

To: Heiko Roth

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Sent by email only

Brussels, 19 April 2022

**Subject: Your application for access to documents – Ref No 2022-21**

Dear Mr. Roth,

We refer to your e-mail dated 19/01/2022 in which you make a large number of requests for access to documents. This specific one was registered on 03/03/2022 under reference number 2022/21.

In accordance with Article 7(8) of Regulation 1049/2001, a 15-working day extension of the initial deadline, of which you were informed, was implemented on 24/03/2022. Thus, the final deadline for replying to the initial request is 19/04/2022.

You requested access to documents containing the following information:

*“On 11/10/2020, the EDPB published the "Recommendations 02/2020 on the European Essential Guarantees for surveillance measures" as "adopted":*

[https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_recommendations\\_202002\\_europeanessentialguaranteessurveillance\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_recommendations_202002_europeanessentialguaranteessurveillance_en.pdf)

*Apparently, no public consultation was carried out before the publication of the final recommendation, as is usually the case. This is what my question refers to.*

*2 REQUEST itself*

*2.1 Documentation showing why there was no public consultation.*

*2.2 Documents containing information used to prepare Recommendations 02/2020 (e.g., legal opinions, third-party comments, own research).”*

## **Assessment**

We have identified 109 documents that fall within the scope of your request.

To facilitate our assessment and your consultation of the files, the titles of each file has been adequately numbered. We will refer to the numbers of each single file in our assessment below.

In relation to the first part of your request (“2.1 *Documentation showing why there was no public consultation*”), please note that such decision to not subject these recommendations to public consultation was made by EDPB members during the 41<sup>st</sup> EDPB Plenary meeting. The public minutes of this meeting are available here: [https://edpb.europa.eu/our-work-tools/our-documents/minutes/41st-plenary-meeting-remote\\_en](https://edpb.europa.eu/our-work-tools/our-documents/minutes/41st-plenary-meeting-remote_en) (see item 3.2). We did not find any document indicate the reason why the decision to not subject Recommendations 02/2020 to public consultation was made.

In relation to the second part of your request (“2.2 *Documents containing information used to prepare Recommendations 02/2020 (e.g., legal opinions, third-party comments, own research)*”), please find our assessment below.

### 1. Full non-disclosure

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we have come to the conclusion that the documents mentioned below cannot be disclosed. Their disclosure is prevented by the following exceptions to the right of access laid down in Article 4 of the Regulation, namely:

**Exception 4(1)(b) (“Privacy and integrity of the individual”).** The following documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The applicable legislation in this field is 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. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable<sup>1</sup>. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

In addition, all metadata containing direct or indirect identifiers that would allow for an identification of a specific data subject was removed for the entirety of documents assessed in accordance with the exception mentioned above.

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<sup>1</sup> Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.



This exception applies to the following documents:

4-22, 27, 30, 35, 37, 38, 41-51, 57-79, 81-90, 92-95, 97-109

**Exception 4(3), 2nd paragraph:** The documents which you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. This includes several draft versions of documents adopted by the EDPB. The exception also applies to documents whose disclosure would undermine the decision-making process of the EDPB, in particular as it would curtail the Members “space to think”, by preventing them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake, also in light of their national situations. The disclosure of these opinions will also have consequences in forthcoming discussions, since specific discussions/opinions/views of the EDPB are subject to updates and revisions and can thus be reopened at any time.

This exception applies to the following documents:

4-54, 56-90, 92-95, 97, 99-109

In addition to the application of some exceptions from Article 4 of the Regulation as explained above, please note that some parts of some of these documents fall outside the scope of your request, therefore leading to the full non-disclosure of said documents, namely:

**Documents falling partially outside the scope of the request:**

97, 100-104, 106-109

We have considered whether partial access could be granted to the documents requested. However, the document(s) are either entirely covered by the exception(s), or the expungement of the information falling under the exception(s) is so significant that it renders the documents irrelevant, which is why they are not provided.

Finally, we have examined whether there could be an overriding public interest in disclosing these documents, but we have not been able to identify such an interest. For these reasons, access to these documents is denied.

## **2. Partial disclosure**

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, alongside the scope of your request, we have come to the conclusion that full disclosure of the documents mentioned below cannot be granted. Some parts of these documents have been redacted as the information either falls outside the scope of your request or its disclosure is prevented by the following exceptions to the right of access laid down in Article 4 of Regulation 1049/2001:

**Documents falling partially outside the scope of the request: 1-3**

**Exceptions applicable under Article 4 Regulation 1049/2001:**

- **Exception 4(1)(b) (“Privacy and integrity of the individual”)**. The following documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The applicable legislation in this field is 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. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable<sup>2</sup>. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

In addition, all metadata containing direct or indirect identifiers that would allow for an identification of a specific data subject was removed for the entirety of documents assessed in accordance with the exception mentioned above.

This exception applies to the following documents: 98

- **Exception 4(3), 2nd paragraph**. The redacted sections of this document contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Their disclosure would seriously undermine the decision-making process of the EDPB as it would curtail the Members “space to think”, as it would prevent them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake also in light of their national situations. The disclosure of these opinions will also have consequences in forthcoming discussions, since specific discussions/opinions/views of the EDPB are subject to updates and revisions and can thus be reopened at any time.

In addition, rapporteurs were redacted in order to avoid unnecessary pressure from external parties regarding the discussions and guidance provided, which would seriously undermine the decision-making process of the EDPB.

This exception applies to the following documents: 55

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<sup>2</sup> Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.



The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. We have not been able to identify such an interest.

### 3. Full disclosure

The following documents can be fully disclosed: 91 and 96.

Please note that the content of both documents corresponds to the final, adopted recommendation, which can be retrieved through the following link: [https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-022020-european-essential-guarantees\\_en](https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-022020-european-essential-guarantees_en).

### Disclaimer

You may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document/documents. Please note that neither the EDPB, nor its Secretariat assume liability stemming from the reuse.

### Means of redress

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the European Data Protection Board to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the following email address: [edpb@edpb.europa.eu](mailto:edpb@edpb.europa.eu). Please make reference to the case number of your request in the subject.

Yours faithfully,



Ventsislav Karadjov

Vice-Chair of the EDPB