



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/1693**

Dear [REDACTED],

I refer to your letter of 26 March 2019, registered on the same day, in 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 20 March 2016, addressed to the Directorate-General for Mobility and Transport, you requested access to a document referenced under number 'C(2015)8005/1'.

The European Commission has identified the following document as falling under the scope of your request:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- Commission Implementing Decision C(2015)8005/1 of 28 October 2015 laying down detailed measures for the implementation of common rules in the field of aviation security containing information referred to in Article 18 (a) of Regulation (EC) No 300/2008, (hereafter ‘the requested document’).

In its initial reply of 26 March 2019, the Directorate-General for Mobility and Transport refused access to this document based on the exception of Article 4(1)(a) first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. Your arguments have been taken into account in our assessment, the results of which are explained below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review I regret to inform you that I have to confirm the initial decision of Directorate-General for Mobility and Transport to refuse access to the requested document, based on the exception of Article 4(1)(a) first and third indents (protection of the public interest as regards public security and international relations) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the public interest as regards public security and international relations

Article 4(1)(a) first indent of Regulation (EC) No 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 [...]’.

Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 provides that ‘the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the public interest as regards [...] international relations [...]’.

As a preliminary remark, please note that if access is granted to a document under Regulation (EC) No 1049/2001, this document becomes accessible to the public at large.

The General Court has acknowledged 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’.³

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation’.⁴

The Commission Implementing Decision C(2015)8005/1, to which you request access, lays down detailed measures in the field of aviation security, to be implemented by Member States. It contains security-sensitive information, such as the protection of passengers and baggages, the description of passengers’ and baggages’ screening methods and risk assessments. Furthermore, the requested document sets performance requirements for a number of detection systems and equipment capable of detecting threat materials, such as liquid explosive detection systems. The document also lays down specific security measures for security-restricted areas at airports, requirements and procedures to follow in order to perform aircraft security searches, as well as information about methods of examinations and security controls taking place at airports. Please note that it is not possible to give more details justifying the need for confidentiality in respect of the requested document without disclosing its content and, thereby, depriving the exception of its very purpose.⁵

This information, if disclosed, would undermine the protection of public security, as it would put in the public domain detailed knowledge about airport security procedures, methods and equipment, thereby promoting and facilitating malicious attempts of circumventing aviation security rules and procedures. This would, in turn, thwart the effectiveness of the fight against terrorism and would compromise the position of the European Union in international cooperation concerning the fight against terrorism. In this context, the Court of Justice specifically recognised that disclosure of information related to the fight against terrorism undermines the public security.⁶

³ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council of the EU*, T-264/04, EU:T:2007:114, paragraph 40.

⁴ Judgment of the General Court of 11 July 2018, *Client Earth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

⁵ Judgment of the General Court of 8 February 2018, *Pagpyrios organismos ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 71.

⁶ Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 66, (hereafter *Sison v Council*).

Furthermore, the requested document is not published and is addressed only to the Member States. Indeed, point (a) of Article 18 of Regulation (EC) No 300/2008⁷ on common rules in the field of civil aviation security provides for the non-publication of the requested document precisely for the reason of protecting sensitive security information. Granting public access to the information contained in the decision would call into question and change the nature of the procedure foreseen for sharing sensitive information relating to aviation security with third parties, laid down in Article 18 point (a) of Regulation (EC) No 300/2008 and in the Commission Implementing Decision C(2015)8005/1.

Regarding the exception protecting the public interest as regards international relations, it has been recognised that Article 4(1)(a) third indent can be invoked if it is clear that disclosure would harm the EU's international relations with third countries.⁸

As provided for in the Commission Implementing Regulation (EU) 2015/1998 of 5 November 2015 laying down detailed measures for the implementation of the common basic standards on aviation security⁹, the European Union has recognised several third countries as applying security standards equivalent to the European common basic standards in the field of aviation security. This implies a number of obligations and rules to respect, such as the obligation of notification of the authorities of the Member States in case security standards applied by third countries are no longer equivalent to the common basic standards of the European Union and vice versa. Hence, any substantial changes as regards the applicable rules in the field of aviation security in the European Union, including the number of people having access to security-sensitive information, would necessarily have an impact on the third countries which apply equivalent standards. This would in turn undermine the European Union's relations to those countries, as it would reveal security standards also applicable in those third countries, without their prior knowledge and agreement.

Therefore, I conclude that there is a real and non-hypothetical risk that disclosure of the requested document can undermine Article 4(1)(a) first and third indents (protection of the public interest as regards public security and international relations), of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1)(a) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

⁷ Regulation (EC) No 300/2009 of the European Parliament and of the Council of 11 March 2008, on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002, Official Journal L 97, p.72.

⁸ Judgment of the Court of First Instance of 7 February 2002, *Kuijter v Council*, T-211/00, EU:T:2002:30 paragraphs 62-65.

⁹ Commission Implementing Regulation (EU) 2015/1998 of 5 November 2015 laying down detailed measures for the implementation of the common basic standards on aviation security, Official Journal L 299, p.1.

In your confirmatory application, you argue that your company was founded ‘[...] to exploit unique technology and create a disruptive next generation of security screening equipment’. You also argue the following, I quote, ‘[w]e are now involved in an exercise to mature the design and performance of our devices so that they are market-ready by 2020, and in this regard we will be engaging with government stakeholder organisations to test and certify our equipment as necessary. We therefore need as much information as possible regarding the regulations and performance requirements for security scanners so that we can assure ourselves of compliance in advance’.

As confirmed by the General Court in the *Franchet and Byk* judgment, ‘[...] the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.

Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account’.¹⁰ This was further confirmed by the Court of Justice in Case C-266/05 (*Sison v Council*) where it held that ‘the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 and to refuse, if that is the case, the access requested’.¹¹

It follows that your application must be examined in the same way as an application from any other person.

Please note that this confirmatory decision for access to documents is without prejudice to any reply by the appropriate national authority regarding access to the requested document on the ‘need to know’ basis, as stipulated in the Commission Implementing Decision C(2015)8001/1 itself.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

I understand from your application that in order for your company to develop its devices and make them market ready by 2020, you need information regarding performance requirements for security scanners. This is precisely the type of information contained in decision C(2015)8005/1, the public disclosure of which would undermine the protection of the public interest as regards public security and international relations. As explained above, access to this information must be refused based on the exception in Article 4 (1)(a) first and third indents of Regulation (EC) No 1049/2001.

¹⁰ Judgement of the General Court of 6 July 2006, *Franchet and Byk v Commission*, Joined Cases T-391/03 and T-70/04, EU:T:2006:190, paragraphs 136 and 137.

¹¹ Judgement in *Sison v Council*, cited above, paragraph 47.

Consequently, I note that no meaningful partial access is possible without undermining the above-mentioned protected interests.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General