



Emily O'Reilly

European Ombudsman

Proposal

for a solution on the European Commission's refusal to give full public access to documents concerning a mineral exploration research project funded under the Horizon 2020 programme (cases 1132/2022/OAM and 1374/2022/OAM)

Made in accordance with Article 2(10) of the Statute of the European Ombudsman¹

Background to the complaint

1. The complainant, an environmental organisation from Spain, asked the Commission for public access to documents concerning an EU Horizon 2020 research project in the field of mineral exploration, namely New Exploration Technologies (NEXT).² In particular, the complainant was interested in the part of the NEXT project that related to the San Finx mine, located in the north-west of Spain.

2. The Commission initially refused to grant access to the requested documents, arguing that their disclosure would undermine the commercial interests of the consortium's members.³

3. The complainant then asked the Commission to review its decision (by making a 'confirmatory application').

4. In reply, the Commission identified five documents. It refused access to one document in its entirety (*Document 2.1: San Finx documentation*), relying on the need to protect the privacy and the integrity of the individual⁴ and commercial interests.⁵ The Commission granted partial access to the remaining four documents, invoking several exceptions under the EU legislation on public access to documents:

- Redactions for the protection the privacy and the integrity of the individual only:

¹ Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3A2021%3A253%3ATOC.

² New Exploration Technologies is a research project in the field of mineral exploration developed by a pan-European consortium from six Member States (Finland, France, Germany, Malta, Spain and Sweden). The consortium consists of 16 partners from research institutes, academia, service providers and industry. More information is available at: <https://cordis.europa.eu/project/id/776804>.

³ Under Article 4(2) first indent of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049>.

⁴ Under Article 4(1)(b) of Regulation 1049/2001.

⁵ Idem 3.



- *Document 1: e-mail from the Geological Survey of Finland (GTK) to the Executive Agency for SMEs (EASME), 16 February 2021;*
- Redactions for the protection the privacy and the integrity of the individual and for the protection of commercial interests:
 - *Document 1.1 'San Finx mine and the NEXT Update', February 2021;*
 - *Document 2: e-mail from the GTK to European Health and Digital Executive Agency (HaDEA), 17 June 2021;*
 - *Document 3: e-mail from the GTK to HaDEA, 12 July 2021.*

5. Dissatisfied with the outcome, the complainant turned to the Ombudsman, first regarding the document that the Commission refused to disclose in its entirety, and then in relation to the documents to which it was granted partial access only.

The inquiry

6. The Ombudsman opened two inquiries into the complaints, which are treated jointly. Since the complainant did not object to the redaction of personal data, the inquiry focused on the Commission's application of the exception for the protection of commercial interests. As the redactions in document 1 concern personal data only, the Ombudsman's inquiry did not relate to that document.

7. In the course of the inquiry, the Ombudsman inspected the four documents at issue and the documentation relating to the consultation of the third party.⁶

Arguments presented

8. The **complainant** argued that it sought public access to the documents, as there is a "public interest in relation to the protection of the EU budget and the environment". In its view, all requested documents contain information related to emissions into the environment. It stated that an overriding public interest in disclosure of environmental information exists pursuant to Article 6(1) of the EU Aarhus Regulation.⁷

9. The complainant also noted that the NEXT project is already under intense public scrutiny, including from members of the European and Spanish parliaments.⁸

⁶ Conducted in line with Article 4(4) of Regulation 1049/2001.

⁷ Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1367>.

⁸ The complainant referred to a question from a Member of the European Parliament to the European Commission: https://www.europarl.europa.eu/doceo/document/E-9-2021-003447_EN.html and to a question from a Member of the Spanish Parliament to the Spanish Government: https://www.congreso.es/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=184%2F063488.



10. The **Commission** stated that the requested documents relate to one of the project's deliverables, namely deliverable 8.3 (ethics). Deliverable 8.3 was marked in the grant agreement as '*confidential*'.

11. It then noted that, in accordance with the Horizon 2020 Regulation,⁹ and the grant agreement,¹⁰ documents identified as confidential by a grant applicant cannot be disclosed during the implementation of the projects and for four years thereafter. In this regard, the Commission said it consulted with the coordinator of the project, who informed the Commission that the beneficiaries opposed the disclosure of the documents.

12. The Commission noted that it balanced these confidentiality requirements against the public access provisions in Regulation 1049/2001¹¹ and, as a result, granted partial access to the documents. It concluded that there was a real and non-hypothetical risk that disclosing the documents in full would undermine the commercial interests of the third party concerned.

13. The Commission also took the view that "*the redacted parts of the documents do not contain information related to emissions into the environment in the sense of Article 6.1 of Regulation (EC) No 1367/2006*". Therefore, it considered that the complainant did not show that there was an overriding public interest in (full) disclosure of the documents. The Commission stated that it could not, itself, identify any further public interest capable of overriding the protection of commercial interests.

The Ombudsman's assessment

14. The documents at issue in this case concern one of the mineral exploration sites used in the NEXT project, the San Finx mine. There has been a significant public interest as regards the San Finx mine, not least because of the allegedly high environmental and social costs associated with the mining activities there.¹²

15. The Ombudsman understands that the documents relate to one of the deliverables of the NEXT project and that the beneficiaries that submitted these documents to the Commission consider them to be confidential.¹³

⁹ See Article 3 of Regulation 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in "Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)": <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1290>

¹⁰ The grant agreement of the NEXT project is not publicly available. However, the Commission publishes a Model Grant Agreement valid for all Horizon 2020 grants which can be consulted for illustrative purposes. The Commission referred to the confidentiality provisions under Article 36.1: "*During implementation of the action and for four years after the period set out in Article 3, the parties must keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed ('confidential information')*": https://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/amqa/h2020-amqa_en.pdf

¹¹ The Commission referred to the Judgment of the General Court of 15 December 2021, *Patrick Breyer v European Research Executive Agency*, Case T-158/19: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019TJ0158>.

¹² See for example questions from Members of the European Parliament to the European Commission: https://www.europarl.europa.eu/doceo/document/G-9-2021-001001_EN.html.

¹³ See paragraph 11.



16. The Horizon 2020 Regulation states 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”.¹⁴ The Union courts have confirmed¹⁵ that the mere fact that documents are considered as ‘confidential’ pursuant to this provision constitutes only an *indication* that their content is sensitive. That is not, however, sufficient to justify the application of the exception referred to in the first indent of Article 4(2) of Regulation 1049/2001, namely the need to protect commercial interests.

17. Moreover, an institution can refuse access to a document with a view to protecting commercial interests only where there is no overriding public interest in disclosure.¹⁶

18. In this case, the Commission stated that it could not identify an overriding public interest that would justify disclosing the redacted information. In particular, it insisted that the documents do not contain information related to emissions into the environment, within the meaning of Article 6(1) of the EU Aarhus Regulation.

19. The inspection of the four unredacted documents confirmed that they contain, in parts, information on investments, costs, workforce, commercial relations of a third party (one of the participants in the consortium) and administrative information. It is reasonable to consider that the disclosure of this information could undermine the commercial interests of the third party concerned.

20. The Ombudsman considers that there is no overriding public interest in the disclosure of most of the redacted information, in particular to information relating to the ownership and the transfer of ownership of assets, investments, information relating to costs and workforce and certain administrative information.¹⁷

21. However, the Ombudsman takes the view that some information in document 1.1 can be understood as being ‘*environmental information*’ within the meaning of the EU Aarhus Regulation and that parts of that information relate to ‘*emissions into the environment*’.

22. The aim of the Aarhus Regulation is to ensure the widest possible access to information concerning *factors*, such as emissions, and *measures*, such as activities, affecting or *likely to affect* elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites.¹⁸

23. While the NEXT project does not concern mineral *extraction* (that is, the commercial exploitation of the mine) but is a research and innovation project relating to mineral exploration and exploitation, this does not mean that it will not, if carried out, affect the environment.

¹⁴ Article 3 of Regulation 1290/2013.

¹⁵ See *Patrick Breyer v European Research Executive Agency*, paragraphs 70-71.

¹⁶ See *Patrick Breyer v European Research Executive Agency*, at paragraphs 181-205.

¹⁷ Document 2.1 in its entirety and parts of documents 1.1 (including all the annexes), 2 and 3.

¹⁸ See in particular Article 2(1)(d)(ii) and (iii) of the Aarhus Regulation.



24. By way of examples only, reference is made in document 1.1 to sampling and tests (Section 1.1). While sampling of a mine, and tests, do not impact on the environment to the same extent as mineral extraction (mining) does, they nonetheless affect the environment. The Ombudsman recalls that the Aarhus Regulation does not apply any form of threshold test when considering whether information is 'environmental information'. *Any* information relating to effects on the environment is environmental information, even if the effect on the environment is relatively small. Document 1.1 also describes how the San Finx mine is being exploited by its owners (Section 2.2), which clearly constitutes environmental information. The document further contains information on discharging of mine water, that is, information on emissions into the environment (Sections 2.2 and 2.3).

25. The Ombudsman is therefore of the view that there is a public interest in having access to certain information in document 1.1 and that this public interest overrides the interests in non-disclosure. Consequently, the relevant parts of document 1.1 should be released.

26. Finally, it appears that some of the redacted information in documents 2 and 3 has already been disclosed by the Commission in reply to written questions from the European Parliament.¹⁹ It is not clear to the Ombudsman why the Commission did not release this information to the complainant.

27. In light of the above, the Ombudsman considers that the Commission should review its position with a view to granting the widest possible public access to the requested documents.

The proposal for a solution

The Ombudsman proposes that the European Commission should review its position, taking into account the above observations, with a view to granting the widest possible public access to the requested documents.

The European Commission is invited to inform the Ombudsman by 7 December 2022 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly
European Ombudsman

Strasbourg, 10/10/2022

¹⁹ E-003447/2021, available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-003447_EN.html.