



EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2021/0617**

Dear Mr Sabido,

I refer to your letter of 14 April 2021, registered on 15 April 2021, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 9 February 2021, addressed to the Directorate-General for Mobility and Transport, you requested access to the following documents, I quote ‘:

1) Any and all correspondence (including email) from 1 January 2020 to the present day, 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 present day, between DG Mobility and Transport and stakeholders regarding airfare pricing in relation

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

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 present day, 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 Commission identified the following documents:

- Political letter sent by Directorate-General for Mobility and Transport to Austrian authorities on 24 July 2020, registered under ARES(2020)3921551;
- E-mails from the Directorate-General for Mobility and Transport (DG MOVE) sent to Austrian authorities:
 - o DG MOVE to Austrian Authorities on 11 June 2020, registered under ARES(2020)3031916;
 - o Austrian Authorities to DG MOVE on 19 June 2020, registered under ARES (2020)3549003;
 - o DG MOVE to Austrian Authorities on 25 September 2020, registered under CHAP(2020)01711/D/009;
 - o Austrian Authorities to DG MOVE on 28 September 2020, registered under CHAP(2020)01711/A/010;
 - o DG MOVE to Austrian Authorities on 28 September 2020, registered under CHAP(2020)01711/D/011;
 - o Austrian Authorities to DG MOVE on 29 September 2020, registered under CHAP(2020)01711/A/012;
 - o DG MOVE to Austrian Authorities on 29 September 2020, registered under CHAP(2020)01711/D/013;
 - o DG MOVE to Austrian Authorities on 29 September 2020, registered under CHAP(2020)01711/D/024;
 - o Austrian Authorities to DG MOVE on 5 October 2020, registered under CHAP(2020)01711/A/025;
 - o DG MOVE to Austrian Authorities on 5 October 2020, registered under CHAP(2020)01711/D/026;
 - o Austrian Authorities to DG MOVE on 6 October 2020, registered under CHAP(2020)01711/A/027;
 - o DG MOVE to Austrian Authorities on 21 October 2020, registered under CHAP(2020)01711/D/014;
 - o DG MOVE to Austrian Authorities on 1 December 2020, registered under CHAP(2020)01711/D/015;
 - o Austrian Authorities to DG MOVE on 1 December 2020, registered under CHAP(2020)01711/A/016;
 - o DG MOVE to Austrian Authorities on 1 December 2020, registered under CHAP(2020)01711/D/017;
 - o Austrian Authorities to DG MOVE on 7 December 2020, CHAP(2020)01711/A/018;

- DG MOVE to Austrian Authorities on 2 February 2021, registered under CHAP(2020)01711/D/019;
- DG MOVE to Austrian Authorities on 3 February 2021, registered under CHAP(2020)01711/D/020;
- Austrian Authorities to DG MOVE on 4 February 2021, registered under CHAP(2020)01711/A/021;
- DG MOVE to Austrian Authorities on 4 February 2021, registered under CHAP(2020)01711/D/022;
- Internal meeting report dated 20 October 2020, registered under ARES(2020)5673598;
- Correspondence between the Directorate-General for Mobility and Transport and the complainant:
 - Complaint dated 16 June 2020, registered under CHAP(2020)01711/A/001;
 - Acknowledgement of receipt sent on 9 July 2020, registered under CHAP(2020)01711/D/002;
 - Holding reply sent to complainant on 3 August 2020, registered under ARES(2020)4074877.

In its initial reply of 24 March 2021, the Directorate-General for Mobility and Transport refused access to these documents based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Mobility and Transport to refuse access to the documents requested based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of inspections, investigations and audits

The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits'.

The documents which you seek to obtain form part of the administrative file of an ongoing CHAP procedure (number CHAP(2020)01711) which concerns Austria's possible initiative on air fares.

CHAP refers to the Commission central IT database used for registering and handling complaints and enquiries received from EU citizens and organisations concerning potential infringement of EU law. By extension, it also refers to Commission investigative procedure related to such complaints.

After investigating the complaint, the Commission may either issue a letter of formal notice opening procedures against the Member State in question, or close the case definitively³. In this regard, I would like to underline that the dialogue with the Austrian authorities and the investigative activities to which the requested documents relate are ongoing and could potentially lead to the opening of infringement proceedings under Article 258 of the Treaty on Functioning of the European Union.

The General Court has interpreted the third indent of Article 4(2) of Regulation (EC) No 1049/2001 among others in its *LPN v European Commission* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure⁴. This confirmed the Court's earlier *Petrie v European Commission* judgment, in which it ruled that '[...] the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure'⁵.

Furthermore, in its *Spirlea v European Commission* judgment, the General Court recognised the importance of 'an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 TFEU, which would be likely to lead to the dispute being brought before the Court'⁶. This judgment relates specifically to EU Pilot investigations. However, CHAP procedures can be assimilated to EU Pilot procedures as both investigations precede a potential opening of infringement proceedings under Article 258 TFEU. In the same judgment, the General Court also observed that the element unifying the Court's reasoning in all of the judgments concerning access to documents in investigation procedures in which a general presumption of refusal of access was recognised, is that access would be 'wholly

³ You can find more information in the Annex of the Commission communication 'EU law: Better results through better application', available on https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.018.01.0010.01.ENG

⁴ Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, and 65-68.

⁵ Judgment of the General Court of 11 December 2001, *Petrie and Others v European Commission*, T-191/99, EU:T:2001:284, paragraph 68.

⁶ Judgment of the General Court of 25 September 2014, *Darius Nicolai and Mihaela Spirlea v European Commission*, T-306/12, EU:T:2014:816, paragraph 57, confirmed by the Judgment of the Court of Justice of 11 May 2017, *Kingdom of Sweden v European Commission*, EU:C:2017:356.

incompatible with the proper conduct of those procedures and is likely to jeopardise their outcome'⁷.

In consequence, the general presumption of inaccessibility applies to all types of ongoing investigation procedures which may lead to the opening of a formal infringement procedure under Article 258 of the Treaty on Functioning of the European Union, including CHAP procedures.

In light of the above case law, I consider that the documents requested are manifestly covered, in their entirety, by the exception referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, as they are placed in the administrative file of the above-mentioned CHAP file.

Public access to these documents, which form part of the dialogue with the authorities of the Member State concerned, would be detrimental to the proper conduct of the investigation. It would compromise the smooth cooperation between the European Commission and the Austrian authorities, which is an essential precondition for the effective fulfilment of the duties of the European Commission. Indeed, it would lead to reduced willingness by the authorities of the Member State concerned to participate constructively in ongoing and future investigations.

Moreover, given the ongoing nature of the procedure in question, the disclosure of the documents requested would expose the relevant European Commission departments to the foreseeable risk of coming under outside pressure, which would be detrimental to the proper conduct of the investigation and undermine its effectiveness. I take the view that the purpose of such investigations is best achieved free from external pressure.

In these circumstances, there is a real and non-hypothetical risk that the disclosure of the requested documents would adversely affect the ongoing above-mentioned investigation and its follow-up. In order for the European Commission to be able to carry out its tasks, there has to be a protected space throughout the different stages of the above-mentioned procedures until the case has been definitively closed.

I must conclude, therefore, that access to the requested document must be denied based on the exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you mention that there is an overriding public interest in obtaining access to the document requested. You mention that 'the public has a right to

⁷ Judgment of the General Court of 25 September 2014, *Darius Nicolai and Mihaela Spirlea v European Commission*, T-306/12, EU:T:2014:816, paragraph 57.

know on what grounds the Commission is investigating and considering the possibility of launching an infringement procedure against a Member State which has taken measures to reduce short-haul flights and tackle climate change, a goal the European Commission has also professed to want.’ You also refer to the principles of transparency, openness, the importance of climate change, participation of the public in the European Commission decision making etc.

Please note that general considerations, such as those mentioned above, cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question⁸.

In light of the above, I must conclude that the arguments you invoke do not demonstrate how the disclosure of the requested documents would contribute, in a concrete manner, to the protection of any public interest that would override the public interest protected by the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. Indeed, I consider that the public interest in this case is better served by refusing access to the document requested in order not to compromise the smooth cooperation between the European Commission and the Austrian authorities and the willingness of the Austrian authorities to participate constructively in ongoing and future investigations.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness⁹, provides further support to this conclusion.

4. PARTIAL ACCESS

As stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.¹⁰

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exception to the right of public access.

⁸ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

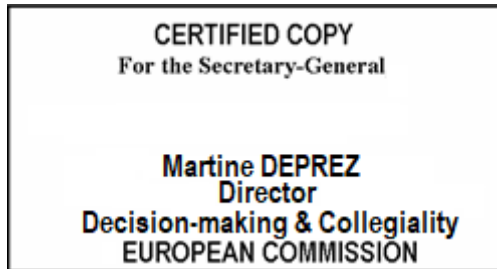
⁹ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

¹⁰ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Ilze JUHANSONE
Secretary-General