



EUROPEAN COMMISSION
RESEARCH EXECUTIVE AGENCY

Director

Brussels, **17 JAN. 2019**
REA/MT/vc

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Subject: Your confirmatory application pursuant to Article 7(2) of Regulation (EC) No 1049/2001 – application for access to documents (ref. Ares(2018)6073379)

Dear Mr Breyer,

I refer to your email of 26 November 2018 registered by the Research Executive Agency (REA) on 27 November 2018 under reference number Ares(2018)6073379. You request, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, a review of the position taken by REA with regard to the initial request for access to documents.

1. SCOPE OF YOUR REQUEST

On 5 November 2018, the European Commission registered your initial application for access to documents submitted via the website AskTheEU.org and concerning the project iBorderCtrl (grant agreement nr. 700626) managed by REA.

On 7 November 2018, the request was reassigned to REA.

In your application you requested:

“ *D1.1 Ethics advisor's first report*

D1.2 Ethics of profiling, the risk of stigmatization of individuals and mitigation plan

¹ OJ L 145, 31.5.2001, p.43.

D1.3 Ethics Advisor

D2.1 Requirement Analysis Report

D2.2 Reference Architecture and components specifications

D2.3 EU wide legal and ethical review report

D3.1 Data Collection Devices - specifications

D7.3 Dissemination and communication plan

D7.6 Yearly communication report including communication material

D7.8 Dissemination and communication plan 2

D8.1 Quality Management Plan

D8.3 Periodic Progress Report

D8.4 Annual Report

D8.5 Periodic Progress Report 2

D8.7 Annual Report 2”.

On 23 November 2018, REA replied to your initial application (reference Ares (2018)6011402). In its letter REA provided an inventory of the documents related to the request (Annex 1 of the reply), containing reference to the documents directly accessible and specifying for each document non-disclosed or partially disclosed the legal grounds on which REA based its decision.

In particular, REA has partially disclosed deliverable D3.1 (Data Collection Devices - specifications) and deliverable D7.6 (Yearly communication report including communication material) is publicly available on the project website (<https://www.iborderctrl.eu/Publications>). The access to the other deliverables have been refused based on the exceptions relating to the protection of the privacy and integrity of the individual and/or of commercial interests of a natural or legal person, laid down respectively in Articles 4(1)(b) and 4(2), first indent, of Regulation (EC) No 1049/2001. Concerning deliverable D3.1, please find attached the latest version of the deliverable held by REA; the version that you have received in attachment of the reply to the initial application was a previous one and can now be replaced.

On 27 November 2018, REA registered your confirmatory application, pursuant to Article 7(2) of Regulation (EC) No 1049/2001.

On 18 December 2018, REA informed you of the extension of the initial deadline of 15 working days by additional 15 working days, in accordance with Article 8(2) of the Regulation.

Through your confirmatory application, while not objecting to REA invoking the exception of protection of privacy, you request a review of the position taken by REA on your initial request with regard to the documents to which access was denied based on the protection of commercial interests of a natural or legal person.

2. ASSESSMENT OF YOUR CONFIRMATORY APPLICATION

When assessing a confirmatory application for access to documents, REA conducts a fresh review of the reply given at the initial stage in light of the provisions of Regulation 1049/2001. Following this review, I am pleased to inform you that partial access can be granted to the deliverables D7.3 “Dissemination and communication plan” and D7.8 “Dissemination and communication plan 2”. Please find enclosed an expunged version of these deliverables. As regards the expunged parts of these documents and the other requested documents listed above, I confirm that they are covered by the exception of Article 4(2), first indent, (protection of commercial interests of a natural or legal person) for the reasons set out below.

2.1 Protection of commercial interests

In accordance with Article 4(2), first indent, of the Regulation, an institution 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.

The deliverables of the project iBorderCtrl, to which you request access, contain consortium confidential information about the methodology, research approach and strategy as to how the iBorderCtrl consortium proposes to achieve the project results.

More precisely, deliverables D1.1, D1.2, D1.3 and D2.3 include ethics and legal assessment of tools, technical components and methodologies developed within the project.

Deliverables D2.1 and D2.2 present technological solutions (e.g. new document analysis tools, advanced biometric technologies for identification) and the definition of the overall system architecture, providing the general framework for all the different modules that will compose the final integrated system.

Deliverable D8.1 contains consortium confidential information on how to manage the project, from the planning of technical activities to the final delivery of results. It also defines the project’s quality control procedures, roles and responsibilities for the development of each technological component.

Deliverables D8.3, D8.4, D8.5 and D8.7 describe the technical progress of the different work-packages at project months 6, 12, 18 and 24 with reference to the different technological and scientific outputs of the project.

This information has to be considered as inside knowledge of the iBorderCtrl consortium. It reflects the specific intellectual property, on-going research, know-how, methodologies, techniques and strategies which belong to the consortium.

As stated in the reply to the initial application, the public disclosure of such information would undermine the commercial interests of the iBorderCtrl consortium within the meaning of Article 4(2), first indent, of Regulation 1049/2001, as it would give an unfair advantage to the (potential) competitors of the consortium. By having access to the commercially sensitive information in the documents requested, the competitors would be able to profit from it, as follows.

First, the public disclosure would give the competitors the opportunity to anticipate the strategies and weaknesses of the partners of the iBorderCtrl consortium, including when competing in calls for tenders and proposals.

Secondly, the public disclosure would give their competitors the opportunity to copy or use the intellectual property, know-how, methodologies techniques and strategies of the iBorderCtrl consortium. The competitors would be able to employ this information in order to improve the production of their own competing products or provision of their own competing services. Furthermore, this would also result in the competitors having an unfair advantage when seeking and obtaining patents, approvals, authorisations and/or designations for their products or services.

Thirdly, the public disclosure would also undermine the possibilities of the partners of the iBorderCtrl consortium to obtain funding from existing and potential new investors. Given the competitive environment in which the project consortium operates, the information in question can only maintain its commercial value if it is kept confidential.

Fourthly, considering the sensitive nature of information in the documents, their public disclosure could also cause reputational damage to both (partners of the) iBorderCtrl consortium and the individuals linked with it.

Against this background, the disclosure would clearly adversely affect the competitive position of the iBorderCtrl consortium on the market and, in turn, seriously undermine their commercial interests, including their intellectual property.

I wish also to point out in this regard that, in accordance with Article 3 of H2020 Rules for participation, *“Subject 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.”*

This confidentiality provision is implemented in the H2020 Model Grant Agreement. Its Article 36 stipulates that *“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”).”*

Article 36 also provides that *“the Agency may disclose confidential information to its staff, other EU institutions and bodies. It may also disclose it to third parties, if (a) this is necessary to implement the Agreement or safeguard the EU’s financial interests and (b) the recipients of the information are bound by an obligation of confidentiality.”*

In the Grant Agreement for the project iBorderCtrl, all the requested deliverables not disclosed to you (except deliverable 8.7), are listed as ‘confidential’, bearing the following confidentiality marking *“Confidential, only for members of the consortium (including the Commission Services and/or REA Services)”*.

Please note that the General Court has addressed the issue of contractual confidentiality, under the EU Framework Programmes for Research and Innovation, in its *Technion*

judgment². It ruled that, if a contractual clause in the Grant Agreement provides that the Commission must use the documents and information, provided by a beneficiary, on a confidential basis, those documents and information cannot (within the timeframe set out in the Grant Agreement) be disclosed or released to persons not party to the contract.

The General Court confirmed that “*disclosure of the documents on the basis of Regulation No 1049/2001 would undermine the very existence of that clause of the contract, inasmuch as it would allow persons not party to the contract, namely the general public, access to the abovementioned documents*”.

The exception of Article 4(2), first indent, of Regulation 1049/2001 must, therefore, be interpreted also in line with the confidentiality provisions of H2020 Rules for Participation and its implementing acts.

It is consistent case-law that when two regulations regulate access to documents, without one of them having precedence as in the present case, they have to be applied in a manner compatible with the other and which enables a coherent application of them³.

Furthermore, the exception of Article 4(2), first indent, of Regulation 1049/2001 has to 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 EU 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.

I take the view that applying Regulation 1049/2001 cannot have the effect of rendering the above-mentioned provisions, in particular Article 339 TFEU, over which it does not have precedence, ineffective.

In consequence, there is a real and non-hypothetical risk that public access to the documents requested would undermine the commercial interests, including intellectual property, of the iBorderCtrl consortium.

Therefore, for the other requested documents (i.e. D1.1, D1.2, D1.3, D2.1, D2.2, D2.3, D8.1, D8.3, D8.4, D8.5 and D8.7) and the expunged parts of the documents partially disclosed (i.e. deliverables D3.1, D7.3 and D7.8), I confirm the initial position of REA that access must be denied in full on the basis of the exception laid down in Article 4(2), first indent, of Regulation (EC) No 1049/2001 and no further partial access is possible without undermining the interests described above.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2), first indent, of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure.

² Judgment of the General Court in *Technion v Commission*, T-480/11, EU:T:2015:272, paragraph 58.

³ Judgment of 28 June 2012 in *Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 110.

In your confirmatory application, you present a series of arguments in support of your view that there is an overriding public interest in disclosure of the requested documents. In your opinion, this outweighs the interest protected by the exception provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001.

Firstly, you claim that since iBorderCTRL is a publicly funded project "*the public has a legitimate interest in accessing the results of the project*". You continue arguing that since "*a lot of details on this project have been disclosed already (...) this confirms that the iborderctrl project cannot in its entirety be considered the intellectual property of the private actors involved. Especially reports on ethical issues, the legal framework or communication strategy do not (or not mostly) contain intellectual property.*"

Secondly, you argue that "*there is an overriding public interest in finding out whether the development of unethical and/or unlawful interferences in the human right to privacy are being publicly funded. The iborderctrl project is being critically discussed in the media as aiming at establishing a new means of mass surveillance. Access to the requested documents is needed so that an informed public and democratic debate on the proposed system can take place. I intend to use the requested information politically and for media reporting.*"

Regarding the notion of public interest, I would like to recall that the recital (11) of the Regulation (EC) No 1049/2001 provides that, "*in principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions.*"

In this respect, REA also recalls that the public interest in disseminating project results is guaranteed by the set-up of a coherent set of strategies and tools to disseminate results of finalized projects. Such disclosure is usually made through publishable summaries of project outcomes, prepared by the consortium and approved by the Commission/REA while preserving the intellectual property of the consortium.

Concerning your argument that the disclosure of details on this project would confirm that the project cannot in its entirety be considered as the intellectual property of the private actors involved, I would like to point out that, as mentioned above, the protection of commercial interests includes intellectual property but it is not limited to it.

As mentioned above, the deliverables related to the ethics and legal assessment refer to specific technological and scientific developments, processes and results of the project. Consequently, this information has commercial value and any disclosure could be used in detriment of the commercial interests of the iBorderCtrl members and have a negative impact on their ability to successfully exploit the research results.

Regarding your argument that under the project there would be the development of unethical and/or unlawful interferences in the human right to privacy and that the project is being critically discussed in the media as aiming at establishing a new means of mass surveillance, please note that iBorderCtrl is an ongoing research project funded under EU Horizon 2020 research programme. The project aims at testing new technologies in controlled border management scenarios that could potentially increase the efficiency of the EU's external borders management, ensuring faster processing for bona fide travellers and quicker detection of illegal activities. As such, it is not a technology development project, targeting the actual implementation of a working system with real customers.

Moreover, the Commission (and REA) gives highest priority to ethics and respect of fundamental rights in EU funded research, which must comply with established ethical principles and applicable law. Particular attention is paid to privacy, human rights and protection of personal data. All these ethical aspects of the project were evaluated by independent experts, and their recommendations were fully integrated in the project research activities.

Considering the above-mentioned arguments establishing the foreseeable risk to harm the commercial interests or legitimate interests in the field of intellectual property of third parties that would result from the further disclosure of the deliverables, REA estimates that in this case, the invoked public interest described in your confirmatory application does not outweigh the need to protect the interests of the third parties concerned. Therefore, the exception laid down in Article 4(2), first indent, of the Regulation should apply and you have not presented sufficient elements demonstrating the existence of an overriding public interest in disclosure of the requested documents.

4. CONCLUSION

Having re-examined your request, for the above-mentioned reasons, I have come to the conclusion that deliverables D3.1 (Data Collection Devices - specifications), already partially disclosed with the initial application, D7.3 (Dissemination and communication plan) and D7.8 (Dissemination and communication plan 2) can be sent to you. No further access is possible without undermining the interests described above because the expunged parts of the disclosed documents and the other requested deliverables are covered in their entirety by the invoked exception to the right of public access.

REA considers that, in absence of overriding public interests, it has the duty not to grant access to these documents according to Article 4(2), first indent, of Regulation (EC) No 1049/2001 as the prevailing interest is, in this case, the protection of the commercial interests including intellectual property of the third parties concerned.

5. MEANS OF REDRESS

I draw your attention to the means of redress available against this decision insofar as it refuses access to certain requested documents. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Marc TACHELET

Enclosures: - Deliverable D3.1 Data Collection Devices - specifications (latest version)
- Deliverable D7.3 Dissemination and communication plan
- Deliverable D7.8 Dissemination and communication plan 2