



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 15th May 2019

Mr. Peter Teffer
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Request for access to documents

Ref.: New request registered GestDem 2019/2114 following your confirmatory application reference GestDem 2019/1258

Dear Mr. Teffer,

By e-mail of 5 March 2019, you addressed a request, under Regulation (EC) No 1049/2001¹, to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission (DG GROW) asking for “*the Commission's legal analysis of the General Court of the European Union's Judgment in Cases T-339/16 Ville de Paris v Commission, T-352/16 Ville de Bruxelles v Commission and T-391/16 Ville de Madrid v Commission*” (registered under reference GestDem 2019/1258).

By letter of 27 March 2019, DG GROW sent you the response to your request. On the same day, you submitted a confirmatory application against that response for considering that the document identified by DG GROW did not match the terms of your request. Subsequently, by letter of 9 April 2019 the Secretariat General of the Commission informed you that, in light of the clarifications in your confirmatory application, a new initial request had been registered and transferred to the Legal Service (registered under reference GestDem 2019/2114) and that your confirmatory application GestDem 2019/1258 would be closed.

Consequently, the present reply addresses the new initial request attributed to the Legal Service.

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, 31.05.2001, page 43).

After examination of the Legal Service's files, the following documents have been identified as matching the terms of your request:

1. Background note of the Legal Service of 22 January 2019 (document reference Ares(2019)2632727);
2. Note of the Legal Service of 19 February 2019 to the Directors General of DG GROW, the Directorate-General for Environment (DG ENV) and the Directorate-General for Climate Action (DG CLIMA), with title : "*jugement du tribunal du 13 décembre 2018 dans les affaires jointes T-339/16 Ville de Paris v. Commission, T-352/16 Ville de Bruxelles v Commission and T-391/16 Ayuntamiento de Madrid v Commission – Pourvoi de la Commission*" (document reference Ares(2019)1023442);
3. Revised background note of the Legal Service of 20 February 2019 (document reference Ares(2019)3139320);
4. Draft Commission Decision on the submission of an appeal before the Court of Justice, attached to document under number 2, registered also under reference Ares(2019)1023442. Please note that the Commission adopted this decision on 22 February 2019².

In reply to your application, I regret to inform you that access cannot be granted to the above requested documents since they are covered by the exception provided for under Article 4(2), second indent, of Regulation (EC) No 1049/2001 ("*protection of court proceedings*"), as explained hereafter.

1. PROTECTION OF COURT PROCEEDINGS

Article 4(2) second indent states by way of exception that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure".

The purpose of the exception for the protection of court proceedings is to maintain the independence of the European Union institutions in their dealings with the Court as well as to ensure the proper course of justice and a fair hearing for the parties.

Although on 13 December 2018 the General Court rendered its judgment in Joined Cases T-339/16, T-352/16 and T-391/16³, three appeals against that judgment are currently pending before the Court of Justice, lodged by the German Government (Case C-177/19P)⁴, the Hungarian Government (Case C-178/19P)⁵ and the European Commission (C-179/19P)⁶.

The documents to which you request access concern the Commission's position in the proceedings currently pending. More specifically, documents under numbers 1 and 2 are background notes containing a legal assessment of the judgment at issue with a view to a possible appeal against it before the Court of Justice. Document under number 2 is a note to the above-referred Directorates-General in view of a Commission Decision on the launching

² Commission Decision C(2019)1640 final.

³ Judgment of the General Court of 13 December 2018 in Joined Cases T-339/16, T-352/16 and T-391/16, *Ville de Paris v Commission, Ville de Bruxelles v Commission, Ayuntamiento de Madrid v Commission*, ECLI:EU:T:2018:927.

⁴ C-177/19 P, *Germany - Ville de Paris and others v Commission*:
<http://curia.europa.eu/juris/liste.jsf?num=C-177/19&language=en>.

⁵ C-178/19 P - *Hungary - Ville de Paris and others v Commission*:
<http://curia.europa.eu/juris/liste.jsf?num=C-178/19&language=en>

⁶ C-179/19 P - *Commission v Ville de Paris and others*:
<http://curia.europa.eu/juris/liste.jsf?num=C-179/19&language=en>.

of an appeal against the judgment. Document under number 3 is the draft Commission Decision to lodge an appeal before the Court of Justice containing the Commission's legal position and arguments supporting the appeal.

The Court of Justice has stated in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that the pleadings lodged in court proceedings are wholly specific since they are inherently part of the judicial activities of the Court and that these activities are as such excluded from the scope of the right of access to documents without any distinction being drawn between the various procedural stages, in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity⁷.

In addition, the Court has recognised the existence of a general presumption under which *"disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending"*⁸.

I consider that public disclosure of the requested documents would undermine the pending court proceedings before the Court of Justice by affecting negatively the atmosphere of total serenity in which the exchange of arguments by the parties and the deliberations of the Court shall take place.

Although, strictly speaking, the identified documents are not part of the pleadings lodged with the Court, they constitute internal documents drawn up specifically with a view to allowing the Commission to lodge an appeal in specific court proceedings, revealing some preliminary legal views on the Commission's legal position and line of action.

In this regard, the General Court has stated that the expression 'court proceedings' has been interpreted by the General Court as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings⁹. Furthermore, in those judgments the Court has concluded that *"the words 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean the pleadings or other documents lodged and internal documents concerning the investigation of the case [...]"*¹⁰.

Furthermore, the Commission considers that the general presumption of non-disclosure recognized in the API judgment cited above, covers, by analogy, not only the pleadings but also other documents drafted in the framework of specific court proceedings such as the documents you have requested.

In light of the above, I consider that, for as long as Cases C-177/19P, C-178/19P and C-179/19P are pending, the requested documents must remain confidential, in accordance with the exception for the protection of court proceedings, since their disclosure would undermine the ongoing court proceedings and the atmosphere of total serenity.

⁷ Judgment of the Court of Justice of 21 September 2010 in Joined Cases *Sweden and others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 77, 79 and 92.

⁸ *Ibid.*, paragraph 94.

⁹ Judgment of 6 July 2006 in Joined Cases *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 88 et 89; judgment of 27 February 2015, in Case *Breyer v Commission*, T-188/12, EU:T:2015:124, paragraph 75.

¹⁰ Judgment in *Franchet and Byk v Commission*, paragraph 90; judgment in *Breyer v Commission*, paragraph 75.

Please note that in accordance with the case law of the Court of Justice, the Commission is entitled to refuse access to documents covered by a general presumption, without having to carry out a specific and individual examination of these documents¹¹ and, consequently, a partial access cannot be granted.

2. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4(2) second indent. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the refused documents that would outweigh the public interest in the protection of the pending court proceedings before the Court of Justice.

3. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

European Commission
Secretary-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

Yours sincerely,



Luis ROMERO REQUENA

¹¹ Judgment of the Court of Justice of 14 July 2016 in Case *Sea Handling v Commission*, C-271/15 P, ECLI:EU:C:2016:557, paragraph 69.