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Proposal

of the European Ombudsman for a solution in case 1529/2019/MIG on the European Defence Agency's refusal of public access to documents concerning the ethics reviews of proposals for the EU's Preparatory Action on Defence Research

Made in accordance with Article 3(5) of the Statute of the European Ombudsman¹

Background to the complaint

1. The European Defence Agency (EDA) is responsible for the management and implementation of the EU's Preparatory Action on Defence Research (PADR). The PADR supports research with a view to preparing a European defence research programme.²

2. PADR projects are funded by the EU through a three-year cycle (from 2017 to 2019). Following the adoption of an annual work programme, the EDA publishes a call for proposals. Applicants can then submit proposals for research projects and the EDA decides which of them will receive EU funding. When assessing the proposals, the EDA conducts, amongst other checks, a review of the ethical, legal and societal aspects of the proposed project (a so-called 'ELSA review').

3. In April 2019, the complainant, the Belgian NGO Vredesactie (Peace Action), asked the EDA to give it public access to "*documents which contain information with relation to the [ELSA] reviews for all the project proposals in relation to [PADR].*"

4. The EDA identified 24 documents as falling within the scope of the access request, including 15 reports summarising the ELSA reviews of the proposals submitted in 2017 and 2018. It gave the complainant full access to three documents and partial access to the remaining 21 documents. Regarding the

¹ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

² For more information, see: <https://www.eda.europa.eu/what-we-do/activities/activities-search/pilot-project-and-preparatory-action-for-defence-research>.



redactions it made, the EDA relied on the need to protect personal data and commercial interests of the parties mentioned in the documents.³ The EDA also said that some parts of the documents fell outside the scope of the complainant's request.

5. The complainant did not challenge the redaction of personal data. However, it asked the EDA to review its redaction of commercial information (it made a so-called 'confirmatory application').

6. As the EDA maintained its previous view, the complainant turned to the Ombudsman in August 2019.

The inquiry

7. The Ombudsman opened an inquiry to consider whether the EDA's redaction of commercial information was reasonable.

8. In the course of the inquiry, the Ombudsman received the EDA's reply on the complaint and the Ombudsman's inquiry team inspected the requested documents. Upon request, the Ombudsman also obtained further clarifications from the EDA. Specifically, the EDA explained which information it considers to fall outside the scope of the complainant's request for public access. It also clarified that there were additional documents to which it had denied access. These were the assessments carried out by three individual evaluators on each of the proposals. These were not mentioned in the EDA's previous correspondence with the complainant.

Arguments presented to the Ombudsman

9. The complainant argued that the EDA had not explained how disclosure of the documents would "specifically and actually" undermine the commercial interests of the applicants concerned and why this was "reasonably foreseeable and not purely hypothetical".⁴

10. The complainant also took the view that there is a public interest in knowing how the EDA carries out ELSA reviews of military research projects, given the implications such projects may have, for example, in respect of human rights. This public interest, the complainant stated, overrides the commercial interests of the applicants concerned.

11. The EDA argued that the commercial information contained in the requested documents is sensitive. Disclosure of this information would, for

³ In accordance with Article 4(1)(b) and 4(2), first indent, of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>.

⁴ The complainant referred to EU case law, for example, judgment of the Court of 28 November 2013, *Jurašinović v Council of the EU*, C-576/12 P, paragraph 45: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144988&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7300182>.



example, reveal know-how which could affect the applicants' business activities.

12. In its reply to the Ombudsman, the EDA added that the project proposals that did not receive funding are particularly sensitive. Not only might the applicants want to re-use the ideas outlined in these proposals; disclosing that their proposal was rejected might also damage the reputation of applicants.

13. Regarding successful proposals, the EDA referred to the information that has already been made publicly available on its website. It added that the requested summary reports contain abstracts of the proposals. Disclosure of the summary reports would, the EDA maintained, undermine the commercial interests of the applicants.

14. Regarding the assessment of the evaluators, the EDA stated that this information forms part of the deliberations of the evaluation committee that makes the funding recommendations. Disclosure of this information would thus undermine the EDA's decision-making process. In addition, as the assessment reflects the weaknesses of the proposals identified by the evaluators, disclosure would undermine the applicant's commercial interests.

The Ombudsman's assessment

15. As regards access to the reports of the *individual* evaluators, the Ombudsman reminds the EDA that it should have identified these documents to the complainant when it first responded to the request for access. However, the Ombudsman acknowledges that the EDA proactively corrected this oversight by informing the Ombudsman (and the complainant) of the existence of these individual assessments.

16. Having examined the reports of the individual evaluators, the Ombudsman agrees that these *individual* assessments should not be disclosed. While a convincing argument can be made that the overall assessment of projects would not undermine the decision-making process in an award process (see below), this is not the case for the disclosure of the *individual assessments of the evaluators*. Disclosure of such individual assessments could give rise to pressure being placed on individual evaluators and the risk of self-censorship.⁵

17. Regarding the remaining documents (specifically the summary reports of the ELSA reviews), the Ombudsman notes that, aside from personal data, there are two categories of information that was redacted from these documents: **some details of the proposed projects** (in particular the names, participants and abstracts of the projects), and **details of the evaluators' overall assessment**.

18. Regarding the **details of the proposed projects**, these were redacted to protect the commercial interests of the parties concerned. The Ombudsman

⁵ Judgment of the General Court of 22 May 2012, *Sviluppo Globale v Commission*, T-6/10, paragraph 78 to 82:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=122992&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=2879877>.



agrees that the EDA should, as regards these documents, distinguish between *unsuccessful* proposals that did not receive funding and *successful* proposal that were funded and implemented.

19. Disclosure of details of projects that did not receive EU funding could undermine the commercial interests of the applicants concerned. It could, for example, damage their reputation.⁶ There is also no overriding public interest in access to documents containing such information since the projects did not receive any EU funding from the EDA.

20. The same is not true for proposals that received EU funding and were (or are being) implemented. The Ombudsman considers that the public has, in principle, a right to be adequately informed about the content of projects financed using public money.

21. The Ombudsman notes that the EDA has proactively published some information on the projects that received funding on its website, including an abstract summarising what the projects are about and the amounts allocated to the projects. The Ombudsman has reviewed the documents relating to these projects and can confirm that the information available on the EDA's website reflects the corresponding information contained in the ELSA reviews.

22. The summary reports contain **additional details** which shed further light on the assessment of possible ethical, legal and societal implications of the projects. While some of this information is of a general nature, other comments are more specific, identifying, for example, certain weaknesses of the projects as well as safeguards which the beneficiaries should put in place when implementing their respective project. It is not evident to the Ombudsman why disclosing this information, regarding *successful* proposals, would undermine any valid commercial interests.

23. As regards whether releasing the evaluators' *overall* assessment would undermine the EDA's decision-making processes, the Ombudsman notes that the summary reports show the conclusions on which all evaluators agreed following their individual assessment of the proposals. The summary reports do not reveal the individual evaluator's views.

24. In any event, given that public money was used to finance these projects, there is an overriding public interest in knowing how and why that money was spent. Given the possible ethical, legal and societal implications of the funded projects, it is also important to assure the public that *these aspects* are examined carefully, and that necessary safeguards are put in place, most notably, to ensure that no fundamental rights are violated.

25. The Ombudsman therefore considers that it was not justified to withhold this information and will make a proposal for a solution below.

⁶ Case 416/2018/THH on the European Research Executive Agency's refusal to publish abstracts of unsuccessful grant applications on its website: <https://www.ombudsman.europa.eu/en/decision/en/91463>.



The proposal for a solution

Based on the above findings, the Ombudsman proposes that 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.

The EDA is invited to inform the Ombudsman by Thursday, 9 January 2020 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly
European Ombudsman

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