



EUROPEAN COMMISSION

Brussels, 26.11.2018
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Mr Bram Vranken
Vredesactie
Patriottenstraat 27
2600 Berchem
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 –Gestdem 2018/2431**

Dear Mr Vranken,

I refer to your email of 26 July 2018, registered on 27 July 2018, in which you submit, on behalf of *Vredesactie*, 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

On 23 April 2018 you submitted an initial application in which you requested access to:

- 'the list of members appointed to the Advisory Group and the Declaration of Interests submitted by these members;
- [a]ll documents – including but not limited to emails, presentations, agendas and minutes related to the Advisory Group for the Preparatory Action on Defence Research (E03523)'.

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

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

On 24 July 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified 13 documents, listed in an annex to its reply, as falling under the scope of the request.

In its reply, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs:

- granted access to document 9, subject only to the redaction of personal data;
- refused access to the remaining 12 documents on the basis of the exceptions for, respectively, the protection of the public interest as regards defence and military matters provided for in the second indent of Article 4(1)(a) of Regulation 1049/2001; the protection of privacy and integrity of the individual provided for in Article 4(1)(b) of Regulation 1049/2001; as well as the exception protecting the decision-making process laid down in Article 4(3), first subparagraph of Regulation 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you argue that the reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs does not provide a list of members appointed to the advisory group and the declaration of interests submitted by these members. You also argue that the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs did not provide any of the presentations, agendas, minutes or any other relevant documents referred to in the call for applications for the selection of members of the Advisory Group for the Preparatory Action on Defence Research.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Concerning your request for access to the list of members of the advisory group and the corresponding declarations of interests, as well as presentations, agendas, minutes and other documents related to this group, please note that the Advisory Group for the Preparatory Action has not yet been established by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. There is indeed an announcement of this group made in the register of expert groups, but for the time being, no members have been appointed and no meetings have taken place.

It follows that there are no documents that could fall under the scope of the request related to the activities of the group. In light of the above, given that the European Commission does not hold any of the documents to which you refer in your application, it is not possible to handle your application in so far as point 1 and the relevant parts of point 2 thereof are concerned.

However, the Commission has identified 13 internal documents, including the call for applications relating to the launching of the group which, as explained above, has not yet been set up.

With regard to documents identified at the initial stage, I can inform you that full access is granted to documents 6 and 8 and wide partial access is granted to documents 1, 2, 3, 4, 5, 7, 10, 11 and 12. The limited redactions are based on the exception protecting privacy and the integrity of the individual, provided for in Article 4(1)(b) of Regulation 1049/2001.

With regard to documents 1 and 13, certain parts thereof fall out of the scope of your request, as they concern a different subject matter.

As regards the part of document 13 containing information relevant for your request, access is partially granted. The redacted part is covered by the exception provided for in Article 4(3), first subparagraph, of Regulation 1049/2001 (protection of the decision-making process).

The detailed reasons are set out below.

2.1. Protection of the privacy and 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 undisclosed parts of documents 1, 2, 3, 4, 5, 7, 10, 11 and 12 contain the names, surnames, contact details (email and office addresses and telephone numbers) of staff members of the European Commission who do not hold any senior management position. The undisclosed parts of document 12 also contain names, surnames and contact details (email addresses and telephone numbers) of a third party representative to whom the call was addressed.

Furthermore, the relevant undisclosed parts of the documents contain the biometric data (handwritten signatures of the staff members of the European Commission or third party representatives).

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines it as ‘any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’.

It follows that public disclosure of all of the above-mentioned personal information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling³, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁴.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁵. Indeed, in its recent judgment in the *ClientEarth* case, the Court of Justice ruled that ‘whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access’⁶. I refer also to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data⁷.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in documents.

Therefore, I conclude that the transfer of personal data through the public disclosure of the personal data included in the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation 45/2001. Consequently, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Furthermore, as regards the handwritten signatures of staff members of the European Commission and third party representatives, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

³ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.*, (ECLI:EU:C:2010:378), paragraph 63.

⁴ *Ibid.*, paragraphs 77-78.

⁵ *Ibid.*

⁶ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

⁷ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provides that ‘access to a document, 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’.

As already explained, documents 1 and 13 are minutes of Commission internal meetings. Most parts of these documents are out of scope as they do not concern the establishment of the Advisory Group for Preparatory Research. Two paragraphs contain positions regarding the establishment of the Advisory Group for the Preparatory Action on Defence Research.

As the future of the group has not yet been decided, any possible disclosure at this stage would seriously harm the ongoing decision-making process on this matter. The topic discussed could affect the orientations and strategic thinking about the actions on defence research and the decision-making initiatives of the European Defence Fund, which is in its implementation (project selection) phase, based on the preparatory action for defence research.

Public disclosure of the above-mentioned parts of document 13 would reveal information concerning the European Commission's possible actions in the defence domain.

Indeed, the defence domain is particularly sensitive due to its very nature and its intrinsic link with the security of the Member States and the European Union. This is particularly true given the unstable international context and the fact that the European Union is facing a complex and challenging environment in which new threats, such as hybrid and cyber-attacks, are emerging, and more conventional challenges are returning.

The undisclosed parts of the documents include a description of policy options for the future shape of the above-mentioned programmes. Publically revealing these policy options would seriously undermine the margin for manoeuvre of the European Commission in exploring, in the framework of the ongoing negotiations with the Member States, all possible policy options free from external pressure. The release of these policy options (as reflected in document 13) would reveal steps and approaches to be taken and would therefore seriously undermine the current decision-making process.

Having regard to the above, I consider that the use of the exception under Article 4(3), first subparagraph, of Regulation 1049/2001 is justified concerning parts of document 13 and that access thereto must be refused on that basis.

3. PARTIAL ACCESS

As explained above, wide partial access is granted to documents 1, 2, 3, 4, 5, 7, 10, 11 and 12, subject to redaction of personal data.

With regard to remaining document 13, which was withheld entirely at initial stage, partial access is granted in accordance with Article 4(6) of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 does not need to be balanced against overriding public interest in disclosure.

The exception laid down in Article 4(3) 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 request, you do not put forward any arguments relating to an overriding public interest in disclosure. In this context, I would like to refer to the judgment in the *Strack* case⁸, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient merely to rely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure⁹.

Based on my own analysis, I have not been able to identify any other elements capable of demonstrating the existence of a public interest that would override the need to protect ongoing decision-making process concerning the establishment of an advisory group under the preparatory action on defence research, grounded in the first subparagraph of Article 4(3) of Regulation 1049/2001.

⁸ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v European Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

⁹ *Ibid*, paragraph 129.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and a complaint to the 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

Enclosures: (12)