

CHIEF EXECUTIVE

Mr Peter Teffer

SENT BY EMAIL ONLY

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EDA202207092/CSD/LEG

18 July 2022

Subject: Decision pursuant to Article 7 of the Chief Executive Decision No. 19/09 of 07/06/2019¹ adopting the EDA policy on public access to documents in accordance with the provisions of Regulation 1049/2001.²

Dear Mr Teffer,

I refer to your email of 27 June 2022 in which you submit 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 (hereinafter "Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 17 May 2022, registered on the same data under the reference number 2022/18/IN, you requested access to:

"All documents related to the four measures recommended by the EDA Legal Office, listed in the 14 October 2021 letter to the European Ombudsman (EDA202110041/CSD/CE):

- 1) guidelines on post-employment restrictions*
- 2) insertion of new standard paragraph in vacancy notices*
- 3) possible adoption of internal procedures restricting access to confidential information*
- 4) possible appointment of an EDA ethics officer*

¹ <https://eda.europa.eu/who-we-are/transparency/access-to-eda-documents>.

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 (JO L 145 du 31.5.2001, p. 43–48).

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My request thus covers any document, including but not limited to minutes, e-mails, annexes, letters, drafts, notes. The timeframe is from 14 October 2021 until today, 17 May 2022."

In its initial response sent on 24 June 2022, the European Defence Agency (hereinafter "the Agency") identified relevant documents and provided you with documents in attachment to and/or linked in the response.

As regards the documents for which access could not be granted, the Agency confirmed it had identified certain documents but that disclosure was prevented by several exceptions to the right of access laid down in Regulation 1049/2001, notably Article 4(3) - *protection of the decision-making process* and Article 4(1)(b) *privacy and the integrity of the individual*.

In a follow-up email of 21 June 2022, you requested "*a list of the titles of the withheld documents, including their dates*". EDA replied negatively to this follow-up request by email on 24 June 2022, referring to the requirements of the Regulation, which applies to existing documents pursuant to Article 2(3) of Regulation 1049/2001.

On 27 June 2022 you submitted a request for confirmatory application.

2. ASSESSMENT AND CONCLUSION UNDER REGULATION 1049/2001

Pursuant to Article 7(2) of EDA Decision No 19/09 of 07/06/2019, decisions on confirmatory applications are made by the EDA Chief Executive.

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Agency conducts a fresh review of the initial reply provided.

In my review following your confirmatory application, I have reassessed the content of the documents in order to examine whether the Agency's position communicated to you in our initial reply of 24/06/2022 should be altered.

In its initial response the Agency communicated to you that it had identified a number of documents which fell within the scope of the request and disclosed the following four documents in attachment to the reply email:

1. Reply from the European Defence Agency (EDA) to the European Ombudsman's recommendations (published on the European Ombudsman's website in redacted form)
2. EDA HR template vacancy notice for Senior Manager positions

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3. EDA application form for authorisation to engage in an occupational activity after leaving EDA (post-employment activity)
4. EDA Internal presentation on ethics & conduct (noting that this document predated the timeframe indicated in your request, but remained valid and applicable)

EDA furthermore referred you to the EDA website on [Ethics and Conduct \(europa.eu\)](#) and to the rules governing resources and budget, in particular to the procedure to prepare the draft general budget, including resource requests (with the related staff establishment plan), for each year:

- [EDA Council Decision \(europa.eu\)](#), notably Article 13,
- [EDA financial rules \(europa.eu\)](#), notably Article 14,
- [EDA website \(Budget and staff establishment plan\)](#).

EDA also informed you that there were further documents identified as falling in the scope of your request, notably internal emails, drafts and ongoing resource requests, which could not be released since they were protected by the exceptions in Article 4(3) and Article 4(1)(b).

Pursuant to Article 4(3) “*access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*”.

The Agency explained that the documents you seek access to are internal emails and draft documents which prepare and further elaborate on ongoing initiatives and internal decision-making processes. These documents would reveal preliminary views and policy options which are currently under consideration and discussion. More specifically, the internal decision-making process would be seriously undermined if staff involved could not rely on the confidentiality of these working-level discussions before an official position by management or decision-making bodies at the required level is taken. EDA services must be able to explore all possible options on a working level free from external scrutiny during the development of policies and the preparation of resource requests. Therefore, the exception laid down in Article 4(3) first subparagraph of Regulation 1049/2001 applies to these documents.

EDA had examined to which extent the exception laid down in Article 4(3) of Regulation 1049/2001 may be waived in case of an overriding public interest in disclosure. Such an

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interest must be firstly a public interest and secondly outweigh the harm caused by the disclosure. Having analysed your initial request EDA had not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(3) mentioned above.

In your confirmatory application you ask EDA specifically to review its position on the application of Article 4(3) of the Regulation.

You consider, in particular, that “[...] EDA has already revealed these policy options, in the 14 October 2021 letter to the European Ombudsman (EDA202110041/CSD/CE). This is a letter which the EDA explicitly acknowledged ‘will be published on the European Ombudsman’s website’.”

You furthermore hold the view that, “[i]n the letter, the EDA has already revealed that the EDA Legal Office has recommended inter alia ‘[...]EDA to consider adopting internal procedures restricting access to confidential information (where staff still in service declare a move to another job)’ and ‘EDA to consider formally appointing a member of staff as EDA Ethics Officer’.”

You furthermore recall that “[t]he letter continued to inform the Ombudsman that these measures are ‘under preparation by the respective services and will be put in place as soon as approved by the management’.”

You conclude on this basis that “[t]he policy options are thus already disclosed to the Ombudsman and effectively the wider public – even though an official position by management on whether to adopt these internal procedures and appoint an EDA ethics officer respectively, has not yet been taken.”

You “therefore believe that the perceived risk of seriously undermining the EDA’s internal decision-making process is in fact quite limited.”

As you correctly state EDA had communicated to the European Ombudsman its considerations as for an adequate follow-up, based on recommendations of the Legal Office. However, as you also acknowledge and as has been communicated to you, some final decisions on parts of the intended follow-up have not yet been taken and are still under consideration.

For instance, with regards to the resource request, as can be seen from the website and other publicly available information, EDA's general budget (together with the Staff Establishment Plan) for the following financial year is approved at the end of the present calendar year by

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the Steering Board, after several iterative discussions, first internal to EDA and then with the Member State representatives. It is the prerogative of EDA participating Member States as represented in the Steering Board to take such decisions. As long as such approval has not happened, EDA cannot commit the participating Member States by publishing financial and staff decisions yet to be taken later in the year. This is precisely what Article 4(3) of Regulation 1049/2001 protects.

Should the resource request be successful, the public will be informed by way of a publication of the respective vacancy notice.

With regards to the overriding public interest in disclosure, it should be recalled that such an interest must be firstly a public interest and secondly outweigh the harm caused by the disclosure.

You disagree with EDA's conclusion on this point and refer to the inquiry of the European Ombudsman in case [OI/3/2021/KR](#). As you are no doubt aware, based on the inquiry in reference, the European Ombudsman has decided to close the case concluding that the EDA has accepted the European Ombudsman's recommendations and inviting the EDA to share its guidelines on post-employment restrictions **once they are approved** by the EDA's management. The request is therefore to share a final agreed version and not a draft which is still part of an on-going process as indicated to you in our initial response.

As a result, I conclude that, pursuant to Article 4(3) of Regulation 1049/2001 the decision that access cannot be granted to documents was correct and is hereby upheld.

The Agency also informed you that parts of the documents relating to personal data contained within the documents identified were protected by the exception under Article 4(1)(b) - privacy and the integrity of the individual. The Agency noted in its response to your initial application that, in line with Article 9(1)(b) of Regulation 2018/1725³, transmission of the personal data identified could not be done, except if you prove the necessity to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. You do not put forward any arguments, neither in your initial request nor in your confirmatory

³ 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 (OJ L 295, 21.11.2018, p. 39).

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application, to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001 the decision that access cannot be granted to documents was correct and is hereby upheld.

In conclusion and in response to your confirmatory application, I hereby confirm that EDA's initial position refusing access to the documents requested was, in my view, correct and is hereby upheld.

3. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision concerning public access to documents, that is, judicial proceedings brought before the Court of Justice of the European Union and complaints for maladministration filed with the European Ombudsman under the conditions specified in Articles 263 and 228 of the Treaty of the Functioning of the European Union respectively.

Yours sincerely,


Jiří Šedivý