



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels,
MOVE

Mr. Alessandro RUNCI
Via Cerreto Sannita, 13
00182 – Roma
ITALY

*Sent by e-mail with request
for acknowledgement of receipt:*
ask+request-9099-ea2782e9@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2021/0801

Dear Mr Runci,

We refer to your demand dated 17 March 2021, in which you make a request for access to documents, registered on 18 March 2021 under the abovementioned reference number.

The description in your initial application, dated 16 February 2021, did not enable us to identify concrete documents, which would correspond to your request. Thus, pursuant to Article 6(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter ‘Regulation (EC) No 1049/2001’), in our clarification request dated 11 March 2021 we invited you to provide us with more detailed information on the documents which you seek to obtain, such as the intended subject matter and/or specific aspects of the request, and more precise and shorter time periods.

Following this clarification from your side, we concluded that your request concerns the following documents dated from January 2019:

- *all reports (and other notes) from meetings between DG MOVE and Italian government's representatives, in which the Lyon-Turin railway link project (Action 2014-EU-TM0401-M) was discussed.*
- *all correspondence (including emails and attachments) between DG MOVE and representatives of the Italian government, which relates to the Lyon-Turin railway link project.*
- *all correspondence (including emails and attachments) between DG MOVE and the European Court of Auditors in which the Lyon-Turin railway link project was discussed.*

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, p. 43.

- *all reports (and other notes) of meetings between DG MOVE and the European Court of Auditors, in which the Lyon-Turin railway link project was discussed.*
- *all reports (and other notes) of meetings between DG MOVE and representatives of the Tunnel Euralpin Lyon Turin s.a.s (TELT)*
- *all correspondence (including emails and attachments) between DG MOVE and representatives of the Tunnel Euralpin Lyon Turin s.a.s (TELT).*

Please note that due to the wide scope of your request, covering also areas falling under the responsibility of other services, parts of your request have been attributed to other services. This reply relates only to the documents held by the Directorate-General for Mobility and Transport. You will receive the replies from the other respective Directorates-General in due course.

First, having examined the documents requested under the provisions of Regulation (EC) No 1049/2001, we have come to the conclusion that some of the documents may be partially disclosed. Some parts of those documents have been blanked out as their disclosure is prevented by exception to the right of access laid down in Article 4 of the Regulation.

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data. The documents to which you request access contain personal data, in particular the names pertaining to staff members of the Commission services, representatives of the Italian Ministry and of TELT

The applicable legislation in this field is 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC² ('Regulation 2018/1725').

In particular, Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data³.

In its judgment in Case C-28/08 P (Bavarian Lager)⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, the EU Data Protection Regulation becomes fully applicable⁵.

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'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

² 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OC L 205 of 21.11.2018, p. 39.

³ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, [ECLI:EU:C:2017:994](#), paragraphs 33-35.

⁴ Judgment of 29 June 2010 in Case C-28/08 P, *Commission v Bavarian Lager*, [ECLI:EU:C:2010:378](#), paragraph 63.

⁵ Whereas this judgment specifically related to 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

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

In your request, you do 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 Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, 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 (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated 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.

Second, concerning your request with regard to the exchanges and correspondence between Directorate-General for Mobility and Transport and the Court of Auditors ('ECA'), on the basis of Article 4(4) of the Regulation (EC) No 1049/2001, the ECA has been consulted and has indicated to be opposed to the public disclosure of the document(s) concerned.

ECA underlined that preliminary audit observations are and remain confidential even after the audit report is published. They are specifically protected under Article 4(2) of Decision No 12/2005 of the Court of Auditors of 10 March 2005 regarding public access to Court of Auditors documents, as amended by Decision No 14/2009 of 5 February 2009⁶ ("the ECA's Decision on access to documents"). According to this provision, "(...) the Court shall refuse access to its audit observations (...)".

The ECA considers first, that this provision reflects the requirements of Article 258(1) and Article 259(1) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union ("FR")⁷, which set out that the observations made by the ECA that should appear in its Annual Reports and Special Reports shall remain confidential and shall be subject to an adversarial procedure.

Second, the term "audit observations" used in the ECA's Decision on access to documents encompasses all versions of the audit observations that precede the final published version which was "cleared" with the auditee during the adversarial procedure.

Third, it should be noted that the adversarial procedure has the purpose to resolve, firstly, any disagreements over the facts that remain after the statements of the preliminary findings procedure, and, secondly, any differences in opinion between the ECA and the Commission (or other auditees) over interpretation of the evidence. The adversarial meeting is also used to finalise the auditee(s)'s replies to the observations. Therefore, during the adversarial procedure, various versions of these types of "documents" could be exchanged.

⁶ Consolidated version published in OJ C 67, 20.3.2009, p. 1.

⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

As regards the replies of the Commission to the ECA's preliminary audit observations we consider that access has to be refused on the basis of the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, following which :

“Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.”

Indeed, in this case, the disclosure of the observations made by the Commission in the context of these audit observations would seriously compromise the decision-making process of this institution, as it could deter the Commission from making such observations in an independent manner, and without being influenced by the prospect of having the full explanations on the activities that are being subject to the audit being made public. In fact, the possibility of providing information independently and fully to the ECA in the context of an audit helps to encourage the unconditional cooperation between both institutions – therefore allowing for the smooth running of the decision-making process in the context of audit proceedings.

The Court of Auditors has confirmed this assessment. In fact, the Court of Auditors considers that the preliminary audit observations and the replies thereto are a “package” that cannot be split. Another interpretation risks rendering ineffective the provision on maintaining the secrecy of the preliminary audit observations until cleared through the adversarial procedure with the auditee. The purpose of this provision is to safeguard “the right to be heard” of the auditee and therefore, to protect the auditor and the auditee, by avoiding to release into the public domain versions of the audit observations and of the auditee's replies which do not reflect the final adopted position by those institutions.

Moreover, the exchanges and correspondence between Directorate-General for Mobility and Transport and the ECA also contain personal data of staff members of the Commission services and of other persons. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data. Consequently, for the reasons explained above, as regards the other requested documents access could not be granted to the personal data contained in these documents as well.

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in the disclosure of the documents. In the case at hand, there is no reason to assume that there is an overriding public interest to fully disclose the concerned documents.

Regarding the meeting reports disclosed as part of your request, these documents were drawn up for internal use under the responsibility of the relevant services of Directorate-General for Mobility and Transport. They solely reflect the services' interpretation of the interventions made and do not set out any official position of the third parties to which the documents refer, which were not consulted on their content. They do not reflect the position of the Commission and cannot be quoted as such.

In case you would disagree with this position, you are entitled, in accordance with Article 7(2) of Regulation (EC) No 1049/2001, to submit a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission, Secretariat-General
Unit C.1. ‘Transparency, Document Management and Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Finally, I kindly ask you to confirm receipt of this email.

Yours sincerely,

Henrik HOLOLEI
[e-signed]

Enclosed:

1. Annex 1: DG MOVE invitation to TELT for a discussion on Lyon-Turin base tunnel project, 8 May 2019
2. Annex 2: DG MOVE invitation to Italy for a discussion on Lyon-Turin base tunnel project, 13 May 2019
3. Annex 3: Reply from Italy to DG MOVE, 28 May 2019
4. Annex 4: DG MOVE to TELT on 3 June 2019
5. Annex 5: DG MOVE to Italy on 3 June 2019
6. Annex 6: DG MOVE summary of a meeting, 6 June 2019
7. Annex 7: DG MOVE invitation to TELT, 20 December 2019
8. Annex 8: DG MOVE invitation to TELT, 20 December 2019
9. Annex 9: DG MOVE invitation to Italy, 20 December 2019
10. Annex 10: email from TELT to DG MOVE, 7 February 2020
11. Annex 11: TELT letter to DG MOVE, 7 February 2020
12. Annex 12: DG MOVE to Italy, 19 October 2020
13. Annex 13: Italy to DG MOVE, 22 December 2020
14. Annex 14: DG MOVE reply to Italy, 26 March 2021

Exchanges with the Court of Auditors which are not disclosed:

- E-mail from the Commission to the European Court of Auditors (ECA) of 09/08/2019 concerning the European Court of Auditor's Special Report "EU transport flagship infrastructures: no timely completion of the transport network, with the Commission on the sidelines in the implementation of megaprojects", registered on 09/08/2019 under reference Ares(2019)5180831.
- E-mail from Commission to the European Court of Auditors (ECA) of 20/12/2018 concerning the European Court of Auditor's Special Report "EU transport flagship infrastructures: no timely completion of the transport network, with the Commission on the sidelines in the implementation of megaprojects", registered on 20/12/2018 under reference Ares(2018)6594763.
- Attachment to correspondence from Commission to the European Court of Auditors (ECA) on 20/12/2018 concerning the European Court of Auditor's Special Report "EU transport flagship infrastructures: no timely completion of the transport network, with the Commission on the sidelines in the implementation of megaprojects", registered on 20/12/2018 under reference Ares(2018)6594763.
- Letter from Commission to the European Court of Auditors (ECA) on 14/10/2019 concerning the European Court of Auditor's Special Report "EU transport flagship infrastructures: no timely completion of the transport network, with the Commission on the sidelines in the implementation of megaprojects", registered on 14/10/2019 under reference Ares(2019)6339339.

