




EUROPEAN COMMISSION

Brussels, 3.12.2018
C(2018) 8365 final


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**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 2018/2188**

Dear ,

I refer 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 17 April 2018, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and registered under reference number GESTDEM 2018/2188, you requested access to ‘[a]ll documents – including but not limited to emails, presentations, agendas, and minutes of meetings – related to the As-If Programme Committee for Defence Research (E03524)’.

In its initial reply dated 24 July 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs informed you that it had identified 42 documents as falling within the scope of your request. It granted wide partial access to 16 documents, 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.

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

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

Furthermore, it refused access to the remaining 26 documents on the basis of Article 4(3) (protection of the 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.

The European Commission has identified 29 documents as falling (partially) under the scope of your confirmatory application. Indeed, three further documents have been identified at confirmatory level. These documents are included as documents 27 – 29 in the list of documents that is enclosed as an annex to this decision. Please note that, for reasons of consistency, all the documents concerned have been given a new numbering at confirmatory level.

Having examined your confirmatory application, I would like to inform you that:

- full access is granted to documents 5, 6, 7, 10, 13, 14, 16, 22, 23, 27 and 28, as their content does not fall under any of the exceptions to the right of access provided in Article 4 of Regulation 1049/2001;
- wide partial access is granted to documents 1, 2, 3, 4, 8, 9, 11, 12, 15, 17, 18, 19, 20, 26 and 29, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;
- partial access is granted to document 21, pursuant to Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001;

and

- partial access is granted to document 25, pursuant to Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation 1049/2001.

Please find a copy of each of these documents enclosed to this decision.

Moreover, I have to confirm the initial decision of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs to refuse access to document 24 pursuant to Article 4(1)(a), second indent (protection of the public interest as regards defence and military matters) of Regulation 1049/2001.

Furthermore, I would like to inform you that document 26 has been identified as partially falling within the scope of your request by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

This document contains two very different elements.

First, document 26 contains an e-mail from a European Commission staff member to Member States' representatives concerning the meetings of the working group 'System-on-a-Chip' under the As-If Programme Committee for Defence Research on 20 September 2017 and 2 October 2017. Wide partial access to the invitations to these meetings was granted at initial level (documents 20 and 41³) and full access is being granted through this confirmatory decision to the draft agendas that were attached to these invitations (documents 14 and 27⁴). Moreover, document 26 contains the reply of a representative of the United Kingdom, who is a member of the As-If Programme Committee for Defence Research.

Second, document 26 contains a further email exchange between the European Commission staff member and the representative of the United Kingdom. However, this email exchange refers to matters that have no relation with the As-If Programme Committee for Defence Research and thus the scope of your request⁵.

For these reasons, the parts not falling within the scope of your request have been redacted in document 26.

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 applicable⁶

Article 2(a) of the Data Protection Regulation⁷ 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

³ Numbering at initial level.

⁴ Numbering at confirmatory level, as indicated in the attached list of documents.

⁵ This email exchange concerns indeed the appointment of evaluators for the evaluation of proposals following the call for proposals 'PADR-EDT-02-2018: European high-performance, trustable (re)configurable system-on-a-chip or system-in-package for defence applications', that does not fall within the remit of the As-If Programme Committee for Defence Research.

⁶ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

⁷ 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.

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.⁸

Documents 1, 2, 3, 4, 8, 9, 11, 12, 15, 17, 18, 19, 20, 26 and 29 contain personal data such as the names and functions of persons who do not form part of the senior management of the European Commission and national institutions as well as e-mail addresses, office addresses and phone numbers. In addition, documents 3, 9 and 29 contain handwritten signatures.

The names⁹ 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.¹⁰ 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.

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.¹¹

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 data.¹²

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.

⁸ 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.

⁹ Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

¹⁰ *Idem*, paragraphs 77-78.

¹¹ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹² Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

As to the handwritten signatures appearing in documents 3, 9 and 29, 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.

2.2. Protection of the public interest as regards defence and military matters

Article 4(1)(a), second indent of Regulation 1049/2001 provides that [t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] defence and military matters [...].

Document 24 concerning critical defence technologies originates from the European Defence Agency and has been provided to the European Commission as input for discussions in the framework of the As-If-Committee for Defence Research.

I would like to stress that a part of this document does not fall within the scope of your confirmatory application, as it refers to topics that had not been subject to the discussions in the As-If Programme Committee for Defence Research or in one of its subgroups. Indeed, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs has received this document from the European Defence Agency in a version where the part concerned is redacted.

The part falling within the scope of your request contains background information on specific defence technologies, their state of the art, current capabilities and challenges and future needs.

The public disclosure of this part of document 24 would reveal sensitive information forming part of the defence policy of the EU and its Member States and their possible actions in this field. This, in turn, would undermine the protection of the public interest as regards defence and military matters, as provided for in the second indent of Article 4(1)(a) of Regulation 1049/2001.

Indeed, the defence domain is particularly sensitive due to its very nature and its intrinsic link with the security of EU Member States and the EU as a whole. This is particularly true given the unstable international context and the fact that the EU faces a complex and challenging environment in which new threats, such as hybrid and cyber-attacks, are emerging, and more conventional challenges are returning.

Moreover, the defence domain is relatively recent in the EU context and requires the exchange of sensitive information with Member States, which enables the European Commission to prepare properly work on EU defence policy (translated, among other things, into the work programme concerning the preparatory action on defence research).

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), second indent (protection of the public interest as regards defence and military matters) of Regulation 1049/2001 is justified concerning document 24 and that access thereto must be refused on that basis.

2.3. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

The redacted parts of document 21 contain information on the content of the discussions on the first draft of the work programme 2019 concerning the preparatory action on defence research, in particular on the content of future calls for proposals (point 3.3 of the document concerned). This work programme has not been adopted, and the information concerned relates to issues where no final decision has yet been taken. Its public disclosure would provide insight into the ongoing discussions between the European Commission and the Member States on the content and procedures linked to the future calls for proposal to be included in this work programme. The public disclosure of the parts concerned would seriously undermine the margin for manoeuvre of the European Commission in exploring, in the framework of the ongoing discussions with the Member States on the work programme, all possible options free from external pressure. However, it is essential to prevent any external interference and pressure, as such interference would jeopardise the efficiency and integrity of the decision-making process with regard to future calls for proposals and could also have impacts on the implementation of these calls at a later stage. In this instance, the European Commission has to preserve a certain room for manoeuvre and ‘space to think’ in the framework of its corresponding decision-making processes.

Against this background, I consider that the undisclosed parts of documents 21 need to be protected against the risks associated with public disclosure under the exception provided for under Article 4(3), first subparagraph of Regulation 1049/2001¹³.

2.4. Protection of commercial interests, including intellectual property

Article 4(2), first indent of Regulation 1049/2001 provides that ‘[t]he institutions 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’.

Document 25 contains the names of the consortia that have submitted their proposals in response to the call for proposals entitled ‘Force protection and advanced soldier systems

¹³ Please note that the meeting in April 2018 as announced in document 21 did however not take place.

beyond current programmes'¹⁴, launched by the European Defence Agency in implementation of the work programme concerning the preparatory action on defence research for the year 2017. Those proposals had to undergo a security scrutiny carried out by the subgroup 'Security Scrutiny' under the As-If Programme Committee for Defence Research.

The names of the three consortia the proposals of which were finally not selected for funding have to be withheld on the basis of Article 4(2), first indent of Regulation 1049/2001, as their public disclosure could cause reputational damage to both the organisations concerned and the individuals linked with them.

Indeed, public disclosure would adversely affect the competitive position of these organisations on the market and, in turn, seriously undermine their commercial interests.

Therefore, I conclude that access to the relevant parts in document 25 has to be refused on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

3. PARTIAL ACCESS

As indicated above, partial access is granted to documents 1, 2, 3, 4, 8, 9, 11, 12, 15, 17, 18, 19, 20, 26 and 29, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) and to document 21 pursuant to Article 4(3), first subparagraph (protection of the decision-making process) as well as to document 25 pursuant to Article 4(2), first indent (protection of the commercial interests of a natural or legal person) of Regulation 1049/2001.

No meaningful partial access can be granted to document 24 without undermining the interest protected as described in point 2.2.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(a), second indent and 4(1)(b) of Regulation 1049/2001 are absolute exceptions which do not require the institution to balance them against a possible public interest in disclosure.

The exceptions laid down in Article 4(2), first indent and Article 4(3), first subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

¹⁴ <https://ec.europa.eu/research/participants/portal/desktop/en/opportunities/pppa/calls/padr-fpss-2017.html#c.topics=callIdentifier/t/PADR-FPSS-2017/1/1/1/default-group&callStatus/t/Forthcoming/1/1/0/default-group&callStatus/t/Open/1/1/0/default-group&callStatus/t/Closed/1/1/0/default-group&+identifier/desc:>

In your confirmatory request, you do not put forward any arguments that would point to an overriding public interest. Based on the elements at my disposal, I have not been able to establish the existence of such an overriding public interest either.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the interests protected by Article 4(2), first indent and Article 4(3), first subparagraph of Regulation 1049/2001.

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: (29 – list of documents and 28 documents)