



EUROPEAN COMMISSION

Brussels, 14.11.2018
C(2018) 7682 final

Mr Peter Teffer
EU Observer
Rue Montoyer 18B
1000 Brussels

DECISION OF THE EUROPEAN 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 2018/2193**

Dear Mr Teffer,

I am writing with reference to your email of 14 August 2018, registered on 17 August 2018, in which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR APPLICATION

In your initial application of 18 April 2018, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and registered under reference number GESTDEM 2018/2193, you requested access to ‘[a]ll documents – including but not limited to emails, presentations, agendas, and minutes of meetings – related to the Consultation Forum with industry set up in relation to the European Defence Fund’. You also stressed that

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

² Official Journal L 145, 31.05.2001, p. 43.

the ‘Consultation Forum was set up, according to the [C]ommission, “with the European defence industry to best align the supply and demand sides” ’.

In its initial reply dated 24 July 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs informed you that it had identified 13 documents as falling within the scope of your request. It granted wide partial access to one document, subject to the sole redaction of personal data pursuant to Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. Furthermore, it refused access to the remaining 12 documents on the basis of Article 4(3) (protection of the institution’s decision-making process) and Article 4(1)(a), second indent (protection of the public interest as regards defence and military matters) of Regulation 1049/2001.

In your confirmatory application, you request a review of this position.

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.

In this context, it has been found that the documents identified by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs do not relate to the Consultation Forum with the European defence industry, but rather to the Advisory Group for the Preparatory Action on Defence Research³. Therefore, these documents do not fall within the scope of your confirmatory application as described above and were thus erroneously identified as such at the initial phase.

For these reasons, the European Commission has carried out a new search for documents falling within the scope of your confirmatory application.

In the framework of this renewed search, the following seven documents relating to two meetings of the Consultation Forum with the European defence industry, and thus corresponding to the description given in your application, have been identified:

- invitation to the meeting of the Consultation Forum on 19 April 2017 dated 24 March 2017, Ares(2017)1589962 (hereafter ‘document 1’);
- agenda of the meeting of the Consultation Forum on 19 April 2017, Ares(2017)1589962 (hereafter ‘document 2’);

³ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3523>.

- letter of the Secretary-General of the Aero Space and Defence Industries Association of Europe to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs dated 24 March, Ares(2017)1687498 (hereafter ‘document 3’);
- invitation to the meeting of the Consultation Forum on 27 September 2017 dated 4 August 2017, Ares (2018)772824 (hereafter ‘document 4’);
- agenda of the meeting of the Consultation Forum on 27 September 2017. Ares(2018)772824 (hereafter ‘document 5’);
- letter of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs to the Secretary-General of the Aero Space and Defence Industries Association of Europe dated 7 September 2017, Ares(2017)4371775 (hereafter ‘document 6’);

and

- flash report of the meeting the Consultation Forum on 27 September 2017, Ares(2018)5248988 (hereafter ‘document 7’).

Please note that the Consultation Forum with the European defence industry, the establishment of which had indeed been announced in a press release of the European Commission relating to the European Defence Action Plan⁴, has not yet been set up as a permanent forum. Only two ad-hoc meetings took place in 2017, to which the seven documents listed above relate.

I would also like to point out that the European Commission is not obliged to draw up a summary record of every meeting with interest representatives. In accordance with the European Commission’s current administrative practice, a written record should only be ensured of those meetings that contain important information or may involve action by the European Commission.

Having examined your confirmatory application, I can inform you that:

- full access is granted to documents 1, 2, 5 and 7, as their content does not fall under any of the exceptions to the right of access provided for in Article 4 of Regulation 1049/2001;

and

- wide partial access is granted to documents 3, 4 and 6, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

The detailed reasons are set out below.

⁴ See point 15 of the fact sheet to be found under the following link: http://europa.eu/rapid/press-release_MEMO-16-4101_en.htm.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that the ‘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 its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001 (hereafter ‘Data Protection Regulation’) becomes fully applicable.⁵

Article 2(a) of the Data Protection Regulation⁶ provides that personal data ‘shall mean any information relating to an identified or identifiable 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.⁷

Documents 4 and 6 contain personal data such as the names, e-mail addresses and phone numbers of persons who do not form part of the senior management of the European Commission. Document 3 contains the name and function of an individual who is not the main representative of the Aero Space and Defence Industries Association of Europe. Moreover, these three documents contain handwritten signatures.

The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. 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.⁹ Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the transfer of personal data occur.

⁵ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

⁶ 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, Official Journal L 8 of 12 January 2001, page 1.

⁷ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁸ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

⁹ *Idem*, paragraphs 77-78.

In its judgment in the *ClientEarth* case, 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.’¹⁰

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 data.¹¹

In your confirmatory request you do not establish the necessity of having the data in question transferred to you.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by disclosure of the personal data reflected in the documents concerned, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signatures appearing in the documents, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data that have been redacted from the documents concerned, as the need to obtain access thereto has not been substantiated, and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. PARTIAL ACCESS

As indicated above, wide partial access is herewith granted to documents 3, 4 and 5, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance it against a possible public interest in disclosure.

¹⁰ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹¹ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

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 complaints 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 European Commission
Martin SELMAYR
Secretary-General

Enclosures (7)