REGISTERED LETTER
WITH ACKNOWLEDGEMENT OF RECEIPT

██████████████████████

Subject: Your confirmatory application for public access to documents
            Our reference: **A (2019)5912C** (to be quoted in future correspondence)

De██████████

On 13 May 2019, the European Parliament registered your application for public access to the source code and any documentation and build instructions for two applications of the website "epthinktank.eu" of the European Parliament.

Other than the source code, Parliament identified three documents as relevant to your request:

1. Software architecture documentation for European Parliament Research Service (EPRS) - mobile application project;
2. Installation and configuration manual for EPRS - mobile application project;
3. Programmer's manual for EPRS - mobile application project.

On 5 June 2019, Parliament informed you on its decision not to grant public access to the source code and the three related documents, on the grounds of point a) of Article 3 and the first indent of point a) of Article 4(1) of Regulation (EC) No 1049/2001[1].

On 11 June 2019, you filed a confirmatory application asking Parliament to reconsider its initial position.

Pursuant to Rule 116(4) of the Rules of Procedure of the European Parliament, and Article 5 of the Decision of the Bureau of the European Parliament, dated 28 November 2001[2], on

---

[1]   Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p.43

[2]   Rules governing public access to European Parliament documents, Bureau decision of 28 November 2001, OJ C 216 of 22.7.2011, p. 19.

Rules governing public access to European Parliament documents, I, as Vice-President responsible for matters relating to access to documents, am responding to your confirmatory application on behalf and under the authority of the Bureau.

Assessment of your confirmatory application

Parliament assessed your claims in the light of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. This Regulation strikes a balance between transparency and the need to protect specific interests like an institution's ability to work properly.

In your confirmatory application, you claim that the EPRS applications provide citizens of the European Union with access to legislative and budgetary documents, and you refer, as an example, to the "Legislative train schedule". Building on this assumption, you conclude that, contrary to what Parliament stated in its initial decision, the EPRS applications are part of Parliament's sphere of responsibility and, that therefore, the documents you requested are covered by Regulation (EC) No 1049/2001, as they can be regarded as "content" concerning a matter related to activities within the institution's sphere of responsibility.

Parliament cannot assent to your interpretation of Article 3 of Regulation (EC) No 1049/2001.

The source code and the three related documents contain technical IT content concerning the creation and running of two EPRS applications.

The source code is the actual and plain text created by a programmer in human-readable alphanumeric characters used to write the instructions for a computer program or an application.

Document under point 1), the software architecture documentation, describes how the applications are built for iOS and Android devices. Document under point 2), the installation and configuration manual, describes how the applications aggregate the data. Finally, document under point 3), the programmer's manual, describes the main commands inside the applications in order to facilitate changes, modification and updates of the source code.

Considering that the source code and the three related documents altogether are conceived as a technical IT support tool for the creation and running of two EPRS applications, they are clearly distinct from the content provided by these applications which aim at providing the Members of the European Parliament and the citizens with accurate information on the policies, activities and decisions taken in all areas of activity of the European Union.

Therefore, while the contents provided and managed thanks to the EPRS applications refer to Parliament's policies and activities, neither the source code nor the content of any of the three related documents on its technical features can be regarded as concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility within the meaning of point a) of Article 3 of Regulation (EC) No 1049/2001, such a sphere of responsibility relating notably to Parliament's legislative or budgetary, responsibilities as laid down in Article 14 of the Treaty on the European Union.

This is supported by the fact that the purpose of Regulation (EC) No 1049/2001 is to give the fullest possible effect to the right of public access to documents in order to enable citizens to participate more closely in the decision-making process of Union institutions[3].

---

[3]   See Recitals 2 and 4 of Regulation (EC) No 1049/2001.

In addition, it is settled case-law that the right of public access to documents of the institutions applies only to existing documents in the possession of the institution concerned and that Regulation (EC) No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist[4]. The Court found in the context of access to documents contained in databases that any information which would, in order to be obtained, require an alteration either to the organisation of an electronic database or to the search tools currently available for the extraction of information must be considered to be a new document[5]. Similarly, as regards the source code required, Parliament would only be able to disclose it after the intervention of the external provider who developed the code. Indeed, in order to be disclosed, the source code would have to be presented in a sufficiently abstract manner allowing it to be fully independent from Parliament. This intervention would necessarily involve certain operations requiring a substantial investment in terms of time and financial resources from Parliament. Disclosing the source code would therefore amount to creating a new document.

Therefore, the source code and the three related documents of the EPRS applications cannot be qualified as documents within the meaning of point a) of Article 3 of Regulation (EC) No 1049/2001. On this basis, access to the requested documents cannot be granted.

Protection of the public interest as regards public security

With your confirmative application, you also contest Parliament's subsidiary ground for refusal at initial stage, that is to say the need to protect the public interest as regards public security, in accordance with the first indent of point a) of Article 4(1) of Regulation (EC) No 1049/2001. In your view, there is no technical reason why the release of the source code of an application of Parliament for EU citizens would threaten Parliament's security and the public disclosure of the source code and the three related documents on its technical features could not jeopardize the running of the EPRS' server.

Parliament cannot uphold your argument. Every day, Parliament hosts its Members, administrative and technical staff, as well as personalities from all over the world or regular citizens. The recent technological developments have increased hacks and hack attempts into Parliament's communications and computer systems. Parliament should be protected from such intrusions or intrusion attempts, some of which may be malicious and lead to disruptions in the functioning of the institution or even endangering the security of its premises and of persons.

As you know, a source code consists of instructions in a particular language that programmers use to write up programs, independently of whether it will run or not only on specific domains and/or sub-domains. Parliament's programmers may create or use the same source code, and the three related documents, when building other programs and applications for the management of Parliament's infrastructures (for instance the monitoring of its buildings, the management of the work-flow as well as the management of other information and communication systems and services), many of which aim at preventing threats to public security.

Parliament must prevent any malicious intrusion into its information systems and technology tools. Disclosing the source code and the three related documents, which are altogether conceived as a technical IT support tool, would entail that Parliament's processes may be analysed, and that outsiders may get knowledge of Parliament's standard IT security mechanisms. Disclosure would facilitate the discovery of built-in protective elements and

---

[4]   See judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 38 and 46.
[5]   See judgment of 11 January 2017, *Typke v Commission*, C-491/15 P, EU:C:2017:5, paragraph 40.

facilitate the task of hacking into Parliament's security systems. Parliament's functioning as an Institution, and its security, would therefore be threatened. Disclosure of the source code and of the three related documents would therefore undermine the protection of the public interest as regards public security.

Therefore, no information on the source code and on the three related documents of the EPRS applications can be released.

<u>Protection of commercial interests, including intellectual property</u>

In addition to the above, Parliament is of the view that disclosure of the source code and of the three related documents would undermine the protection of its commercial interests, including the exclusive intellectual property rights associated with the EPRS applications.

In order to apply the exception provided for by the first indent of Article 4(2) of Regulation (EC) No 1049/2001, it must be shown that the documents requested contain elements, which may, if disclosed, seriously undermine the commercial interests of a legal person[6]. It cannot be excluded that an EU institution may claim, as such, protection of its own 'commercial interests', *inter alia* because it has commercial relations with third parties and because that protection includes 'intellectual property'[7].

Currently, the European Union, represented in this case by Parliament, holds the exclusive property rights associated with the two EPRS applications. The cost free disclosure to the public of the source code and of the three related documents of the EPRS applications would seriously undermine the commercial interests of Parliament associated with these property rights considering that it would allow the general public to reproduce, translate, adapt or transform these applications for their own private purposes.

Pursuant to point c) of Article 4(1) of Directive 2009/24/EC[8], the exclusive rights of the right holder of a program include the right to authorise any form of distribution to the public, including the rental, of the original computer program or of copies thereof. Parliament decided that the EPRS applications will not be made available as open source. Therefore, disclosure would constitute a direct infringement of the exclusive property rights associated with the EPRS applications.

Parliament could not identify any overriding public interest in disclosure of the source code and of the three related documents which would counterbalance such a risk of infringement of Parliament's commercial interests, including the exclusive property rights associated with the EPRS applications.

<u>Conclusion</u>

As a consequence, I regret to inform you that public access to the source code of the EPRS applications and to the three related documents on its technical features cannot be granted because they cannot be considered as documents within the meaning of point a) of Article 3 of Regulation (EC) No 1049/2001 and, in any event, because their disclosure would undermine the protection of public interest as regards public security, in accordance with the first indent of point a) of Article 4(1) of Regulation (EC) No 1049/2001, and the protection of

---

[6]   See judgment of 7 February 2018, *PTC Therapeutics International v European Medecines Agency*, T-718/15, EU:T:2018:66, paragraph 85 and judgment of 9 September 2014, *MasterCard a. o. v Commission*, T-516/11, EU:T:2014:759, paragraph 82.

[7]   See judgment of 6 December 2012, *Evropaïki Dynamiki v Commission*, T-167/10, EU:T:2012:651, paragraph 86.

[8]   Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16

first indent of point a) of Article 4(1) of Regulation (EC) No 1049/2001, and the protection of commercial interest of Parliament, including intellectual property, in accordance with the first indent of Article 4(2) of the same Regulation.

Partial access in accordance with Article 4(6) of Regulation (EC) No 1049/2001 would, in any case, not be possible because disclosure of part of the source code and/or of the three related documents, conceived altogether as a technical IT support tool for the EPRS applications, would similarly undermine the protection of public interest as regards public security and the commercial interests of Parliament, including the exclusive property rights associated with the EPRS applications.

Finally, I would like to draw your attention to the means of redress against this decision according to Article 8 of Regulation (EC) No 1049/2001. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in the Treaty on the Functioning of the European Union. I equally draw your attention to the fact that filing a complaint with the European Ombudsman does not have suspensory effect.

Yours sincerely,