Article 4 of that Regulation, nor can be considered as confidential in the sense of Article 3 of Regulation (EU) No 1290/2013 laying down the rules for participation and dissemination in Horizon 2020 (hereafter 'Regulation (EU) No 1290/2013')[3].

Against this background, I can inform you that:

– partial access is granted to document 1 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; and

– partial access is granted to documents 1.1, 2 and 3 based on 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.

As regards document 2.1, access is prevented under Article 4(1)(b) and the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

Please note, however, that the actual transmission of the documents is subject to the absence of a request, by the originator of the documents, for interim measures, as referred to in section 5 of this decision.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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'.

Although you excluded personal data from the scope of the confirmatory application, I would like to explain the reasons as to why such data cannot be disclosed in application of the above-referred exception.

In its judgment in Case C-28/08 P (*Bavarian Lager*)[4], the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000

[3] OJ L 347, 20.12.2013, p. 81.

[4] Judgment of the Court of Justice of 29 June 2010, *European Commission* v *The Bavarian Lager Co. Ltd* (hereafter referred to as *'European Commission* v *The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

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[5] (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC[6] (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation'[7].

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'[8].

The requested documents contain personal data such as the names, surnames, personal identification number and contact details (e-mails, phone numbers) of representatives of third parties. Furthermore, they contain the names, surnames and e-mails of persons who do not form part of the senior management of the European Commission. Document 1.1 also contains handwritten signatures of the persons concerned.

The names[9] of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is

5 OJ L 8, 12.1.2001, p. 1.

6 OJ L 295, 21.11.2018, p. 39.

7 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 59.

8 Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others* v *Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

9 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 68.

proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data[10]. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of commercial interests of a natural or legal person

The first indent of Article 4(2) of Regulation (EC) No 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'.

[10] Judgment of the Court of Justice of 16 July 2015, *ClientEarth* v *European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

The exception of the first indent of Article 4(2) of Regulation (EC) No 1049/2001 should be read also in light of Article 339 of the Treaty on the Functioning of the European Union (TFEU), which requires staff members of the Union institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

The requested documents relate to a grant agreement (NEXT (776804)) funded under Horizon 2020. The project ran from 1 May 2018 to 30 September 2021. There were five deliverables in the Work Package 8, including deliverable 8.3 to which the documents relate.

Article 3 of Regulation (EU) No 1290/2013 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, read in conjunction with Article 3 of Regulation (EU) No 1290/2013, lays down the obligation to maintain confidentiality of documents and other material of the project identified as confidential during the implementation of the action and for four years after the duration of the action.

While Regulation (EU) No 1290/2013 and the grant agreement provide for certain exceptions to the confidentiality rules, in particular as regards making information available to the Union institutions and the Member States in accordance with Article 4 of that Regulation and Article 36.1 of the grant agreement, or related to the obligation to disseminate the results in accordance with Article 43.2 of that Regulation in addition to Articles 29.1 and 29.2 of the grant agreement, both Regulation (EU) No 1290/2013 and the grant agreement guarantee the principle of confidentiality of information flagged as confidential during the period determined in the grant agreement.

It follows from Article 38.2.1 of the grant agreement that the right of the European Commission to use beneficiaries' materials, documents or information includes giving access in response to individual requests under Regulation (EC) No 1049/2001. However, this does not change the confidentiality obligations contained in Article 36, which shall still apply.

Deliverable 8.3 (ethics) was marked in the grant agreement as 'confidential, only for members of the consortium (including the Commission Services)'. It was signed by both parties and was submitted with the same distinctive confidentiality marking. As the period of four years after the duration of the action has not expired, the information related to this deliverable is thus covered by the confidentiality requirements.

The objective of this confidentiality provision is to guarantee beneficiaries that their project will be treated as confidential and that their business and commercial information will not be made publicly available and thus accessible to potential competitors.

As clarified by the General Court in its judgment in Case T-158/19, Article 36.1(e) of the grant agreement — according to which, in essence, the confidentiality obligations guaranteed under Article 3 of Regulation (EU) No 1290/2013 will cease to apply if Union law or national law requires the disclosure of information — cannot be interpreted as meaning that the principle of access to documents resulting from Regulation (EC) No 1049/2001 necessarily prevails over the protection of the confidentiality of documents established by Regulation (EU) No 1290/2013[11]. Article 36.1(e) of the grant agreement reflects the need to apply Regulation (EC) No 1290/2013 and Regulation (EU) No 1049/2001 in a compatible and consistent way.

In that judgment, the General Court also clarified that the classification as confidential of the documents communicated to an institution in the framework of a project is not sufficient to justify the application of the exception protecting commercial interests. The institution has to examine in a concrete and individual way whether the documents classified as confidential are fully or partially covered by that exception[12].

The European Commission has conducted a concrete assessment of the requested documents taking into account the information at its disposal, including *inter alia* the position of the third party and the arguments provided in your confirmatory application. Whereas the European Commission does not consider that documents 1, 1.1, 2 and 3 can be fully covered by the above-referred exception, there is a real and non-hypothetical risk that public release of the withheld parts of these documents, in addition to document 2.1, would undermine the commercial interests of the third party concerned.

In particular, the redacted parts of document 1.1 contain information about workforce and costs linked to the project (travel expenses, figures about investments and information about persons who have worked in 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. Documents 1.1, 2, 2.1 and 3 reflect extracts from the confidential deliverable 8.3. They concern permitting procedures, operational details of the activity of the mine, and commercial relations of the third parties concerned.

It follows that the documents requested are likely to present a commercial value for the consortium and, as a result, their commercial interests can be protected. The members of the consortium may have legitimate commercial interests linked to the results of that project which may fall within the exception referred to in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

Hence, public disclosure of the above-referred information, which was shared exclusively with the services of the European Commission and was not intended to be disclosed to the public, could undermine the commercial interests of the concerned third

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11 Judgment of the General Court of 17 December 2021, *Patrick Breyer* v *Research Executive Agency*, *T-158/19*, EU:T:2021:902 paragraph 70 .

12 Ibid, paragraph 71.

party, by placing in the public domain confidential commercial information of the project.

Based on the assessment of the documents, the need to apply Regulation (EC) No 1290/2013 and Regulation (EU) No 1049/2001 in a compatible and consistent way, and the opposition of the third party to the disclosure, I consider that the public interest is best served by protecting these parts from public access.

In light of the above, I consider that the use of the exception under the first indent of Article 4(2) of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the relevant undisclosed parts of documents 1.1, 2 and 3, in addition to document 2.1, without the agreement of the originator, must be refused on that basis.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the first indent of Article 4(2) 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal[13].

In your confirmatory application, you took the view that the requested documents are subject to an overriding public interest in disclosure given that, in your opinion, the information contained in such documents relate to emissions into the environment in the sense of Article 6 of Regulation (EC) No 1367/2006[14]. You argue that, I quote, 'the requested documents […] have as their main subject the emissions into the environment from the San Finx mine and how an EU funded project had been, at least partially, responsible for their continuation in absence of discharge and environmental permits as well as adequate treatment measures, causing significant environmental damage. Therefore, the application of exceptions concerning requests for access to environmental information pursuant Article 6.1 of Regulation (EC) No 1367/2006 should not have been ignored'.

However, I consider that such considerations are not supported by the actual assessment of the withheld parts of the documents nor demonstrate a pressing need for the public to obtain the undisclosed parts of the documents, specifically. Please note that NEXT ('New

[13] Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC* v *European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

[14] OJ L 264, 25.9.2006, p. 13.

Exploration Technologies') is not a mining project (mineral extraction) but, as indicated in the project summary, a mineral exploration research and innovation project which developed 'new geo-models, novel sensitive exploration technologies and data analysis methods which together are fast, cost-effective, environmentally safe and socially accepted'. 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.

Hence, I consider that an overriding public interest in this disclosure has not been established on the basis of the arguments invoked in your application. Nor have I been able to identify any public interest capable of overriding the interest protected by the first indent of Article 4(2) of Regulation (EC) No 1049/2001. Any public interest has been satisfied with the partial access that is herewith granted to the requested documents.

I would like to stress that the requested documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[15]. The General Court confirmed this jurisprudence in its judgment in Case T-476/12 (*St. Gobain Glass*)[16] stressing the serenity of administrative proceedings and the need to protect administrative procedures from external pressure.

Please note also that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

As mentioned above, partial access is herewith granted to documents 1, 1.1, 2 and 3. However, no further partial access is possible without undermining the interests described above.

5. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of Commission Decision of 5 December 2001 amending its rules of procedure[17], '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of

[15] Judgment of the Court of Justice of 29 June 2010, *European Commission* v *Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *European Commission* v *Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

[16] Judgment of the General Court of 11 December 2014, *Saint-Gobain Glass Deutschland* v *European Commission*, T-476/12, EU:T:2014:1059, paragraphs 81-82.

[17] Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), OJ, L 345, 29.12.2001, p. 94.

Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure'.

Since the decision to grant partial access is taken against the objection of the third party originator expressed at initial and confirmatory levels, the European Commission will inform the third party originator of its decision to give partial access to the documents requested. It will not grant such partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third-party author, in accordance with the provisions mentioned above.

This time-period will allow the third party to inform the European Commission whether it will object to the partial disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third-party author has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the redacted document to you.

6. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

For the Commission
Ilze JUHANSONE
Secretary-General

Enclosures: (4) (the enclosures will be forwarded in accordance with section 5 above)