

CHIEF EXECUTIVE

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SENT BY EMAIL ONLY

EDA202012053/CSD/LEG

15 December 2020

Subject: Decision pursuant to Article 7 of the Chief Executive Decision No.19/09 of 07/06/2019¹ adopting the EDA policy on public access to documents in accordance with the provisions of Regulation 1049/2001.²

Dear Mr Teffer,

I refer to your email of 30 November 2020 by which 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 9 October 2020, you requested, among other documents, access to:

"All documents related to meetings between the Chief Executive of the European Defence Agency and Airbus employees from 1 February 2019 to 1 February 2020, including briefings written ahead of the meetings and minutes reporting the content of the meetings."

On 27 November 2020, the European Defence Agency (hereinafter "*EDA*"), refused to grant access to the abovementioned documents as they fall under the exception(s) provided for by Article 4 of Regulation 1049/2001.

The current confirmatory application concerns the refusal of the documents under point 4 of EDA's initial response.

¹ <https://eda.europa.eu/info-hub/eda-documents/access-to-eda-documents>

² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (JO L 145 du 31.5.2001, p. 43–48).

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In its initial response, EDA informed you that the refusal was justified to protect the interests covered under Articles 4(1)(a), second indent, 4(1)(b) and 4(2) first indent.

Pursuant to Article 4(3), *"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"*.

Pursuant to Article 4(1)(a), second indent, *"the institutions shall refuse access to a document where disclosure would undermine the protection of: [...]defence and military matters"*.

Pursuant to Article 4(1)(b), *"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."*

The exceptions provided under Article 4(1) of Regulation 1049/2001 are absolute in nature and as such, not balanced by an overriding public interest in disclosure.

Pursuant to Article 4(2), first indent, *"the 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."*

It is noted that in your initial request, you did not put forward any arguments to establish an existing overriding public interest in disclosure.

In your confirmatory application you argue that *"the combination of the facts that Mr Domecq has a new occupation at Airbus while also having interacted with Airbus as Chief Executive of the agency, leads to a possible perception that Mr Domecq has been awarded the job at Airbus because of things he did while Chief Executive of the agency, for example influence calls for proposals or other bids. To tackle this perception, the public benefits from as much transparency about Mr Domecq's interactions with Airbus as possible."*

You further note that, *"Mr Domecq himself wrote in the e-mail released as document 01b: "I never discussed or entertained any discussion related to specific call for proposals or bids in the EU context in which Airbus had or could have a direct interest in. Furthermore, each time I met any company representatives I made sure that these matters would not be discussed. You can check the minutes of these meetings to verify this aspect."*

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Therefore, according to you *"this is precisely the reason that release of the 6 documents would constitute an overriding public interest: it would allow the press and public to confirm whether Mr Domecq was indeed telling the truth in his e-mail."*

Additionally, you state that *"EDA argued that disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation (EC) No 1049/2001. Indeed, that article offers institutions the possibility to refuse access where disclosure would undermine the protection of defence and military matters and commercial interests of a natural or legal person, including intellectual property. However, even if there is a risk of undermining these interests, an institution can still decide to release the documents if there is an "overriding public interest in disclosure".*

Pursuant to Article 7(2) of 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, EDA conducts a fresh review of the initial reply provided.

Following the confirmatory review, I can only inform you that I have to confirm the EDA initial position refusing access to the documents requested.

In your confirmatory application you incorrectly assume that all exceptions to the right of access laid down in Article 4 could be overruled by an overriding public interest in disclosure. In particular, you argue that this is the case in regard to the exception provided under Article 4(1)(a), second indent – defence and military matters.

Please be informed that any of the exceptions provided for by Article 4(1)(a) cannot be overridden as they are absolute in nature.³

Furthermore, as established by the Court of Justice of the European Union, when applying the exceptions of Article 4(1)(a), the institutions enjoy wide discretion⁴, in particular when the core activities of the institution concerned - in this instance the European Defence Agency – are conferred to it by the Treaty on European Union.⁵

³ C-266/05, *Sison v Council*, para 46 & T-31/18 DEP - *Izuzquiza and Semsrott v Frontex*, paras 63-65

⁴ T-644/16, *ClientEarth v Commission*, paras 23-25

⁵ T-14/98, *Hautala v. Council*, para 71

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The exception under Article 4(1)(a), second indent applies to the entirety of the document(s) and not only to parts of it. If the content of those document(s) had been disclosed, it would have created a situation where the legitimate expectation of confidentiality in exchanges with external stakeholders would have been negatively impacted. This in turn would have led to loss of trust and impacted the constructiveness and openness of future exchanges, thereby undermining EDA's mission.

Additionally, as already explained in EDA's initial response, the documents contain information regarding on-going projects of the Member States relating to defence and military matters.

You have been also informed that the documents in question contain personal data. The exception provided for by Article 4(1)(b) is absolute in nature. In accordance with settled caselaw, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 (repealed by Regulation 2018/1725, referred to as 'the Data Protection Regulation')⁶ become applicable in their entirety.⁷

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Consequently, we have concluded that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, 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.

⁶ 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39–98)

⁷ C-28/08 P, Commission v Bavarian Lager, para 63

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In principle, the expunging of the personal data would allow partial access to the document(s) access to which is sought. However, as explained, the document(s) are, in any case, covered by the defence and military exception in their entirety.

You were further informed that the documents contain information of a commercial nature, the disclosure of which could undermine and impact negatively the business activities and commercial interests of Airbus. Commercial interests must be protected in virtue of Article 4(2) first indent of Regulation 1049/2001.

As per settled caselaw, the “*commercial interests*” exception covers commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations or where those documents contain information particular to that undertaking which reveal its expertise.⁸

The exception can be invoked to documents which, if disclosed would “*seriously*” undermine the commercial interests of a legal person⁹ or simply undermine these interests.¹⁰

The documents in question contain information relating to projects taken forward and future areas of activities considered by Airbus, providing thereby elements related to its positioning compared to its competitors.

The commercial interests exception would allow for partial disclosure in case it does not cover fully the document(s) requested. However, in the case at stake, no meaningful partial access is possible without undermining the protected interests.

From the above it follows that the documents in question are fully covered by the exceptions set out in Articles 4(1)(a) second indent, 4(1)(b) and 4(2) first indent, and as a consequence, access to them shall be refused.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

In your application you claim that the disclosure “*would allow the press and public to confirm whether Mr Domecq was indeed telling the truth in his e-mail*” where he provided clarifications concerning his application for post-employment activity.

⁸ T-718/15, PTC Therapeutics International v EMA, paras 84 and 85

⁹ T-516/11, MasterCard and Others v Commission, para 82

¹⁰ T-643/13, Rogesa v Commission, para 70

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EDA has examined to which extent the exception laid down in Article 4(2), first indent of Regulation 1049/2001 may be waived in case of an overriding public interest in disclosure. Such an interest must firstly be of public interest and secondly outweigh the harm caused by the disclosure.

Having analysed your request, we consider that the possible existence of an overriding public interest in disclosure in the sense of the Regulation that would outweigh the exception stipulated in Article 4(2) first indent, does not change the final decision on the disclosure of the documents.

This is due to the fact that the documents, to which access is sought, are fully covered by Article 4(1)(a) second indent – protection of defence and military matters. This exception is absolute in nature and is not balanced by an overriding public interest in disclosure.

I would, nevertheless like to take this opportunity to assure you that these documents were carefully scrutinized and duly taken into account in the process of assessment of Mr Domecq's application under Article 18 of EDA Staff Regulations, which explains why the authorization was granted under certain conditions. Those conditions aim exactly at preventing any possible conflict of interests, including any perceived conflict with the interests of the Agency.

4. 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,


Jiří Šedivý