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Cologne, 04. JULI 2019

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**Subject: Your confirmatory application for access to documents**

Reference: Your email of 13 June 2019

Dear Mr Waites,

Thank you for your email dated 13 June 2019, in which you request the European Union Aviation Safety Agency (EASA) to reconsider its decision of 04 June 2019 of refusing to grant access to the following technical documentation concerning to the certification Boeing 737 MAX aircraft models:

- *Technical correspondence with the FAA pertaining to the certification of the Manoeuvring Characteristics Augmentation System (MCAS) on the Boeing 737 MAX (including demonstration of compliance against FAR/CS 25.671 and 25.672, together with description of the specific flight crew training required for MCAS).*
- *Any documents detailing safety concerns relating to the Boeing 737 MAX aircraft following the fatal accidents on 29th October 2018 (Lion Air) and 10th March 2019 (Ethiopian Airlines).*

Your confirmatory application for access to documents has been handled in accordance with Regulation (EC) No 1049/2001,<sup>1</sup> that is applicable to documents held by EASA under Art. 119(1) of Regulation (EU) No 2018/1139.<sup>2</sup>

Your initial application was denied by EASA on the basis of the exception set forth in the third indent of Article 4(2) of Regulation (EC) 1049/2001 to protect the purpose of inspections, investigations and audits. EASA has now reviewed your confirmatory application and decides to maintain its decision to deny you access to the requested documents, since the revision confirmed that the content of the requested documents falls under the system of exceptions provided by Regulation (EC) 1049/2001, as explained in the followings.

As already mentioned in our initial decision, EASA took a mandatory airworthiness action by suspending all flight operations<sup>3</sup> with aircraft models Boeing 737-8 and 737-9 'MAX'.

<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 31 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.3.2001, p. 43).

<sup>2</sup> Regulation (EU) No 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ L 212, 22.8.2018, p. 1–122).

<sup>3</sup> Refer to Emergency Airworthiness Directive (EAD) No. 2019-0051-E and Safety Directive (SD) No 2019-01



This action was triggered by the identification of an unsafe condition resulting from a malfunction of those aircraft models. Before these aircraft models can be returned to service, this malfunction and the consequences thereof have to be thoroughly investigated and the type certificate (TC) holder has to propose corrective actions that are acceptable to the certifying authorities, and in particular to EASA in the EU, to restore the required level of safety. This ongoing design-related investigation, based on certification documentation produced both before and after the accidents, will have to be concluded with a formal EASA decision waiving the suspension of the flight operations.

In addition, the purpose and nature of the requested documents must be also assessed in a wider and more general context. Many of these documents form basis of the initial and continued airworthiness process requiring demonstration of compliance with the applicable certification requirements by the applicant or TC holder. This demonstration exercise is subject to investigation and verification of compliance by the certifying authority at the necessary level.

In the abovementioned investigative processes, cooperation in good faith and mutual confidence between the involved parties are indispensable in order to enable the different stakeholders to express themselves freely and this atmosphere needs to be protected from any interference. This is of fundamental importance for the safety process to work properly, as applicants or TC holders need to feel that they can communicate openly with EASA and they can entrust EASA with any relevant technical information that could assist the decision making process. Therefore, EASA is of the position that the disclosure of the documents would have a bearing on these investigative processes. In particular, EASA takes the view that the release of the documents results in an apparent risk that the open communication between the type certificate holder and EASA would be hampered.

In addition to the design reviews, the two tragic accidents are subject to ongoing safety investigations conducted by the safety investigation authorities of the State of Occurrence respectively. The sole purpose of such investigations is to establish the causes of the accidents and to draw the lessons to be learned to prevent future accidents or incident without apportioning blame or liability. EASA remains committed to support these investigations to draw the necessary conclusions that will contribute to restoration of safety of the operation of these aircraft models. Thus, the same principles of protection must be observed that are mentioned above.

Against this background, we believe that the public disclosure of documents in EASA's possession falling under this request, that are mainly of highly technical nature, could give rise to out of context or incorrect interpretation by those not familiar with the applicable requirements and processes, and that would jeopardize the completion of these investigations. Therefore, these documents shall be protected from disclosure in order to ensure the impartiality and independence of the abovementioned investigations as well as EASA's ongoing decision making process, so that they can be pursued without any external influence or undue pressure.

Additionally, the requested documents relate to the certification of the aircraft models in question, thus they are essential elements of the aircraft certification and validation process. These compliance demonstration documents contain, among others, detailed technical information about the envisaged design of the aircraft type/model, as well as drawings, values, schemes, working methods, calculations and technical deliberations which are the result of high value engineering work developed in several years of technical research. Therefore, the content of these documents is considered sensitive proprietary information and should be treated accordingly, as it relates to the TC holder's respective protected business and technical secrets. The release of such data would severely affect the TC holder by exposing its capabilities to competitors and, consequently, it would specifically and actually undermine its commercial interest. Therefore, they should be protected from disclosure.



EASA has also considered the possibility of granting partial access to the documents. However, it follows from the assessment explained above that the documents in EASA's possession are entirely covered by the relevant considerations and, therefore, no partial access can be granted.

Furthermore, Regulation (EC) 1049/2001 provides that certain exceptions to the right of access must be waived if there is an overriding public interest in disclosure. We acknowledge that there is definitely an interest of the public to know that an aircraft is safe. In order to satisfy this interest, EASA proactively publishes several information on aviation safety and replies to requests for information. In this particular case, the type certificate data sheet of the aircraft is available on EASA's website and that document includes general information on the requirements according to which the aircraft has been certificated, on the technical characteristics of the aircraft and its operational limitations. Furthermore, the bilateral aviation safety agreement, together with its technical implementation procedures, concluded between the EU and US that forms the basis of the validation of the type certificate is also publicly available on our website. EASA continuously publishes airworthiness directives, including their safety rationale, relevant to the type and/or model. EASA also provides, upon request and to the extent possible under the applicable legislation, general information on the model in question. However, you are requesting documents the content of which goes beyond the general public interest to know that the aircraft is safe. These documents contain sensitive data and information having a bearing on the commercial interest of the TC holder as well as on the relevant investigation and decision making processes. EASA finds that you have not demonstrated what kind of overriding public interest is at stake which would prevail over the protection of confidentiality provided by Regulation (EC) No 1049/2001.

Finally, please understand that a confidentiality agreement proposed by you cannot override the protection foreseen by Regulation (EC) No 1049/2009 that is meant to ensure public access to documents. Nevertheless, EASA acknowledges that, as you also emphasize in your confirmatory application, the pilots' community is a key stakeholder in ensuring safety of air operations. As you know, in order to reinforce the line pilot's perspective in the airworthiness certification process, a unique concept, namely the approval of Operational Suitability Data (OSD), was introduced into the aircraft certification process of the EU in 2014. The OSD includes minimum syllabus for type rating, as well as training areas of special emphasis, established according to a process involving operational evaluation in flight. Evaluation subjects are pilots designated by EASA, who are trained and experienced in the base aircraft and having been given the proposed differences training programme for the candidate aircraft. Most of these pilots designated by EASA, either from its own staff or national aviation authorities of Member States, have obtained significant experience in airlines. It is worth noting in this context, that before the return to service of the aircraft models in question, EASA will perform a design review beyond the validation of the design changes proposed by the manufacturer. This will include, among others, an assessment of the differences between the flight crew training for the B737 NG and the B737-8 and -9 MAX models.

In light of these considerations, EASA takes the view that the requested documents in its possession fall under the system of exceptions provided for in Regulation (EC) No 1049/2001. In particular, the disclosure of these documents would undermine, on the one hand, the protection of the purpose of inspection, investigations and audits and, on the other hand, the protection of commercial interest of a natural or legal person, including intellectual property as set forth in the first and third indent of Article 4(2) of the Regulation. In addition, the disclosure of the requested documents would seriously undermine EASA's ongoing decision-making process, as set forth in Article 4(3) of the Regulation. EASA concludes that no overriding public interest has been demonstrated that would set aside the applicability of the abovementioned exceptions and no partial access to the documents can be granted either.

Consequently, EASA is not in the position to provide the requested documents to you.



Means of redress

If you wish to appeal against this decision, the legal remedies open to you are either to lodge a complaint with the European Ombudsman or to institute court proceedings against EASA, under Article 228 or 263 of the Treaty on the Functioning of the EU (TFEU), respectively.

Yours sincerely,

  
Patrick KY

