



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels
MOVE/HH

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acknowledgement of receipt:*
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Subject: Your application for access to documents – GESTDEM 2021/0617

Dear Sir,

We refer to your e-mail of 9 February 2021 in which you make a request for access to documents, registered on 10 February 2021 under the above mentioned reference number, as well as to my services' holding reply of 2 March 2021 (ARES(2021)1577178).

You request access to:

- 1) Any and all correspondence (including email) from 1 January 2020 to the date of your request, between DG Mobility and Transport and stakeholders regarding airfare pricing in relation to the climate. This includes, but is not limited to, measures proposed by the Austrian government.
- 2) A list of meetings, virtual or otherwise, from 1 January 2020 to the date of your request, between DG Mobility and Transport and stakeholders regarding airfare pricing in relation to the climate. This includes, but is not limited to, measures proposed by the Austrian government.
- 3) Minutes of all meetings, virtual or otherwise, from 1 January 2020 to the date of your request, between DG Mobility and Transport and stakeholders regarding airfare pricing

in relation to the climate. This includes, but is not limited to, measures proposed by the Austrian government.

The following documents or categories of documents have been identified as corresponding to your request.

- Letter from DG MOVE to the Austrian authorities,
- DG MOVE emails to the Austrian authorities,
- Internal meeting report, and
- Correspondence between DG MOVE and a complainant.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents¹, we regret to inform you that your application cannot be granted, as disclosure is prevented by an exception to the right of access laid down in Article 4(2) of this Regulation.

In particular, Article 4(2), third indent of Regulation (EC) 1049/2001 establishes that *"The institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."*

The exception foreseen in Article 4(2), third indent, of the above mentioned Regulation applies in particular to an investigation engaged by the Commission services that could ultimately lead to launching an infringement procedure under Article 258 TFEU. The documents requested are covered by the referred exception, as they relate to an ongoing investigation regarding a possible infringement of EU law.

As the law stands, the Court of Justice of the European Union has recognised that the documents concerning an infringement procedure during its pre-litigation stage² enjoy a general presumption of confidentiality as long as the procedure is ongoing³.

The documents which you seek to obtain relate to an ongoing informal dialogue with the Austrian authorities regarding a possible infringement of EU law, as well as to the follow-up of a complaint being examined by the Commission services concerning the same subject.

Disclosure of the documents requested would undermine the protection of the purpose of the ongoing investigation. Indeed, disclosure of the document at this point in time would affect the climate of mutual trust between the authorities of the Member State concerned and the Commission, which is required to enable them to resolve the case without having to

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 Judgment in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, p. 65.

³ Judgment in *ClientEarth / Commission*, C-612/13 P, ECLI:EU:C:2015:486, p. 77.

refer it to the Court of Justice. It has to be noted that access granted in response to an application is to be considered as disclosure to the public at large (*erga omnes*)⁴.

According to established case-law, all the documents relating to an infringement during the pre-litigation stage may be covered by a general presumption of confidentiality. The Court has held in *Sweden and Spirlea v Commission* that “(...) all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say before the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage that is to say after the letter was sent, [a]re regarded as being covered by that presumption”⁵. It follows that “it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of the investigation, within the meaning of the Article 4(2) of Regulation No 1049/2001”⁶.

Therefore, the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 applies to these documents.

Pursuant to Art 4(6) of Regulation (EC) 1049/2001 we have considered whether partial access could be granted to the documents requested. However, given the nature and structure of the documents, partial access would have similar effects as the complete access to the documents. It follows from the assessment made above that the requested documents are entirely covered by the aforementioned exception.

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. We have considered whether an overriding public interest exists and were not able to identify such an interest.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make 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 Secretary-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

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

The COVID-19 outbreak undoubtedly has an impact on the process of handling access to documents requests under Regulation (EC) No 1049/2001. Given large-scale teleworking of the Commission services, all replies, which should normally be sent via registered post,

⁴ Judgment of the General Court of 21 October 2010 in case T-439/08, ECLI:EU:T:2010:442, *Agapiou Joséphidès v Commission and EACEA*, para 116.

⁵ Judgment of the Court of Justice of 11 May 2017 in case C-562/14 P, ECLI:EU:C:2017:356, *Sweden and Spirlea v Commission*, paragraph 41.

⁶ *Ibid*, paragraph 41.

currently are sent only by e-mail. In this regard, we kindly ask you to confirm receipt of this email.

Yours faithfully,

(e-signed)

Henrik HOLOLEI