

CHIEF EXECUTIVE

Mr Vranken
Vredesactie
Patriottenstraat 27
2600-Berchem
Belgium

EDA201906063/CSD/CR

17 June 2019

Subject: DECISION PURSUANT TO ARTICLE 8 OF REGULATION 1049/2001¹

Dear Mr Vranken,

I refer to your email of 22 May 2019 wherein 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 08 April 2019, you requested access to:

"documents which contain information with relation to the ethics, legal and societal aspects (ELSA) reviews for all the project proposals in relation to the Preparatory Action on Defence Research"

On 03 May 2019, the European Defence Agency (hereinafter "the Agency"), granted you partial access to 24 documents identified a falling under the scope of your request.

In its initial response, the Agency informed you that partial access was justified in order to protect the interests covered under Articles 4(1)(b) and 4(2) first indent of Regulation 1049/2001.

In particular, with regard to the personal data expunged from the disclosed documents, you were informed that pursuant to Article 9(1)(b) of Regulation 2018/1725, *"personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume*

¹ OJ L 145 31.5.2001, p. 43

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that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests".

In your initial request, you did not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the Agency did not have to examine whether there was a reason to assume that the data subjects' legitimate interests might be prejudiced as provided by Article 9(1)(b) of Regulation 2018/1725.

In your confirmatory application you argue that the Agency has not explained how disclosure can "specifically and actually" undermine the commercial interests of these entities and why this is "reasonably foreseeable and not purely hypothetical", as required by the established case law.

You further note that, according to you, the Agency has failed to take into account the public interest in disclosing these documents, indicating that are concerns about the ethical implications in relation to the European Defence Fund.

You lastly state that, in your view, the Agency has not considered giving partial access to the information requested in accordance with Article 4(6) of Regulation 1049/2001.

On the basis of the above, you request EDA to reconsider its position.

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.

2. ASSESSMENT AND CONCLUSION UNDER REGULATION 1049/2001

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.

I would first remind you that exceptions under Article 4(1) (b) are absolute in nature and not balanced by an overriding public interest in disclosure. The Agency's position as expressed in our initial response in that respect remains the same as regards the protection of personal data redacted from the documents provided.

Furthermore, and in accordance with Article 4(2) first indent of Regulation 1049/2001 access to documents is refused *"where disclosure would undermine the protection of (...) – commercial interests of a natural or legal person, including intellectual property rights"*.

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As indicated in the response to your initial application, the redacted parts of the documents provided contain sensitive commercial information the disclosure of which would undermine the commercial and business interests of the concerned legal entities and/or reveal know-how which could also have a negative impact on the legal entities ability to exercise their commercial and business activities.

In our review following your confirmatory application, we have again examined to which extent exceptions laid down in Articles 4(2) may be waived in case of an overriding public interest in disclosure. In that sense, we have taken into account the additional arguments you put forward as regards the public interest in disclosing the related data.

Based on this new analysis, we have not found that the elements put forward justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exceptions stipulated in Article 4(2).

Consequently, I conclude that, pursuant to Article 4(2) first indent of Regulation 1049/2001, access cannot be granted to the commercial data that have been redacted from the document(s) as the need to obtain access thereto has not been substantiated either in the initial request for access to documents, nor in the framework of the present confirmatory application and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the commercial data concerned.

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,



Jorge Domecq