



EUROPEAN COMMISSION

Brussels, 30.1.2018
C(2018) 632 final

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 2017/0904**

Dear Mr Vranken,

I refer to your email of 12 May 2017, registered on the same date, 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').

I sincerely apologise for the delay in responding to your confirmatory application.

1. SCOPE OF YOUR REQUEST

In your initial application of 7 February 2017, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), you requested access to the following documents:

1. *a list of meetings of DG Growth (former DG Enterprise and Industry) officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies, including lobby consultancies and law firms, and/or industry associations, in which the upcoming Preparatory Action (PA) on Defence Research and the European Defence Research Programme (EDRP) were dealt with (since 2012);*

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

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

2. *minutes and other reports of these meetings;[and]*
3. *all correspondence (including emails) between DG Growth officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies (including lobby consultancies and law firms) and/or industry associations, in which the PA on Defence Research and the EDRP were dealt with (between January 2012 and today).*

Your request was considered to cover documents held up to the date of your initial application, *i.e.* 7 February 2017.

In its initial reply of 2 May 2017, DG GROW:

- stated that no documents were identified as regards the first part of your request;
- provided partial access to a list of 37 meetings in which the Preparatory Action on Defence Research was addressed, by redacting those parts falling under the exceptions laid down in Article 4, paragraph 1, a), second indent (protection of defence and military matters), Article 4, paragraph 1, b) (protection of privacy and the integrity of the individual) and Article 4, paragraph 3 (protection of the decision-making process) of Regulation 1049/2001;
- specified, regarding the second and third parts of your request, that no relevant documents were identified concerning the European Defence Research Programme;
- identified 45 documents reflecting correspondence relating to the Preparatory Action on Defence Research. DG GROW:
 - fully released three documents, namely Documents 27, 44 and 45, as well as to 21 annexes;
 - granted partial access to 16 documents, including to several of their annexes, amounting to a total of 64 files, on the basis of the above-mentioned exceptions laid down in Article 4, paragraph 1, a), second indent, Article 4, paragraph 1, b) and Article 4, paragraph 3 of Regulation 1049/2001;
 - refused access to the remaining 26 documents (namely Documents 1 to 4, 6, 9 to 26, 29, 33 and 39) and their attachments on the basis of the exceptions set forth in the above-mentioned Article 4, paragraph 1, a), second indent, Article 4, paragraph 3, first subparagraph, and Article 4, paragraph 2, first indent (protection of commercial interests) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. You support your request with detailed arguments, which I will address in the corresponding sections below.

Moreover, you contest that all documents falling within the scope of your request have been identified by DG GROW.

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.

After careful review of the initial decision, I conclude that the names of the undertakings and their CEOs who met with members of the senior management of the Commission, which were previously withheld in the list of meetings provided to you, must be released, (Please see amended list in Annex).

After a thorough reassessment of the 45 documents which were identified by DG GROW as relevant within the framework of your application, I consider that some of these documents, notwithstanding the fact they are linked to the subject matter of the Preparatory Action in Defence Research, fall in fact outside the express scope of your request as explained below.

As far as your reference to four specific meetings, for which no documents have been listed in the Register of Commission Documents or in the initial reply of DG GROW (namely those of 11 December 2015; 23 February 2016; 23 February 2016; and 31 March 2016), it should be clarified in respect of two of the meetings of 23 February 2016, that they relate to the same event, as both Mr Comptour and Commissioner Bieńkowska attended the meeting on 23 February 2016.

Pursuant to Article 2, paragraph 3, of Regulation 1049/2001, the right of access as defined in that Regulation applies only to existing documents in the possession of the institution.

Against this background, the Commission has conducted a renewed search in order to assess whether there were any remaining unidentified documents falling within the scope of your request. Following that search, I confirm that the Commission does not hold any documents other than the ones which were already identified at the initial stage, as falling under the scope of your request.

Consequently, the Commission is unable to handle this part of your confirmatory application.

As regards the 45 documents identified by DG GROW as falling under the part of your request concerning the correspondence relating to the Preparatory Action on Defence Research, I regret to inform you that I have come to the conclusion that 32 of them were erroneously identified as relevant within the framework of your application, as they fall outside the scope of your request, for the reasons explained below.

Amongst the 45 documents in question which were identified by DG GROW as reflecting correspondence with the industry concerning the Preparatory Action on Defence Research, 29 of them consist of briefings. Notwithstanding the fact that those briefings are linked to the subject of the Preparatory Action on Defence Research, they are by their nature preparatory purely internal documents which do not qualify as *correspondence with the industry*. Consequently, they fall outside of the scope of your request.

As regards the 16 remaining other documents, they consist of one speech, 12 invitations, one Agenda and two Minutes. In light of the fact that you were already granted full access to the two minutes and to the invitation listed respectively as documents 27, 44 and 45, I have therefore assessed the remaining 13 documents. They consist of the following:

- 11 invitations (Documents 28, 32, 34, 35, 36, 37, 38, 40, 41, 42) amongst which, 10 invitations were released subject to the sole redaction of personal data, in accordance with Article 4(1)(b) of Regulation 1049/2001. One invitation, namely Document 29 was refused on the basis of articles 4(1)(a), second indent, 4(1)(b) et 4(3), first subparagraph of Regulation 1049/2001;
- 1 Agenda (namely, Document 43) which was partially disclosed on the basis of the exceptions provided under articles 4(1)(a), 4(1)(a), second indent, 4(1)(b) et 4(3), first subparagraph of Regulation 1049/2001; and
- 1 Draft internal Speech (namely Document 6) which was refused on the basis of the exceptions provided under articles 4(1)(a) second indent and 4(3), first subparagraph of Regulation 1049/2001.

It results from the *in concreto* analysis of Documents 6, 29 and 43 that these documents do not fall under the scope of your request which concerns expressly *minutes or other reports* of meetings with the industry or *correspondence with the industry*:

- Document 6 is indeed an internal draft speech;
- Document 29 consists of an invitation which was extended to Member States Representatives only; and
- Document 43 consists of an email which has for recipients only Member State representatives.

As regards, the remaining 10 already-partially-disclosed invitations, I confirm that they can only be released subject to the redaction of personal data, in accordance with the exception for the protection of privacy and the integrity of the individual which is provided under Article 4(1)b of Regulation 1049/2001, for the reasons set out below.

Article 4, paragraph 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.

In this instance, the requested invitations and list of meetings in which the topics of the upcoming preparatory Action on Defense Research and the European Defense Research Programme were discussed, contain information related to identifiable individuals, in particular the names and contact details of individuals who do not form part of the senior management of the Commission, or of external organisations/undertakings.

These data constitute personal data within the meaning of Article 2(a) of Regulation 45/2001³, which defines personal 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.*

According to the Court of Justice, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life.”*⁴

In consequence, the public disclosure of these data included in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁵, 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 cumulative.⁶ Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

⁴ Judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁵ Judgment 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378.

⁶ *Ibid.*, paragraphs 77 and 78.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that *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 of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access.*⁷ I refer also 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 data⁸.

In the light of the above-mentioned case-law, the Commission's policy is to protect personal data of members of its Staff not forming part of senior management. The fact that the latter *act in a professional way*, or as part of their professional functions, does not indeed invalidate the rules of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data. Similarly, and on the same ground, the Commission does not, in principle, disclose the names of individuals other than the main representatives of external entities.

In your confirmatory application, you argue that you *ask this information as part of research on the extent to which the defense industry has influence on EU policy making*. You add that *[t]his research will result in a public report and further communication to the public in an effort to create an informed public debate on EU policy making. As such this effort serves the public interest, similar to how [the] press serves the interest of public and informed debate, [...]*. According to you, *this information can therefore be released based on Article 8(a) of Regulation 45/2001*.

Pursuant to the above-mentioned case-law of the Court of Justice, in order to receive such personal data, the recipient must establish the necessity of having the data transferred and there must be no reason to assume that the data subject's legitimate interests might be prejudiced.

I consider that your arguments in favour of disclosing all names of civil servants and individuals of external entities are of a general nature, and that, in this case, the necessity of the data transfer has not been established by the required *express and legitimate justifications or convincing arguments*⁹.

⁷ Judgment of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, C-615/13 P, EU:C:2015:489, paragraph 47.

⁸ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

⁹ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, , EU:C:2010:378, paragraph 78.

Pursuant to the Commission's practice, access is in principle granted to the names and functions of Commissioners and their Members of Cabinet as well as of Commission staff in senior management positions with a rank equal or higher than that of Director. Similarly, the names of the main representatives of external entities are in principle disclosed¹⁰. This specific access is the most proportionate and appropriate way to balance citizens' interest in being informed about whom participates in the decision-making process leading to the adoption of a specific policy, with the need to respect the applicable data protection rules.

In this instance, this position strikes the right balance between the necessity to obtain a clear record of stakeholders the Commission consulted in the framework of the discussions pertaining to the PADR, and the required protection of the privacy of individuals involved in the administrative processing of the documents in question, in accordance with Article 4, paragraph 1, b) of Regulation 1049/2001, as construed by the above-mentioned settled case-law.

Please note that, even if the necessity for the transfer of all personal data included in the requested documents would have been sufficiently established (*quod non*), it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by the disclosure of their names.

The topic of the documents concerned by your request is quite sensitive by nature, as it relates to defence, military and strategic matters. Against this specific background, disclosure of the protected identities would entail a real and non-hypothetical risk, for the Commission staff concerned, of becoming the subject of unsolicited external contacts.

Therefore, I conclude that the transfer of personal data through the (full) disclosure of the requested documents cannot be considered as fulfilling the requirements of Regulation 45/2001. Consequently, the use of the exception under Article 4, paragraph 1, b) of Regulation 1049/2001 is justified, as, based on the information at my disposal, there is no need to publicly disclose 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.

Please note also that Article 4, paragraph 1, b) of Regulation 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

In the light of the above, I confirm the initial decision of DG GROW to refuse access to the personal data of individuals not forming part of the senior management of the Commission Staff or of other external organisations/undertakings, which is in accordance with the Commission's policy on the protection of personal data pursuant to the above mentioned case-law of the Court of Justice.

¹⁰ Unless the person explicitly objects to such disclosure and/or there are other reasons to think that their legitimate interests might be undermined.

3. PARTIAL ACCESS

In accordance with Article 4, paragraph 6 of Regulation 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested. However, for the reasons explained above, no meaningful (further) partial access is possible as regards the requested documents without undermining the interest described above.

4. 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.

5. PARTS OF YOUR APPLICATION FALLING OUTSIDE THE SCOPE OF THIS DECISION

In your email of 12 May 2017, you also request, *if possible*, [...] *to extend the scope of [your] confirmatory application to meetings and documents held up to the date of the reply of DG GROW (02/05/2017)*.

Pursuant to Article 8, paragraph 1 of Regulation 1049/2001, the purpose of lodging a confirmatory application is to request the institution to review the position taken at the initial level concerning those documents which were requested in the framework of the initial application.

As the confirmatory procedure consists of a *review* of the initial reply, neither the temporal nor the material scope of your initial request can be modified at this stage. The respect of each step of this two-stage procedure ensures the applicant's right of a full review of his/her request in accordance with Regulation 1049/2001.

Therefore, I regret to inform you that I am not in a position to extend the scope of your application, at confirmatory stage, to documents which were not covered by your initial application. I am therefore not in a position to look into your further request, before DG GROW has had an opportunity to address it.

Consequently, this confirmatory decision covers only the documents which you had requested at the initial level up to the date of your initial application, *i.e.* 7 February 2017. However, I trust that the information already disclosed in the framework of the initial reply of DG GROW should be sufficient to meet your purpose of establishing a comprehensive picture of the interaction between the Commission and the defence industry on defence research.

Should you nevertheless wish to extend the temporal scope of your application, you remain entitled to submit a new (additional) initial request.

Yours sincerely,



For the Commission
Alexander ITALIANER
Secretary-General

Annex (1): List of meetings disclosing the names of undertakings met