

CHIEF EXECUTIVE

Ms Laëtitia Sédou

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EDA202007037/CSD/AS

10 July 2020

Dear Ms Sédou,

Subject: DECISION PURSUANT TO ARTICLE 7 OF THE EUROPEAN DEFENCE AGENCY DECISION No 19/09 OF 07/06/2019 ADOPTING THE EDA POLICY ON PUBLIC ACCESS TO DOCUMENTS IN ACCORDANCE WITH THE PROVISIONS OF REGULATION 1049/2001¹

I refer to your email of 2 July 2020 wherein 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 19 May 2020, you requested access to to the details of the 7 projects selected under the 2019 PADR calls : CROWN, AIDED, QUANTAQUEST, PILUM, ARTUS, OPTIMISE, INTERACT. By details you mean "*documents including at least the summaries of the projects, their respective duration and starting dates, the maximum foreseen EU contribution for each project, the list of participants and the requested EU contribution by each participating entity for each project*".

On 15 June 2020, the European Defence Agency (hereinafter "*EDA*"), refused to grant access to the documents requested as they fall under the exception(s) provided for by Article 4 of Regulation 1049/2001. You were also informed that at a later stage the documents could be partially disclosed. This means that in principle, partial access to evaluation of grant applications is possible. However, this is the case only after the grant agreement(s) have been signed, which is currently not the case.

In its initial response, EDA informed you that the refusal was justified to protect the interests covered under Articles 4(3), first paragraph. Pursuant to Article 4(3), "*access to a document,*

¹ OJ L 145 31.5.2001, p.43

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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".

It must be 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 *"although the grant agreements have not been signed yet, these projects have already been nominally approved and the concerned participating companies have been informed about the Agency's decision. As such, it is unclear why disclosing the requested documents would specifically and actually undermine the decision-making process."*

You further note that, *"the European Ombudsman decided in a similar case that "the public has, in principle, a right to be adequately informed about the content of projects financed using public money" (case 1529/2019/MIG)."*

Additionally, you state that *"the European Ombudsman considers that commercial information is not a justification to refuse access to documents: "The European Defence Agency should grant increased partial access to the summary reports on the proposals in receipt of EU funding which have been or are being implemented, including to the commercial information contained in those reports."*

Pursuant to Article 7(2) of EDA Decision No 19/09 of 07/06/2019, decision 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 regret to inform you that at this stage I have to confirm the EDA initial position refusing access to the documents requested.

In the framework of this confirmatory application, it is considered noteworthy to provide some information on the grant process as whole. After being submitted and checked against the admissibility and eligibility conditions, proposals are evaluated and scored against selection and award criteria. To be considered for funding a proposal must at least reach the threshold on each criterion, and an overall threshold. After the evaluation has been finalised,

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a ranked list of proposals, including all proposals with scores above the qualifying score, is established and a final ranking list of proposals for **possible funding** from that list is drawn, depending on the available budget. After the finalisation of the evaluation, applicants receive the Evaluation Result Letter. The coordinators of successful proposals proposed for funding and for which funding is available, receive the 'Evaluation Summary Report' (ESR) and are invited to start the grant agreement preparation. During the grant preparation, legal, administrative and financial information from the **prospective beneficiary** (project participant) and any third parties linked to it is gathered. This stage also aims at ensuring that the Description of the Action (DoA, Annex 1 to the grant agreement) and the Estimated budget for the action (Annex 2) match the proposal. This is also when the key points of the grant agreement are established, and the financial capacity of the prospective beneficiary is verified.

Please note that at any moment before the actual signature of the grant agreement, the grant preparation process could be terminated. Hence, a financial commitment will exist only after the signature of the grant agreement.

Signing the grant agreement is the last step of the grant preparation phase. It shows that both parties formally approve the agreement and its annexes. The grant agreement enters into force on the day of the last signature.

In the light of the above, it is clear that before the signature of the grant agreement has actually taken place, there is no commitment from either side and therefore, any disclosure of the summary reports of the ELSA reviews prior to the existence of the grant agreement could undermine the decision-making process of EDA in relation to grant signature.

Additionally, as you mention in your confirmatory application, the public has, in principle, the right to be adequately informed about the content of projects financed using public money.

As explained above, the grant agreements have not been signed and therefore, there are no projects that have been financed using public money yet. Analogically, your second argument is also unfounded as the grant agreements for the projects mentioned in your request have not been signed and thus, at this point in time the projects in question are not *“proposals in receipt of EU funding which have been or are being implemented”*.

From the above it follows that the documents in question are fully covered by the exception set out in Article 4(3), first paragraph and as a consequence, access to them shall be refused.

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As explained in the initial response, after the grant signature, the documents access to which is sought could be partially disclosed taking into account the exceptions provided for by Articles 4(1)(b) and 4(2), first indent.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

EDA has examined to which extent the exception laid down in Article 4(3) of Regulation 1049/2001 may be waived in case of an overriding public interest in disclosure. Such an interest must firstly be of a public interest and secondly outweigh the harm caused by the disclosure. Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(3). We consider that the prevailing interest in this case is to protect the decision-making process of EDA and the eventual future grant signature. The European Defence Agency did examine whether such an overriding public interest in disclosure exists and concluded that this is not the case.

It is considered that the justification provided under point 2 is sufficient evidence that the risk is reasonable and not hypothetical.

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