



EUROPEAN COMMISSION
RESEARCH EXECUTIVE AGENCY

Director

Brussels,
REA/MT/vc

22 JAN. 2019

Mr Riccardo Coluccini
Contrada Fontangela 19/B
62010 Pollenza (MC)
Italy

*Sent by registered mail with acknowledgment of
receipt and by registered e-mail to:
ask+request-6087-6777c49b@asktheeu.org*

**Subject: Your confirmatory application pursuant to Article 7(2) of Regulation (EC)
No 1049/2001 – application for access to documents (ref.
Ares(2018)6593409)**

Dear Mr Coluccini,

I refer to your email of 19 December 2018 sent via the website AskTheEU.org and registered by the Research Executive Agency (REA) on 20 December 2018 under reference number Ares(2018)6593409. You request, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, a review of the position taken by REA with regard to the initial request for access to documents.

1. SCOPE OF YOUR REQUEST

On 2 November 2018, the European Commission received your initial application for access to documents submitted via the website AskTheEU.org and concerning the project iBorderCtrl (grant agreement nr. 700626) managed by REA.

On 5 November 2018, the request was reassigned to REA.

In your application you requested:

“All the deliverables listed in the 'Publication' section of the project iBorderCtrl, Project ID: 700626 Funded under: H2020-EU.3.7. - Secure societies - Protecting freedom and security of Europe and its citizens: <https://www.iborderctrl.eu/Publications>”.

In the project website the following deliverables appear under “Publications”:

D1.1 Ethics advisor's first report

D1.2 Ethics of profiling, the risk of stigmatization of individuals and mitigation plan

¹ OJ L 145, 31.5.2001, p.43.

D1.3 Ethics Advisor
D2.1 Requirement Analysis Report
D2.2 Reference Architecture and components specifications
D2.3 EU wide legal and ethical review report
D3.1 Data Collection Devices - specifications
D3.2 First version of all technological tools and subsystems (Portable unit, ADDS, DAAT, portable radar, FMT. Avatar based dialogue)
D3.3 Second version of all technological tools and subsystems for integration
D4.1 First version of the iBorderCtrl software platform
D4.2 Second version of the iBorderCtrl software platform
D5.1 Integration Plan
D5.2 Early version of the integrated prototype (limited functionality)
D6.1 Experimental Design for Pilot Deployment and Evaluation
D7.1 Project Web Portal
D7.2 Project flyer
D7.3 Dissemination and communication plan
D7.4 Early Business Plan
D7.6 Yearly communication report including communication material
D7.7 Project Flyer 2
D7.8 Dissemination and communication plan 2
D8.1 Quality Management Plan
D8.3 Periodic Progress Report
D8.4 Annual Report
D8.5 Periodic Progress Report 2
D8.7 Annual Report 2.

On 26 November 2018, REA informed you of the extension of the time limit by additional 15 working days, in accordance with Article 7(3) of the Regulation because the documents requested originated from third parties that had to be consulted.

On 17 December 2018, REA replied to your initial application (reference Ares (2018)6503962). In its letter REA provided an inventory of the documents related to the request (Annex 1 of the reply), containing reference to the documents directly accessible and specifying for each document non-disclosed or partially disclosed the legal grounds on which REA based its decision.

In particular, REA has partially disclosed deliverables D.3.1, D.3.2 and D.3.3, fully disclosed deliverables D.7.2 and D.7.7 and deliverables D7.1 and D7.6 are publicly available on the project website (<https://www.iborderctrl.eu/Publications>).

The access to the other requested deliverables have been refused based on the exceptions relating to the protection of the privacy and integrity of the individual and/or of commercial interests of a natural or legal person, laid down respectively in Articles 4(1)(b) and 4(2), first indent, of Regulation (EC) No 1049/2001.

On 20 December 2018, REA registered your confirmatory application, pursuant to Article 7(2) of Regulation (EC) No 1049/2001.

Through your confirmatory application, you request a review of the position taken by REA on your initial request with regard to the following documents to which access was denied based

on the protection of the privacy and integrity of the individual and the protection of commercial interests of a natural or legal person:

D1.1 Ethics advisor's first report

D1.2 Ethics of profiling, the risk of stigmatization of individuals and mitigation plan

D1.3 Ethics Advisor

D2.1 Requirement Analysis Report

D2.3 EU wide legal and ethical review report.

Although you requested that the scope of the review be limited to the above-mentioned documents, following the re-assessment made in the context of another request of access, REA is now in position to grant you a partial access to deliverables D7.3 (Dissemination and communication plan) and D7.8 (Dissemination and communication plan 2).

2. 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 light of the provisions of Regulation 1049/2001.

Following this review, I regret to inform you that I have to confirm the initial decision of REA to refuse access to the requested documents (i.e. D1.1, D1.2, D1.3, D2.1, D2.3) based on the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual) and Article 4(2), first indent (protection of commercial interests of a natural or legal person) for the reasons set out below.

2.1 Protection of commercial interests

In accordance with Article 4(2), first indent, of the Regulation, 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 deliverables of the project iBorderCtrl, to which you request access, contain consortium confidential information about the methodology, research approach and strategy as to how the iBorderCtrl consortium proposes to achieve the project results.

More precisely, deliverables D1.1, D1.2, D1.3 and D2.3 include ethics and legal assessment of tools, technical components and methodologies developed within the project.

Deliverable D2.1 addresses technological solutions and developments (e.g. document analysis tools, biometric technologies, technologies for the detection of contraband, analytics for data mining) providing the general framework for all the different modules that will compose the final integrated system.

This information has to be considered as inside knowledge of the iBorderCtrl consortium. It reflects the specific intellectual property, on-going research, know-how, methodologies, techniques and strategies which belong to the consortium.

As stated in the reply to the initial application, the public disclosure of such information would undermine the commercial interests of the iBorderCtrl 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 of the consortium. By having access to the 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 iBorderCtrl consortium, 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 iBorderCtrl 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 iBorderCtrl 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, the public disclosure of information in the requested documents could affect the reputation of the iBorderCtrl consortium members and the individuals linked with it.

Against this background, the disclosure would clearly adversely affect the competitive position of the iBorderCtrl 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”).”*

Article 36 also provides that *“the Agency may disclose confidential information to its staff, other EU institutions and bodies. It may also disclose it to third parties, if (a) this is necessary to implement the Agreement or safeguard the EU’s financial interests and (b) the recipients of the information are bound by an obligation of confidentiality.”*

In the Grant Agreement for the project iBorderCtrl, the requested deliverables not disclosed to you are listed as ‘confidential’, bearing the following confidentiality marking “Confidential, only for members of the consortium (including the Commission Services and/or REA Services)”.

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* judgment². 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 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 them³.

Furthermore, the exception of Article 4(2), first indent, of Regulation 1049/2001 has to be read also in 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 consequence, there is a real and non-hypothetical risk that public access to the documents requested would undermine the commercial interests, including intellectual property, of the iBorderCtrl consortium. I conclude, therefore, that access to the documents requested 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.

2.2. 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 (EC) No 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

² Judgment of the General Court in *Technion v Commission*, T-480/11, EU:T:2015:272, paragraph 58.

³ Judgment of 28 June 2012 in *Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 110.

agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725').

The documents to which you request access contain personal data, in particular the documents requested contain information related to identified or identifiable individuals involved in or linked to the iBorder project, in particular their names, functions, contact data and opinions. 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)⁴, 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, can the transmission of personal data 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.

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. 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.

Consequently, 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

⁴ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378.

interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST

Please note that Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exception 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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested. Nor have I been able to identify any public interest capable of overriding the interests protected by Article 4(2), first indent, of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, for the reasons explained here above, no further partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. CONCLUSION

I have come to the conclusion that except for deliverables D7.3 (Dissemination and communication plan) and D7.8 (Dissemination and communication plan 2) that can be sent to you, for the above mentioned reasons, REA considers that, in absence of overriding public interests, it has the duty not to grant access to the requested documents according to Article 4(2), first indent, of Regulation (EC) No 1049/2001 as the prevailing interest is, in this case, the protection of the commercial interests including intellectual property of the third parties concerned.

6. MEANS OF REDRESS

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

Yours sincerely,



Marc TACHELET

Enclosures: - Deliverable D7.3 Dissemination and communication plan
- Deliverable D7.8 Dissemination and communication plan 2

