

CHIEF EXECUTIVE

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EDA202105049/CSD/LEG

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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 Vranken,

I refer to your email of 28 April 2021 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 3 March 2021, you requested access to:

- All documents -including but not limited to e-mails, reports, minutes, etc. - related to meetings between the representatives of the EDA and representatives of the company Airbus;
- All correspondence (including emails) between representatives of the EDA and representatives of the company Airbus".

On 23 April 2021, the European Defence Agency (hereinafter "*EDA*"), granted you partial access to 4 documents identified as falling under the scope of your request and refused access to further documents that correspond to the criteria given in your request, as they fall under the exception(s) provided for by Article 4 of Regulation 1049/2001.

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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The current confirmatory application concerns the refusal to grant access to the documents mentioned in EDA's initial response of 23 April 2021.

In its initial response, EDA informed you that the refusal to these documents was justified to protect the interests covered under Articles 4(1)(a), second indent, 4(1)(b) and 4(2), first indent of Regulation 1049/2001.

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."*

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 reasons you have put forward to justify the application of the exceptions are strikingly vague and thus unsatisfactory. In particular, you have not explained how disclosure can "specifically and actually" undermine the public interest as regards defence and public security matters and why this is "reasonably foreseeable and not purely hypothetical", as required by the established case law of the Court of Justice of the EU (see e.g., Cases 576/12 P, para. 45; C-280/11 P, para. 54; and C-506/08 P, para. 76)."*

You further note that, *"In your response, you have failed to show how disclosing the documents would be "likely, specifically and actually" to seriously undermine commercial interests, and that the risk of that interest being undermined is "reasonably foreseeable and not purely hypothetical", as required by the established case law of the Court of Justice of the EU (see e.g., Case T-471/08, paras. 70-71)."*

Additionally, you state that *"separately, you have failed to take into account the existence of an overriding public interest in disclosure. The relationship between the EDA and Airbus has come under increased scrutiny due to the controversy surrounding the move of the former CEO of the European Defence Agency, Mr. Domecq, to Airbus Defence and Space as Head of Public*

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Affairs and Strategic Advisor. On 22/02, the European Ombudsman has for example opened an inquiry expressing her concern about a “potential risk of conflicts of interest”. As such it is in the public interest to gain more detailed insights on the interactions between the European Defence Agency and Airbus”.

You therefore conclude that " On that basis, we respectfully request that you reconsider your decision, fully comply with your obligations under the Regulation, and disclose the requested documents accordingly."

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.

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.

Following the confirmatory review on the elements raised by you, I can only confirm EDA’s initial position refusing access to the other documents requested.

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

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

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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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 case law, 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 initial request, you do not put forward any arguments to establish the necessity to have the personal 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.

In principle, the expunging of the personal data would allow partial access to the document(s) to which access 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

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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commercial interests of Airbus. Commercial interests must be protected in virtue of Article 4(2) first indent of Regulation 1049/2001.

As per settled case law, 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 consequently, access to them shall be refused.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

In your application you claim that “*The relationship between the EDA and Airbus has come under increased scrutiny due to the controversy surrounding the move of the former CEO of the European Defence Agency, Mr. Domecq, to Airbus Defence and Space as Head of Public Affairs and Strategic Advisor*” and that “*On 22/02 the European Ombudsman has for example opened an inquiry expressing her concern about a “potential risk of conflicts of interest”. As such it is in the public interest to gain more detailed insights on the interactions between the European Defence Agency and Airbus*”.

EDA has examined to which extent the exceptions laid down in Article 4(1), second indent and Article 4(2), first indent of Regulation 1049/2001 may be waived in case of an overriding public

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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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 exceptions stipulated in Article 4(1)(a) second indent and 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.

As also communicated in our initial reply, these documents, notably the procurement related documents, contain information of a commercial nature, the disclosure of which could seriously undermine and impact negatively the business activities and commercial interests of Airbus.

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 our assessment following your confirmatory application.

As regards the inquiry which the European Ombudsman has opened on 22/03/2021, I can inform you that EDA has engaged in a constructive and cooperative dialogue with the European Ombudsman and that it is fully committed to demonstrate that it operates against the highest possible standards of administration, in full compliance with the applicable legal framework.

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
Chief Executive