

Chief Executive

Mr. Bram Vranken
Vredesactie
Patriottenstraat 27
2600-Berchem
Belgium

Ref: EDA201902123/CSD/AS

Brussels, 27 February 2019

**Subject: DECISION PURSUANT TO ARTICLE 7 OF THE EUROPEAN DEFENCE AGENCY
DECISION No 17/15 OF 09/11/2017 ADOPTING THE EDA POLICY ON PUBLIC ACCESS TO
DOCUMENTS IN ACCORDANCE WITH THE PROVISIONS OF REGULATION 1049/2001¹**

Dear Mr. Vranken,

I refer to your email of 8 February 2019 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 December 2018, you requested access to:

"- All documents concerning the selection-process of the 'Independent Experts and Observers of the Pilot Project (PP) and the Preparatory Action on Defence Research (PADR)";

- All documents containing biographical data and curricula vitae of these experts."

On 22 January 2019, the European Defence Agency (hereinafter "*EDA*"), provided you with a partial reply in which you were granted partial access to some of the documents falling under the scope of your request. You were also informed that two of the documents were originating from a third party and therefore, a consultation of the third party was necessary and ongoing and therefore, you would receive a reply concerning those documents at a later stage.

¹ OJ L 145 31.5.2001, p.43

In its initial response, EDA informed you that partial access was justified in order to protect the interests covered under Articles 4(1)(a) fourth indent and 4(1)(b), which are absolute in nature and not balanced by an overriding public interest in disclosure.

In particular, with regard to the personal data expunged from the disclosed documents, you were informed that 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”*.

In your initial request, you did not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Defence Agency did not have to examine whether there was a reason to assume that the data subjects’ legitimate interests might be prejudiced as provided by Article 9(1)(b) of Regulation 2018/1725.

In your confirmatory application you argue that the employers of the experts used by EDA in the framework of the Pilot Project (hereinafter “PP”) and the Preparatory Action on Defence Research (hereinafter “PADR”) should be disclosed and that information on their affiliation should be in the public domain as a principle of good practice, similarly to the practice and example set by the European Commission.

Additionally, you claim that there is an overriding interest in disclosing such personal data as experts might represent the interests of their private employers while performing tasks assigned to them by EDA. Hence, in your view, it is important that such data are disclosed to the public in order for the latter to be able to verify the existence of any potential conflict of interests.

You further note that, according to you, providing only the names of the experts in question is not sufficient to perform such a check on whose interests the experts actually represent.

On the basis of the above, you request EDA to reconsider its position and provide you with additional biographical and therefore, personal data of the experts in question.

Pursuant to Article 7(2) of EDA Decision No 17/15 of 09/11/2017, 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 am pleased to inform you that I decided to grant you wider access, namely the affiliation of the experts concerned as requested by you.

Furthermore, I provide you as well with their nationality. In addition, the document(s) provide information on the type of the organisation to which the expert belongs, i.e. public or non-public, which you might find useful, too.

However, access to some personal data such as contact details, area of expertise, language skills, etc. is to be refused.

In accordance with Article 4(1) of Regulation 1049/2001 *“access to documents is refused 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.”*

In its judgement in Case 28-08 P (Bavarian Lager)², the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data³ becomes fully applicable.

In this judgement, the Court stated that Article 4(1)(b) *“requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular Regulation No 45/2001”*.

In accordance with Article 3 of Regulation (EU) 2018/1725, *“ ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”*.

The expunged data, as mentioned above, clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725.

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’*.

Therefore, EDA can transmit personal data only if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subjects’ legitimate interests might be prejudiced. Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of

² Judgement of the Court of Justice of 29 June 2010, European Commission v The Bavarian Lager C.Ltd, Case C-28/08 P, EU:C:2010:378, para 59

³ Repealed by 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. In accordance with Article 99 of Regulation (EU) 2018/1725, *“Regulation (EC) No 45/2001 and Decision No 1247/2001/247/2002/EC are repealed with effect from 11 December 2018. References to the repealed Regulation and Decision shall be construed as references to this Regulation.”*

Regulation 2018/1725, can the transmission of personal data occur. Those conditions are cumulative.⁴

According to Article 9(1)(b) of Regulation 2018/1725, the European Defence Agency 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 the European Defence Agency 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.

This provision is further confirmed in Case C-615/13 P (*ClientEarth*) where the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data.⁵ In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests.⁶

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by disclosure of the personal data in question 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 remaining personal data that have been redacted from the document(s) as the need to obtain access thereto has not been substantiated neither in the initial request for access to documents, nor in the framework of the present confirmatory application and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, further partial access is herewith granted.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note also that Article 4(1)(b) of Regulation 1049/2001 has an absolute character and does not include the possibility to demonstrate the existence of an overriding public interest in disclosure.

⁴ *Judgement of the Court of Justice of 29 June 2010, Bavarian Lager, paras 77-78*

⁵ *Judgement of the Court of Justice of 16 July 2015, Case C-615/13 P, ClientEarth v European Food Safety Agency, EU:C:2015:489, para 47*

⁶ *Ibid.*, paras 47-48

5. 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,



Jorge Domecq