



EUROPEAN COMMISSION

European Climate, Infrastructure and Environment Executive Agency

Director

Brussels, 5 July 2021
CINEA.A.A2.2/LDP

Ms Emily O'Reilly
European Ombudsman
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Subject: Complaint 465/2021/VB – CINEA's observations to your proposal for a solution

Reference: Your letter of 1 June 2021

Dear Ms O'Reilly,

Thank you for your letter cited in reference, where you inform CINEA about your proposal for a solution regarding the case in subject and request a reply to your proposal.

I am pleased to transmit to you the enclosed CINEA's reply to your proposal for a solution in this case.

CINEA remains at your disposal should you require further information.

Yours sincerely,

Dirk Beckers

Copy: T. Ehnert, R. Hickey (OMBUDSMAN), SG OMBUDSMAN (functional mailbox), DG MOVE (functional mailbox), P. Aba Garrote, A. Boschen, P. Stalins, I. Ramallo and P. Rosa (CINEA)

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- Enclosures:
1. CINEA's opinion on the Ombudsman proposal for a solution
 2. Annex 1 to CINEAS's opinion - CINEA's communication to the Italian authorities dated 14 June 2021
 3. Annex 2 to CINEAS's opinion - Version of the requested document marked for redaction prepared by CINEA, sent on 14 June 2021
 4. Annex 3 to CINEAS's opinion - Relevant exchanges between CINEA and the Italian authorities from 21 June 2021 to 25 June 2021
 5. Annex 4 to CINEAS's opinion - Revised redacted version of the requested document



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European Climate, Infrastructure and Environment Executive Agency's opinion on the European Ombudsman's proposal for a solution

Complaint 465/2021/VB

The abovementioned complaint concerns the Innovation and Networks Executive Agency (INEA)'s refusal to grant full access to an amendment to a grant agreement concerning the Lyon-Turin base tunnel project. The European Climate, Infrastructure and Environment Executive Agency (CINEA or the Agency) replies to the European Ombudsman proposal for a solution in this case as INEA's successor¹.

I. BACKGROUND / SUMMARY OF FACTS

By the initial application of 4 December 2020, Mr Paolo Prieri, on behalf of Presidio Europa NO TAV, (hereafter, 'the Applicant' or 'the Complainant') requested to the Commission and to INEA access to the grant agreement for the CEF Action 2014-EU-TM-0401-M, extended until 31 December 2022. The concerned CEF Action relates to the Lyon-Turin tunnel project (hereafter, 'the project').

INEA identified amendment n° 1 to grant agreement n° INEA / CEF / TRAN / M2014 / 1057372, signed on 17 April 2020, as the requested document (hereafter, 'the requested document').

INEA consulted the Italian authorities, as coordinator of the concerned project and co-author of the requested document. This is in accordance with Article 4(5) of Regulation 1049/2001². In its reply, the Italian authorities referred to previous consultations on the requested document. Namely, the Italian authorities referred to case INEA 2020/13, where the coordinator had indicated that the disclosure of the requested document would certainly rise questions about the legal stability of the procurement and worksite security. The Italian authorities had already agreed to partially disclose the requested document and considered acceptable to share with the Applicant the redacted version already released.

On 4 January 2021, INEA replied to the initial request providing partial access to the requested document, based on Article 4(1)(b) protection of privacy and integrity of individuals and Article 4 (2), first indent, commercial interests of natural and legal person, including intellectual property rights of Regulation 1049/2001.

¹ CINEA succeeded and replaced INEA as from 1 April 2021 in accordance Commission Implementing Decision (EU) 2021/173 of 12 February 2021 establishing the European Climate, Infrastructure and Environment Executive Agency, the European Health and Digital Executive Agency, the European Research Executive Agency, the European Innovation Council and SMEs Executive Agency, the European Research Council Executive Agency, and the European Education and Culture Executive Agency and repealing Implementing Decisions 2013/801/EU, 2013/771/EU, 2013/778/EU, 2013/779/EU, 2013/776/EU and 2013/770/EU, C/2021/953. OJ L 50, 15.2.2021

² 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 L 145, 31.5.2001, p. 43–48

The information provided by INEA to the Applicant made public the detailed description of the 33 project activities, as now in force with the requested document. This detailed description also contains objectives and data on the progress of the project, including the finalisation of the implementation of certain activities. The tables presenting the estimated financial information of the project, such as the distribution of the EU grant between the two beneficiaries, the sources of funding of the project and the amount co-financed by each beneficiary, were also made public.

On 17 January 2021, the Applicant made a confirmatory application requesting to INEA to review its position. In particular, the Applicant alleged that the purpose of the request is to have information regarding the developments in the administrative and contractual activities, which should be clearly visible to European citizens. The request was based on the principle of transparency and sought to allow the public to know how public works are carried out, how public financing is used in this respect and to monitor the proper implementation of the project.

In the framework of the confirmatory application, INEA conducted a fresh review of its first reply. Namely, INEA assessed the arguments provided by the Applicant and carried out an internal consultation on the interpretation of the administrative practice of the Commission³. On 23 February 2021, INEA informed the Applicant that it confirmed its initial decision and refused to provide full public access to the requested document. INEA based its refusal to access to the requested document on the commercial interests exception in Article 4(2), first indent, and the personal data exception in Article 4(1)(b) of Regulation 1049/2001.

On 9 March 2021, the Complainant submitted the Complaint.

II. OMBUDSMAN'S CONCLUSIONS AND PROPOSAL FOR A SOLUTION

In its letter of 1 June 2021 to CINEA, the Ombudsman agrees that it is reasonable to consider that there does not appear to be a clear public interest in obtaining access to the indicative breakdown of estimated eligible costs per activity and per beneficiary, the means of verification, and the personal data included in the requested document. In particular, the Ombudsman considers that the breakdown of eligible costs is commercially sensitive information.

However, the Ombudsman considers that there is an overriding interest in disclosure of the information relating to delays in completing the project. The Ombudsman argues that the delays in the completion of the project risk affecting significant and important public interests. By making public the adapted timeline, the public can monitor the implementation of the project and check whether and why delays are occurring. In particular, the Ombudsman notes that some of the redacted dates in the requested document relate to delays that have already occurred and considers that their potential commercial sensitivity is limited.

Furthermore, the Ombudsman considers that it is an open question whether the disclosure of the redacted parts of the requested document containing information about the revised indicative start and end dates of the project's activities, the revised description of the project's milestones and their revised indicative completion dates could undermine the

³ As established in the Commission guidance note on access to information and documents related to procurement and grant award procedures, already provided to the Ombudsman as annex 2 of INEA's letter of 15 March 2021.

commercial interests of the entities involved in the project, as similar information was made public by the Commission in 2016, before the revised timelines were agreed upon.

In accordance with its Statute and after assessment of the information provided by the Agency and the Complainant, the Ombudsman proposed the following solution:

"CINEA now reviews its position on the complainant's public access request, taking into account my above observations, with a view to granting the widest possible public access to the amendment to the grant agreement."

III. CINEA'S POSITION

CINEA confirms its attachment to the respect of the principles of good administration defined in Article 41 of the EU Charter of Fundamental Rights and by the European Code of Good Administrative Behaviour.

In that sense and in relation to the disclosure of documents related to amendments to grant agreements and its annexes, CINEA carries out a concrete and individual assessment of the documents falling within the scope of a specific request on a case-by-case basis. Given the nature of the documents relating to grant amendments, the exception of access relating to commercial interests of natural or legal persons, including those relating to intellectual property foreseen in Article 4(2) first indent of Regulation 1049/2001, is most likely to apply. If after assessment of the requested documents, CINEA considers that there are reasonable doubts as regards the disclosure of documents co-prepared with a Member State, CINEA consults the Member State to obtain the prior agreement to grant partial or full access⁴. CINEA cannot ignore the objection of the Member State, but conducts a careful examination of whether the reasons for the Member State objection in terms of the exceptions listed in Articles 4(1) to (3) of Regulation 1049/2001 appear to be well founded.

In the present matter, CINEA notes that the Italian authorities provided reasoned objections to the full disclosure of the requested document, redacting only information they considered would prejudice the legal stability of the procurement and worksite security. Furthermore, the Italian authorities had already been consulted on the disclosure of the requested document and had already agreed to partially disclose the requested document.

Taking into account the abovementioned Ombudsman observations, CINEA consulted the Italian authorities on 14 June 2021. CINEA requested the Italian authorities to reconsider the redactions applied in the past and to state their position on the level of disclosure of the requested document referring to the exceptions listed in Articles 4(1) to (3) of Regulation 1049/2001, where necessary. See as **Annex 1**, CINEA's communication to the Italian authorities dated 14 June 2021 and, as **Annex 2**, the version of the requested document marked for redaction prepared by CINEA.

On 21 June 2021, the Italian authorities accepted to grant wider access to the requested document. In particular, regarding the disclosure of information on almost all the past dates of activities-milestones already carried out and most of the information in the milestones table, including the means of verification.

However, as established in the relevant exchanges with the Italian authorities the coordinator maintained the opposition to the disclosure of information relating:

⁴ In accordance with Article 4(5) of Regulation 1049/2001.

- to personal data on the basis of Article 4(1) and (b) of Regulation 1049/2001, and;
- to sensitive future dates (or past dates that could reveal the timing of those future dates) and of the breakdown of costs on the basis of Article 4(1)(a), first indent (public security), Article 4(2), first indent (commercial interests of a natural or legal person) and Article 4(3) (decision-making process) of Regulation 1049/2001.

See enclosed as **Annex 3**.

The revised redacted version of the requested document is enclosed as **Annex 4**.

CINEA would like to note the aspects below in relation to the revised level of disclosure of the requested document. In particular, on whether the disclosure of the redacted parts of the requested document containing information about the revised indicative start and end dates of the project's activities, the revised description of the project's milestones and their revised indicative completion dates could undermine the commercial interests of the entities involved in the project:

- As a general consideration, the Agency respectfully maintains its position that the Commission's decision to disclose the concerned grant agreement does not prejudice the Agency's right and obligation to conduct a concrete assessment of the new request for access to the grant amendment. In the present case, the Agency's decision to provide partial access to the grant amendment was taken based on the administrative practice of the Commission and in agreement with the Commission and the concerned Member State. The Agency's approach in case INEA 2020-41 is also in line with its previous decision in case INEA 2020-13 on the same grant amendment.
- Following the Ombudsman's observations on the matter, in particular, considering the risk that the delays in the completion of the project may cause to significant and important public interests, the Agency agrees to disclose:
 - o The starting dates of all 33 activities and the end dates of 5 activities out of 33;
 - o The future timing estimates in the detailed activities descriptions for Activity 8, "(first phase until 31/12/2021)" in page 14, for activity 15, "by end of august 2020" in page 19 and for activity 27, "From 2019 to 2022" in page 27.
 - o The table of milestones and means of verification (I.5), with the exception of the end dates of 77 out of the 258 milestones.
- The Italian authorities further elaborated their arguments regarding the application of the absolute exception to disclosure based on Article 4(1)(a), first indent (public security) of Regulation 1049/2001 in their communication of 21 June 2021. Based on this complementary information, the Agency also puts forward this exception to reject access to the information contained in the redacted parts of the requested document.

IV. CONCLUSION

On the basis of the above, CINEA agrees to disclose the revised redacted version of the requested document, enclosed as **Annex 4**. CINEA hopes that the proposed revised redacted version of the requested document leads to solve the present case.

In addition, CINEA informs the Ombudsman that the Agency is currently dealing with another request for access to documents relevant to the same amendment object of this complaint. CINEA already informed the new applicant that for the sake of consistency and administrative efficiency, the Agency will provide a full reply to the request once a solution is found in the present case. Therefore, the Agency would appreciate if the Ombudsman services could consider this situation when dealing and closing the present case to limit the waiting time the Agency will require to respond to the other request. In particular, the Agency suggests that, if the Ombudsman must communicate the redacted version of the requested document to the Complainant, this is done indicating that the document is shared for the sole purpose of providing comments on CINEA's reply, that the document is not yet public and that, it should be treated confidentially until CINEA has formally taken the decision to make it public.