



EUROPEAN COMMISSION  
RESEARCH EXECUTIVE AGENCY

Legal Affairs, Internal Control and Reporting  
Head of Sector

Brussels,  
REA C0.1

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**Subject: Your confirmatory application pursuant to Article 7(2) of Regulation (EC) No 1049/2001 – application for access to documents (ref. Ares(2020)6036108)**

Dear Ms Rullmann,

I refer to your email of 27 October 2020 registered by the Research Executive Agency (REA) on 28 October 2020 under reference number Ares (2020)6036108. You request a review of the position taken by REA with regard to the initial request for access to documents, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ('Regulation 1049/2001')<sup>1</sup>.

## 1. SCOPE OF YOUR REQUEST

On 28 August 2020, you submitted your initial application for access to documents concerning the FOLDOUT project, which was registered by REA on 31 August 2020 under reference number Ares(2020)4505232.

In your application regarding the FOLDOUT project ("*Through-foliage detection, including in the outermost regions of the EU*", grant agreement no. 787021) you requested:

*"1. All deliverable documents so far produced in regards to the FOLDOUT project, and a list of all document titles and reference numbers of these deliverables.*

*2. In particular the FOLDOUT Early Demonstrator Evaluation (mentioned here: <https://cordis.europa.eu/project/id/787021/reporting>).*

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<sup>1</sup> OJ L 145, 31.5.2001, p.43.

3. *Minutes of all meetings concerning FOLDOUT. In particular the meeting that took place in Brussels on January 28th, 2020 (mentioned here: [https://urldefense.com/v3/https://di.mod.bg/en/news/bulgarian-defence-institute-participant-foldout-european-project\\_!!DOxrgLBm!RBkhyNCYX13E3j1NToVziAlrVSfiA5\\_sY\\_4vKpHHovRbVSOP5ilJvMGfnD34jyJhC7d74FE0SFrH\\$](https://urldefense.com/v3/https://di.mod.bg/en/news/bulgarian-defence-institute-participant-foldout-european-project_!!DOxrgLBm!RBkhyNCYX13E3j1NToVziAlrVSfiA5_sY_4vKpHHovRbVSOP5ilJvMGfnD34jyJhC7d74FE0SFrH$)).*

4. *Any presentation slides produced by FOLDOUT project partners for use at meetings.*

5. *Any ethical assessments of the FOLDOUT proposal held by REA.*”

On 11 September 2020, after examination of the scope of your request, we have informed you that your application concerned a very large number of documents, which needed to be individually assessed, and the majority of which originates from third parties, which needed to be consulted. In light of the above, we have informed you that we would not be in the position to handle your request within the time limits set out in Article 7 of the Regulation (EC) No 1049/2001 and therefore, in accordance with Article 6(3) of the Regulation, we have conferred with you to find a fair solution.

On 16 September 2020, following the list of, documents provided by REA to you, you replied having made a selection of documents and asked for the following documents:

- *“D3.1 Legal and ethical state of the art*
- *D4.1 Report on user requirements and operational aspects*
- *D4.2 Use cases and scenarios*
- *D5.4 FOLDOUT System Architecture Design Report*
- *D6.3 Physical communication network hardware/software with documentation for ground-based solutions*
- *D10.1 Integration Plan and Test Descriptions*
- *D11.4 Exploitation Plan*
- *Minutes Kick Off Meeting 03.09.2018*
- *Minutes Kick Off Meeting 05.09.2018*
- *FOLDOUT OBJ1 status and plan*
- *FOLDOUT OBJ2 status and plan*
- *FOLDOUT OBJ6 Improve situational awareness through fusion Status and plans*
- *FOLDOUT OBJ7 status and plan*
- *FOLDOUT OB8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios*
- *FOLDOUT OB9 status and plan*
- *FOLDOUT OB11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules*
- *FOLDOUT\_Partner Presentation\_Practicioners\_KEMEA.*”

We have replied on the same day by accepting your selection of 17 documents; therefore, we considered that the fair solution had been reached.

On 12 October 2020, REA replied to your initial request (reference Ares(2020)5414834).

In its letter, REA provided an inventory of the documents related to the request (Annex 1 of the reply), specifying for each document non-disclosed or partially disclosed the legal grounds on which REA based its decision. In particular:

- REA has partially disclosed the following documents, based on the exceptions relating to the protection of the privacy and the integrity of the individual and commercial interests of a natural or legal person, including intellectual property, laid down respectively in Articles 4(1)(b) and 4(2), first indent, of Regulation 1049/2001:
  - D3.1 Legal and ethical state of the art;
  - D5.4 System Architecture Design Report;
  - D6.3 Physical communication network hardware/software with documentation for ground-based solutions;
  - Minutes Kick Off Meeting 03.09.2018;
  - Minutes Kick Off Meeting 05.09.2018;
  - FOLDOUT OBJ1 status and plan;
  - FOLDOUT OBJ2 status and plan;
  - FOLDOUT OBJ6 Improve situational awareness through fusion Status and plans;
  - FOLDOUT OBJ7 status and plan;
  - FOLDOUT OBJ8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios;
  - FOLDOUT OBJ9 status and plan;
  - FOLDOUT OBJ11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules;
  - FOLDOUT\_PartnerPresentation\_Practicioners\_KEMEA.
- Deliverable D4.2, Use cases and scenarios, was also partially disclosed based on the exceptions relating to the protection of public security, the protection of the privacy and the integrity of the individual and commercial interests of a natural or legal person, including intellectual property, laid down respectively in Articles 4(1)(a), first indent, 4(1)(b) and 4(2), first indent, of Regulation 1049/2001;
- The access to the other requested documents of the FOLDOUT project (i.e. D4.1, D10.1, and D11.4), was refused based on the exceptions relating to the protection of public interest of public security and/or the protection of the privacy and the integrity of the individual and commercial interests of a natural or legal person, including intellectual property, laid down respectively in Articles 4(1)a, first indent, 4(1)(b) and 4(2), first indent, of Regulation 1049/2001;

On 28 October 2020, REA registered your confirmatory application, pursuant to Article 7(2) of Regulation 1049/2001.

Through your confirmatory application, while you consider acceptable the redaction of personal data, you challenge the non-disclosure of documents to protect the commercial interests of a natural or legal person under Article 4(2), first indent, and the public security under Article 4.1 (a), first indent, of Regulation 1049/2001.

You invoke arguments concerning transparency in public funding, privacy and data protection to justify the existence of an overriding public interest in disclosure. You also challenge the use of the exception of public security because in your views “...as the project *FOLDOUT* itself does not define how its technologies might be implemented in actual border security scenarios, and might end up not being implemented at all, I would argue that disclosure of *FOLDOUT* documents does not constitute a direct threat to public security...”.

Finally, you request us to reconsider the initial decision taken by REA and to grant the widest possible access to all the documents reviewed in the initial response.

## **1. ASSESSMENT OF YOUR CONFIRMATORY APPLICATION**

When assessing a confirmatory application for access to documents, REA conducts a fresh review of the reply given at the initial stage in the light of the provisions of Regulation 1049/2001.

Following this review, I am pleased to inform you that an extended partial access can be granted to the following documents:

- D.3.1 Legal and ethical state of the art;
- D.5.4 FOLDOUT System Architecture Design Report;
- D.6.3 Physical communication network hardware/software with documentation for ground-based solutions;
- FOLDOUT OBJ1 status and plan;
- FOLDOUT OBJ2 status and plan;
- FOLDOUT OBJ6 Improve situational awareness through fusion Status and plans ,
- FOLDOUT OBJ7 status and plan;
- FOLDOUT OB8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios;
- FOLDOUT OB9 status and plan;
- FOLDOUT OB11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules;
- FOLDOUT\_PartnerPresentation\_Practitioners\_KEMEA.

In addition, the document D11.4 Exploitation Plan can be also partially disclosed.

For the remaining documents (i.e. deliverables D4.1, D4.2, D10.1 and the two minutes of the kick-off meetings held on 3 and 5 September 2018), I confirm the position already taken at the initial stage by REA.

In the light of the above, please find enclosed an expunged version of the deliverables partially disclosed. As regards the expunged parts of the documents and the documents to which access is refused, I set out below the reasons for the application of the invoked exceptions.

Please note that the disclosed documents were received by REA from the coordinator of the project. They are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released document/documents without the agreement of the originator, who may hold an intellectual property right on it/them. The REA does not assume any responsibility from their reuse.

### **1.1. Protection of the public interest as regards public security**

Article 4(1)(a), first 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 public security'.

The non-disclosed deliverable D4.1 of the project FOLDOUT includes the report on user requirements and operational aspects and as such contain specific information and explanations about borders and geographical characteristics of certain countries, which are critical for protecting the public security at borders.

Moreover, deliverables D4.1 and D4.2 of the project FOLDOUT describe use case scenarios, namely the potential threats to the border safety and security, as identified by the competent Law Enforcement Agencies (LEAs) of Bulgaria, Greece, Finland, Lithuania and French Guiana, the objectives of such scenarios, the potential actions, actors and the equipment to respond to such threats, as well as the relevant geographical areas / pilot test areas.

Disclosure of such information could provide intelligence and insights into the strategy of the authorities, to those persons, groups or entities that could impede the authorities' efforts to counter illegal activities at the border, seriously undermining the public interest as regards public security, especially about combatting human trafficking and illegal transport and entry of goods and services.

More in particular, there is serious public interest in keeping confidential all the non-disclosed information contained in the above documents with a view to protecting public security. The misuse of such information for different purposes than initially generated could severely hamper and potentially jeopardise the authorities' efforts to successfully detect irregular and illegal activities at the border. A possible access to the above information would reveal among others the sources of information, the level of surveillance, the weaknesses, the infrastructure, the future strategies and tools of the authorities to counter the existing and upcoming threats to border security and safety and to the integrity of the individuals at the border. Consequently, it would render the consortium's, including the LEAs', efforts to handle cross-border activities null and ineffective, which would seriously undermine public interest.

The General Court has confirmed that 'the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.<sup>2</sup>

In my view, disclosure of the withheld information could lead to misuse of the data and undermine the detection of illegal border activities.

I therefore conclude that the refusal of access to the withheld documents, or parts of them, is justified on the basis of Article 4(1)(a), first indent, of Regulation 1049/2001.

I would also like to point out that Article 4(1)(a) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

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<sup>2</sup> Judgement of the General Court, at the time Court of First Instance, of 25 April 2007 in case T-264/04, WWF European Policy Programme v Council, EU:T:2007:114, paragraph 40.

## **1.2. 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 applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (‘Regulation 2018/1725’).

All documents to which you requested access contain personal data of individuals such as the name, surname, email, address, telephone number, fax number, signature or other personal data of staff of the consortium or of REA that are not in the public domain. Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data<sup>3</sup>

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.

In its judgment in Case C-28/08 P (Bavarian Lager)<sup>4</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.

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 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”.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, the transmission of personal data can occur.

According to Article 9(1)(b) of Regulation 2018/1725, REA has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that REA has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

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<sup>3</sup> Judgment of the Court of Justice of the European Union of 20 December 2017 in case C-434/16.

<sup>4</sup> Judgment of 29 June 2010 in case C-28/08/P, European Commission v The Bavaria Lager Co. Ltd, EU:C2010:378, paragraph 63.

In your confirmatory application, you stated not to contest the application of this exception. Additionally, in this review I could not find any arguments relating to an overriding public interest establishing the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, REA does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

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

Having taken the above into consideration, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest 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.

### **1.3. Protection of commercial interests, including intellectual property**

In accordance with Article 4(2), first indent, of Regulation 1049/2001, an institution 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.

The documents, to which you request access, contain consortium confidential information about the methodology, technologies, business and trade secrets, research approach and strategy as to how the FOLDOUT consortium proposes to achieve the project results. This cannot be disclosed.

More precisely, deliverables D4.1 and D4.2 include analyses, assessments and reports of field tests, user requirements and data as well as use case scenarios about potential threats to the border safety and security for developing, testing and evaluating the FOLDOUT platform. They also include critical information about operational aspects and as such contain specific information and explanations about borders and geographical characteristics of certain countries, which are critical for protecting public security at borders.

Deliverable D3.1 includes the assessments on legal and ethical state of the art, presenting the ethical and legal requirements both for the developed system and for the ongoing compliance of the FOLDOUT project.

Deliverable D5.4 defines the overall FOLDOUT system architecture and specifies the system components with an assessment of tools, systems, technical components and methodologies developed within the project.

Deliverable D6.3 aims to describe the physical communication network between ground components in the FOLDOUT project. It includes the reports on architecture design and on the physical communication network development with documentation for ground-based hardware/software solutions.

Deliverable D10.1 contains the integration plan and the test descriptions to outline a roadmap for integration of various components describing the integration process and responsibilities of the partners and setting the objectives of each integrated prototype.

Deliverable D11.4 includes an exploitation plan. It gives an overview of the main results of the FOLDOUT project and a preliminary idea on how the consortium partners intend to use their results in ongoing and future activities in research and regarding product-marketing strategies. Possible commercial partnerships and future business opportunities are also evaluated.

As regards the minutes of the kick-off meetings held on 3 and 5 September 2018, they include information about discussions and decisions related to internal strategies, business procedures and managerial issues of the Consortium.

Regarding documents (OBJs – objectives) OBJ1 status and plan, OBJ2 status and plan, OBJ6 Improve situational awareness through fusion Status and plans, OBJ7 status and plan, OBJ8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios, OBJ9 status and plan, OBJ11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules, they consist of power point presentations including information for the review experts of the funding authority to analyse the status of the Project and its compliance with the Grant Agreement. They include information about the different objectives, their status, time-line, main findings and the plans for the next periods presented during the first project review meeting on 28 January 2020 in Brussels. These are documents serving administrative and management purposes of the Consortium. Among others, these documents include information to demonstrate the effectiveness of the FOLDOUT concept in realistic operational scenarios, the status and future plans to improve situational awareness through fusion and measures to ensure that the developments are in line with Legal-Ethical Privacy rules of the EU.

The document called “FOLDOUT Partner Presentation Practitioners KEMEA” from the kick-off meeting on 3 September 2018 includes a presentation about the partner, Centre for Security Studies (KEMEA) and in particular about the infrastructure.

As stated in the reply to the initial application, the public disclosure of such information would undermine the commercial interests of the FOLDOUT consortium, within the meaning of Article 4(2), first indent, of Regulation 1049/2001, as it would give an unfair advantage to the (potential) competitors. By having access to commercially sensitive information in the documents requested, the competitors would be able to profit from it, as follows.

First, the public disclosure would give the competitors the opportunity to anticipate the strategies and weaknesses of the partners of the consortia, including when competing in calls for tenders and proposals.

Secondly, the public disclosure would give their competitors the opportunity to copy or use the intellectual property, *know-how*, methodologies, techniques and strategies of the FOLDOUT consortium. The competitors would be able to employ this information in order to improve the production of their own competing products or provision of their own competing services. Furthermore, this would also result in the competitors having an unfair advantage when seeking and obtaining patents, approvals, authorisations and/or designations for their products or services.

Thirdly, the public disclosure would also undermine the possibilities of the partners of the FOLDOUT consortium to obtain funding from existing and potential new investors. Given the competitive environment in which the project consortium operates, the information in question can only maintain its commercial value if it is kept confidential.

Fourthly, considering the sensitive nature of information in the documents, their public disclosure could also cause reputational damage to both (partners of the) FOLDOUT consortium and the individuals linked with it.



Against this background, the disclosure would clearly adversely affect the competitive position of the FOLDOUT consortium on the market and, in turn, seriously undermine their commercial interests, including their intellectual property.

I wish also to point out in this regard that, in accordance with Article 3 of H2020 Rules for participation, “Subject to the conditions established in the implementing agreements, decisions or contracts, any data, knowledge and information communicated as confidential in the framework of an action shall be kept confidential, taking due account of Union law regarding the protection of and access to classified information.”

This confidentiality provision is implemented in the H2020 Model Grant Agreement. Its Article 36 stipulates that “During implementation of the action and for four years after the period set out in Article 3, the parties must keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed (“confidential information”).”

Deliverables for which information are withheld are considered as ‘confidential’.

Please note that the General Court has addressed the issue of contractual confidentiality, under the EU Framework Programmes for Research and Innovation, in its *Technion* judgment<sup>5</sup>. It ruled that, if a contractual clause in the Grant Agreement provides that the Commission must use the documents and information, provided by a beneficiary, on a confidential basis, those documents and information cannot (within the timeframe set out in the Grant Agreement) be disclosed or released to persons not party to the contract.

The General Court confirmed that “disclosure of the documents on the basis of Regulation No 1049/2001 would undermine the very existence of that clause of the contract, inasmuch as it would allow persons not party to the contract, namely the general public, access to the abovementioned documents”.

The exception of Article 4(2), first indent, of Regulation 1049/2001 must, therefore, be interpreted also in line with the confidentiality provisions of the H2020 Rules for Participation and its implementing acts.

It is consistent case-law that when two regulations regulate access to documents, without one of them having precedence as in the present case, they have to be applied in a manner compatible with the other and which enables a coherent application of them<sup>6</sup>.

Furthermore, the exception of Article 4(2), first indent, of Regulation 1049/2001 has to be read also in the light of Article 339 of the Treaty on the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

I take the view that applying Regulation 1049/2001 cannot have the effect of rendering the above-mentioned provisions, in particular Article 339 TFEU, over which it does not have precedence, ineffective.

In light of the above, I consider that there is a real and non-hypothetical risk that public access to the (part of) documents to which access has been fully or partially refused would undermine the

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<sup>5</sup> Judgment of the General Court in *Technion v Commission*, T-480/11, EU:T:2015:272, paragraph 58.

<sup>6</sup> Judgment of 28 June 2012 in *Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 110.

commercial interests, including intellectual property, of the consortium. I conclude, therefore, that such access has to be refused on the basis of the exception laid down in Article 4(2), first indent (protection of commercial interests), of Regulation 1049/2001.

## **2. OVERRIDING PUBLIC INTEREST**

In your confirmatory application, you present arguments in support of your view that there is an overriding public interest in disclosure of the requested documents.

First, in relation to projects that receive public funding, you stress the principle of transparency and you consider that “...*as is fundamental to the right of access to documents, the public has a right to seek transparency of the allocation of public funding as well as of the content of the projects it is spent on.*”

You add that *the surveillance “technologies, machine learning in particular, make use of data that concerns the public and deal with the surveillance of the public. This means that the technologies developed within FOLDOUT process sensitive personal data. Given widespread concerns about privacy and data protection, these proceedings need to be subject to debate in the public domain, which, as is stated in Regulation 1049/2001, “contributes to strengthening the principles of democracy”.*”

You carry on stating that “...*not only is FOLDOUT funded by the public, its subject of surveillance is also the public, constituting an overriding public interest when it comes to both the protection of commercial interests as well as public security*”.

Concerning the exception on public security, although you claim to recognise that there is no possibility for this exception to be set aside by an overriding public interest, you carry on pointing out that “*REA’s response highlights that FOLDOUT concerns a collaborative process to explore new ideas and technologies, and that the research conducted does not deliver products to the market or enforce their uptake by public authorities.*”. Therefore, you consider that “*as the project FOLDOUT itself does not define how its technologies might be implemented in actual border security scenarios, and might end up not being implemented at all*”, you argue “*that disclosure of FOLDOUT documents does not constitute a direct threat to public security, as its actual implementation is outside the scope of the project.*”

The exception for the protection of the public interest as regards public security was not invoked with regard to the particular deliverables on the basis of research and development activities but because certain deliverables or parts thereof describe information like use case scenarios based also on real insights of the border authorities, which could potentially harm public interest.

All the more so, because as a result of the funded R&D activities conducted by the project FOLDOUT, it delivers a preliminary design and integration of systems and technological solutions, which are already in operation used by border guards.

In addition, the operational requirements of border guards are also described in project documents, which are valuable and sensitive information.

On the basis of the above mentioned arguments, the disclosure of project documents constitutes a direct threat to public security for the fact that the knowledge of requirements, operational systems and procedures used by the border guards can provide valuable insights on the ways to overcome/avoid border surveillance.

As mentioned above, Articles 4(1)(a) and 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

The exception laid down in Article 4(2), first indent, 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.

Regarding the notion of public interest, I would like to recall that the recital (11) of the Regulation 1049/2001 provides that, *"in principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions."*

In this respect, REA also recalls that the public interest in disseminating project results is guaranteed by the set-up of a coherent set of strategies and tools to disseminate results of finalised projects. Such disclosure is usually made through publishable summaries of project outcomes, prepared by the consortium and approved by the Commission/REA, while preserving the intellectual property of the consortium.

Moreover, the Commission (and REA) gives highest priority to ethics and respect of fundamental rights in EU funded research, which must comply with established ethical principles and applicable law. Particular attention is paid to privacy, human rights and protection of personal data. All these ethical aspects of the project were evaluated by independent experts, and their recommendations were fully integrated in the project research activities.

Considering the above-mentioned arguments establishing the foreseeable risk to harm the commercial interests or legitimate interests in the field of intellectual property of third parties that would result from the further disclosure of the deliverables/documents, REA estimates that in this case, the invoked public interest described in your confirmatory application does not outweigh the need to protect the interests of the third parties concerned. Therefore, the exception laid down in Article 4(2), first indent, of Regulation 1049/2001 should apply to the documents to which access is refused, in full or in part, and you have not presented sufficient elements demonstrating the existence of an overriding public interest in disclosure of the requested documents.

### **3. CONCLUSION**

Having re-examined your request, I have come to the conclusion that the document D11.4 Exploitation Plan can be also partially disclosed and that an extended partial access can be granted to the following documents:

- D.3.1 Legal and ethical state of the art;
- D.5.4 FOLDOUT System Architecture Design Report;
- D.6.3 Physical communication network hardware/software with documentation for ground-based solutions;
- FOLDOUT OBJ1 status and plan;
- FOLDOUT OBJ2 status and plan;
- FOLDOUT OBJ6 Improve situational awareness through fusion Status and plans ,
- FOLDOUT OBJ7 status and plan;
- FOLDOUT OB8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios;
- FOLDOUT OB9 status and plan;
- FOLDOUT OB11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules;
- FOLDOUT\_PartnerPresentation\_Practicioners\_KEMEA.

No further access is possible without undermining the interests described above because the expunged parts of the disclosed documents and the other requested documents for which disclosure is refused are covered in their entirety by the invoked exceptions to the right of public access.

REA considers that, in absence of overriding public interests, it has the duty not to grant access to the requested documents, according to Articles 4(1)(a), first indent, 4(1)(b) and 4(2), first indent, of Regulation 1049/2001 as the prevailing interests are, in this case, the protection of the public interest as regards public security, of the privacy and the integrity and of the commercial interests, including intellectual property, of the third parties concerned.

#### **4. MEANS OF REDRESS**

I draw your attention to the means of redress available against this decision of the Agency. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court of the European Union or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

(e-signed with Qualified Electronic Signature)

Marc TACHELET

Enclosures:

- Deliverable D.3.1 Legal and ethical state of the art
- Deliverable D.5.4 FOLDOUT System Architecture Design Report
- Deliverable D.6.3 Physical communication network hardware/software with documentation for ground-based solutions
- Deliverable D.11.4 Exploitation Plan
- FOLDOUT OBJ1 status and plan
- FOLDOUT OBJ2 status and plan
- FOLDOUT OBJ6 Improve situational awareness through fusion Status and plans
- FOLDOUT OBJ7 status and plan
- FOLDOUT OB8 Demonstrate effectiveness of FOLDOUT concept in realistic operational scenarios
- FOLDOUT OB9 status and plan
- FOLDOUT OB11 Ensure that the FOLDOUT developments are in line with EU Legal-Ethical-Privacy rules
- FOLDOUT\_Partner Presentation\_Practicioners\_KEMEA