



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 30 May 2022

By email

Mr Peter Teffer
Ekko Voorkamer
Bemuurde Weerd WZ 3
3513 BH Utrecht
The Netherlands

[ask+request-10872-
d4034933@asktheeu.org](mailto:ask+request-10872-d4034933@asktheeu.org)

Subject: Request for access to documents

Ref.: Your email of 22 March 2022, registered on 24 March, under reference GestDem 2022/1730

Dear Mr Teffer,

I refer to your above-referenced application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, by which you 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 Director General DG GROW (document reference Ares (2019) 1023442);*
3. *Revised background note of the Legal Service of 20 February 2019 (document reference Ares (2019) 3139320);*
4. *Commission Decision C(2019)1640 final, including draft version(s).*

1. IDENTIFICATION OF THE DOCUMENTS AND ASSESSMENT

The Legal Service has identified the following documents 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 Director General of Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), Directorate-General for Environment (DG ENV) and Directorate-General for Climate Action (DG CLIMA) (document reference Ares(2019)1023442).

¹ OJ L 145, 31.05.2001, page 43.

3. Attached to document 2 is the draft Commission decision on the submission of an appeal before the Court of Justice (document reference Ares(2019)1023442).
4. Revised background note of the Legal Service of 20 February 2019 (document reference Ares(2019)3139320);
5. Commission Decision of 22 February 2019 on the submission of an appeal before the Court of Justice (document reference C(2019)1640 final) .

On 15 May 2019 the Legal Service sent you a reply² to your previous request for access to documents reference GestDem 2019/2114, by which you requested access to “*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*”.

In its reply, the Legal Service identified the four documents indicated above and refused access to them under the exception provided for in Article 4(2), second indent, of Regulation (EC) No 1049/2001 (“*protection of court proceedings*”). In fact, at the time of the reply three appeals were pending before the Court of Justice, lodged by the German Government (Case C-177/19P)³, the Hungarian Government (Case C-178/19P)⁴ and the European Commission (C-179/19P)⁵, against the judgment of the General Court of 13 December 2018 in Joined Cases T-339/16, T-352/16 and T-391/16⁶.

By your email of 22 March 2022, you renew your request for access to the said documents. You indicate that “*the court case related to above-mentioned documents has come to a close with the 18 February 2022 decision, paving the way to full disclosure of the said documents*”.

Accordingly, the Legal Service has proceeded to a new assessment of the documents requested, in the light of the present factual and legal circumstances, and I have come to the conclusion that they must continue to be refused under the exception for the protection of court proceedings laid down Article 4(2), second indent, of Regulation (EC) No 1049/2001, as will be explained below.

2. PROTECTION OF COURT PROCEEDINGS

Article 4(2), second indent, of Regulation (EC) No 1049/2001 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 courts as well as to ensure the principles of equality of arms and the sound administration of justice.

² Ares(2019)319638.

³ C-177/19P, *Germany v. Ville de Paris and others v Commission*:
<http://curia.europa.eu/juris/liste.jsf?num=C-177/19&language=en>.

⁴ C-178/19P, *Hungary v. Ville de Paris and others v Commission*:
<http://curia.europa.eu/juris/liste.jsf?num=C-178/19&language=en>

⁵ C-179/19P, *Commission v. Ville de Paris and others*:
<http://curia.europa.eu/juris/liste.jsf?num=C-179/19&language=en>.

⁶ 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.

The Court of Justice has stated in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P (*API* judgment) that disclosure of pleadings lodged before the Court of Justice in pending court proceedings is presumed to undermine the protection of these proceedings⁷.

In addition, the Court has recognised the existence of a general presumption in respect of the pleadings in court proceedings, so long as those proceedings remain pending⁸.

The Court has also stated in its *API* judgment that with the closure of the proceedings there are no longer grounds to presume that disclosure of the pleadings would undermine the judicial activities of the Court.⁹ However, the Court has admitted the possibility that disclosure of pleadings relating to court proceedings, which are closed but connected to other proceedings which remain pending, may create a risk that the later proceedings might be undermined¹⁰.

In your request, you indicate that “*the court case related to above-mentioned documents has come to a close with the 18 February 2022 decision, paving the way to full disclosure of the said documents*”. However, the Commission considers that although on 13 January 2022 the Court of Justice rendered its judgment in Joined Cases C-177/19P, C-178/19P and C-179/19P, the documents requested must continue to be refused. Indeed, in the said judgment the Court set aside the judgment of the General Court of 13 December 2018 in Joined Cases T-339/16, T-352/16 and T-391/16, partially annulling the Commission Regulation 2016/646¹¹ (*‘the contested regulation’*). More particularly, the Court concluded that the General Court erred in law in holding that the contested regulation is of direct concern to the applicant cities, within the meaning of the fourth paragraph of Article 263 TFEU. In the light of this, the Court of Justice set aside the judgment dismissing the actions for annulment brought by the applicant cities as inadmissible. However, the Court of Justice did not rule on the findings of the General Court by which it declared that the Commission had exceeded its powers to implement Regulation No 715/2007 and annulled the provision of Commission Regulation (EU) 2016/646 setting the oxides of nitrogen limits during the new real driving emission tests (*‘RDE tests’*). Therefore, there are substantive legal issues related to the validity of the contested regulation which have not been adjudicated by the Court of Justice and that are likely to be the subject of future judicial proceedings (for example, requests for a preliminary ruling regarding the validity of the contested regulation).

The documents requested contain an assessment of the judgment of the General Court of 13 December 2018 and deal with the substantive legal issues related to the validity of the contested regulation. More specifically, documents under numbers 1 and 4 are background notes containing a legal analysis of the judgment at hand with a view to a possible appeal against it before the Court of Justice. Those notes were sent to the European Commission’s President’s Cabinet. Document under number 2 is a note to the Directors General of DG GROW, DG ENV and DG CLIMA in view of a Commission decision on the launching of an appeal against the judgment. Documents under number 3 and 5 are respectively the draft Commission Decision and the Commission decision to lodge an appeal before the Court of Justice containing the Commission’s legal position and arguments supporting the appeal.

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 *Ibid.*, paragraphs 130 and 131.

¹⁰ *Ibid.*, paragraph 132.

¹¹ Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 492/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 109, page 1).

In its judgment in Case T-18/15, the General Court ruled that “*the need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial. However, in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link either with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely*”¹².

In the present case, although the documents requested are not pleadings, they are documents whose disclosure is liable to compromise the equality of arms in the context of future proceedings in the sense of the case-law cited above. Indeed, as already stated, there are substantive legal issues, related to the validity of the contested regulation, which have not been adjudicated by the Court of Justice in its judgment of 13 January 2022 in Joined Cases C-177/19P, C-178/19P and C-179/19P. These questions are likely to be the subject of future judicial proceedings (for example, requests for a preliminary ruling regarding the validity of the contested regulation).

Consequently, since the documents requested deal precisely with the substantive legal issues related to the validity of the contested regulation, I consider that it is essential to guarantee their confidentiality in order to preserve the possibility of the Commission to intervene before the Court of Justice in the context of future judicial proceedings concerning the validity of the contested regulation. The criterion of sound administration of justice, the integrity of court proceedings as well as the principle of equality of arms, the aim of which is to ensure a procedural balance between the parties to court proceedings, would be seriously undermined if the documents requested, dealing with particularly sensitive and contentious issues, were disclosed at this point in time. I consider that the likelihood of the interest in the protection of the court proceedings being compromised is not hypothetical, but a real and concrete one.

Finally, the Commission considers that the general presumption acknowledged by the Court in respect of the pleadings in court proceedings covers, by analogy, the documents at hand.

Consequently, I conclude that the documents requested are covered by the exception provided for under Article 4(2), second indent, of Regulation (EC) No 1049/2001 (“*protection of court proceedings*”) and cannot be publicly disclosed.

3. POSSIBILITY OF GRANTING A PARTIAL ACCESS

Please note that, as recognized by the Court of Justice, where the documents requested are covered by the general presumption of non-disclosure, as in the present case, such documents do not fall within an obligation of disclosure, in full, or in part¹³.

¹² Judgment of the General Court of 15 September 2016, Case T-18/15, *Philip Morris v Commission*, ECLI:EU:T:2016:487, paragraph 64. See also judgment of the General Court of 15 September 2016, Case T-796/14, *Philip Morris Ltd v European Commission*, EU:T:2016:483, paragraph 88.

¹³ Judgment of the Court of Justice of 28 June 2012, Case C-404/10P, *Commission v Éditions Odile Jacob*, ECLI:EU:C:2012:393, paragraph 133.

4. OVERRIDING PUBLIC INTEREST

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. 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, of Regulation (EC) No 1049/2001. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the documents requested that would outweigh the public interest in the protection of future judicial proceedings concerning the validity of the contested regulation.

5. 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 Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1 “Transparency, Document Management & Access to Documents”
BERL 7/076
B-1049 Brussels

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

Yours sincerely,

[signed electronically]

Daniel CALLEJA CRESPO