



EUROPEAN COMMISSION

Brussels,

Mr Bram Vranken
Vredesactie
Patriottenstraat 27
2600 Berchem

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 –Gestdem 2017/7037

Dear Mr Vranken,

I refer to your email of 8 March 2017, registered on 9 March 2017, in which you submit, on behalf of *Vredesactie*, a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

On 21 November 2017, you submitted an initial application in which you requested access to documents containing the following information:

- ‘1. All documents concerning the decision to set-up the Group of Personalities on Defence Research.
2. All documents concerning the selection-process for members of the Group of Personalities on Defence Research.
3. All documents concerning the decision not to register the Group of Personalities on Defence Research as an expert group.’

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

This application was registered under reference number Gestdem 2017/7037.

I note that on the same day, you submitted another initial application concerning documents relating to the European Defence Fund and the Defence Industrial Development Programme. That application was registered under the reference number Gestdem 2017/7033.

Both applications were attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, for handling and reply.

On 23 February 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs provided its joint reply to your initial applications Gestdem 2017/7033 and 2017/7037.

In the reply, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the relevant documents, on the basis of the exception protecting the public interest as regards defence and military matters, provided for in the second indent of Article 4(1)(a) of Regulation 1049/2001, as well as the exception protecting the decision-making process, laid down in Article 4(3) of the said Regulation.

In your confirmatory application, you request a review of this position. In particular, you argue that the reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, does not provide any proper statement of reason. You argue that, '[t]he reasons [the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs] have put forward to justify the application of the exceptions are strikingly vague and thus unsatisfactory'. Consequently, '[the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs] ha[s] not explained how disclosure can “specifically and actually” undermine the public interest [...] as regards defence and public security matters and why this is “reasonably foreseeable and not purely hypothetical”, as required by case law [...]’.

Additionally, you argue that there is an overriding public interest warranting, in your view, the public disclosure of the documents concerned.

This confirmatory decision concerns only the documents identified as falling under the scope of your application Gestdem 2017/7037. You will receive the reply to your application Gestdem 2017/7033 in the due course.

As regards application Gestdem 2017/7037, the European Commission has identified the following documents as falling under the scope of your application:

- Note dated 4 March 2015, concerning the contribution of the European Commission to the Defence Foreign Affairs Council meeting, reference: Ares(2015)1052704 (hereafter: ‘document 1’). The document includes an annex containing the outline of the contribution (hereafter: ‘document 1a’);

- Briefing dated 22 January 2015, reference: Ares(2015)242301 (hereafter: 'document 2'), with four annexes entitled 'European Council on Defence – Inputs and Expected Outcomes (hereafter 'document 2a'), 'Form and scope of the Commission's Contribution to the EC in June 2015' (hereafter 'document 2b'), 'Group on Personalities – State of Play' (hereafter 'document 2c'), 'Calendar of Events' (hereafter 'document 2d').

The entire content of documents 1, 2b and 2d is unrelated to the defence area and therefore falls outside the scope of your initial and confirmatory applications.

Consequently, only documents 1a, 2, 2a and 2c fall under the scope of your application, as they contain information related to its subject matter.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

As a preliminary comment, I would like to refer to public background information provided on the establishment of the Group of Personalities.

In 2015, the European Commission invited key personalities from European industry, governments, the European Parliament and academia to advise it on establishing a Preparatory Group on Common Security and Defence Policy-related research. The primary mission of this Group of Personalities was to help establish recommendations for a long-term vision for EU-funded Common Security and Defence Policy-related research that can boost European defence cooperation. These recommendations address the overall scope and governance of future EU-funded Common Security and Defence Policy research and highlight possible collaboration and coordination mechanisms. The overarching goal of the preparatory action and Common Security and Defence Policy-related research is to create a framework that would facilitate a collaborative approach to defence among the Member States.

Nonetheless, as explained above, the documents identified as falling under the scope of your application contain the contribution of the European Commission to the Defence Foreign Affairs Council meeting. The input encompasses the contribution on a broad range of topics. Consequently, the greater part of the content of documents 1a, 2, and 2a is unrelated to the Group of Personalities on Defence Research. Indeed, these documents contain only very short remarks relating to that group, such as information that the European Commission is looking for endorsement (from the Council) of the launch of the group (document 1a), and the possible timing of the meeting where the state of play of the group was addressed (document 2 and 2a). The state of play of the group is provided in document 2c.

After careful review of the initial decision, I conclude that wide partial access is granted to document 2c mentioned above, with personal data redacted, based on the exception protecting the privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001. The disclosure of the other documents identified, with the redactions of the parts falling outside the scope of your request, would not give you any additional meaningful information.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 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'.

The undisclosed parts of document 2c contain the names, surnames, nationalities and affiliations of third parties (persons to whom participation in the groups in question was proposed and who were not included in the list of members that was made publicly available), or references to such persons.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines data as 'any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity'.

It follows that the public disclosure of all the above-mentioned personal information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling³, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁴.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests

³ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.*, (ECLI:EU:C:2010:378), paragraph 63.

⁴ *Ibid.*, paragraphs 77-78.

of the data subject⁵. The above-mentioned position was confirmed in the *ClientEarth* case⁶. I also refer to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data⁷.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in document 2c.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(b) of Regulation 1049/2001 are absolute exceptions, i.e. their applicability does not need to be balanced against overriding public interest in disclosure.

4. PARTIAL ACCESS

Wide partial access is hereby granted to document 2c.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaint to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: 1

⁵ Ibid.

⁶ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

⁷ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.