



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Mr Vincent Harmsen
c/o Simon de Bergeyck
Rue au Bois 216
1150 Brussels

Advance copy by email:
ask+request-3678-e56de39a@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2017/0186

Dear Mr Harmsen,

I refer to your application dated 22 December 2016 in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

In your application you request access to documents *"where the implications of the election of Donald Trump as US president and the effects for the TTIP negotiations were discussed by officials of the European Commission (all DGs including the Secretariat-General and services such as the EEAS) between 9 November and 22 December 2016"*.

As already communicated to you by the Secretariat General on 11 January 2017, your request was attributed to several Directorates-General of the Commission. This letter contains the reply to your request insofar as it concerns DG TRADE documents.

In particular, we have identified the following documents in DG TRADE:

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- (1) a note prepared by the Washington delegation for Commissioner Malmström's visit to Washington DC dated 22 November 2016 (Ares(2017)407622);
- (2) A report prepared by the trade and agriculture section of the Washington delegation dated 10 November 2016 (Ares(2016)6361700);
- (3) A note prepared by DG TRADE on the subject of "*a preliminary outlook of Mr. Trump's trade policy and EU-US trade relations*" dated 13 December 2016 (Ares(2016)6934245);
- (4) A report of meetings between Ignacio Garcia Bercero with civil society and private sector trade experts in Washington on 16 and 17 November 2016 dated 25 November 2016 (Ares(2016)6634471);
- (5) A report prepared by the trade and agriculture section of the Washington delegation dated 8 December 2016 (Ares(2016)6868353); and
- (6) A report of meetings of the Chief negotiators during the inter-sessional round in Washington on 14-18 November 2016 (Ares(2016)6553207).

1. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question poses a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4.1 of Regulation 1049/2001, the institution is required "*to ascertain whether there is any overriding public interest justifying disclosure*".³

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁴ "*the exceptions to that right [...] must be interpreted and applied strictly*".⁵

Having examined the documents in light of the applicable legal framework, I am pleased to release document 5. However, large parts of this document have been marked as falling

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

outside the scope of your request as they concern topics different from those mentioned in your request. A copy of this document is enclosed. Some personal data contained in this document have also been withheld pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001")⁶.

As regards documents 1, 2, 3, 4 and 6, I regret to inform you that access cannot be granted. Large parts of these documents fall outside the scope of your request. The remaining parts, which are relevant to your request, are covered by the exceptions set out in Articles 4.1(a) third indent and 4.1(b) of Regulation 1049/2001. The reasons justifying the application of these exceptions are set out below in Sections 1.1 and 1.2.

1.1. Protection of international relations

Article 4(1)(a) third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations".

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*.⁷ In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest"*.⁸ In that same judgment, the Court added that the success of negotiations depends on the protection of objectives, tactics and fall-back positions of the parties involved and *"that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations"*.⁹

In addition, the General Court stated that *"[...] the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion"* and that *"any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual*

⁶ Regulation (EC) No 45/2001 of the European Parliament and the 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, OJ L 8, 12.1.2001, p. 1.

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

⁸ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁹ *Id.*, paragraph 102.

trust".¹⁰ Hence, "it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations" and "have a negative effect on the negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations".¹¹ Moreover, "in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations".¹²

Documents 1, 2, 3, 4 and 6 contain internal views, opinions, impressions and speculations of Commission staff regarding the impact that the election of President Trump could have on the TTIP negotiations and the US trade policy in general. They also contain internal strategic assessments and tactical considerations regarding the TTIP negotiations, and reveal indirectly concerns and priorities of the EU in the context of its political and trade relations with the US. Some passages contain judgments and assessments of individual staff members regarding the political situation in the US, and report on the views of other interlocutors regarding the impact of the new administration on the US trade policy.

Public disclosure of this information would undermine in a reasonably foreseeable manner the public interest as regards international relations, by revealing strategic and tactical elements that could weaken the position of the EU in the context of its commercial relations with the US. Moreover, putting in the public domain internal views and considerations of Commission staff members regarding the political climate in the US would jeopardise the relationship and the mutual trust between the EU and the US.

Although the TTIP negotiations have now come to a pause while the Commission awaits clarity on the priorities of the new US administration as regards a trade agreement between the EU and the US,¹³ preserving the negotiating position of the EU, its margin of manoeuvre and tactical approaches is important in order not to jeopardise the results achieved so far in the TTIP negotiations, nor any further discussions which may take place in the future between the EU and the US on commercial issues.

1.2. Protection of privacy and integrity of the individual

Article 4(1) (b) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy

¹⁰ Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 119.

¹¹ *Id.*, paragraphs 123-125.

¹² *Id.*, paragraph 126.

¹³ See Commissioner Malmström's blog post at https://ec.europa.eu/commission/2014-2019/malmstrom/blog/ttip-assessment-and-pause_en.

and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

The Court of Justice has ruled that "*where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data*" "*the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety*"¹⁴.

Article 2(a) of Regulation 45/2001 provides that "*'personal data' shall mean any information relating to an identified or identifiable natural person [...]*". The Court of Justice has confirmed that "*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*"¹⁵ and that "*surnames and forenames may be regarded as personal data*"¹⁶, including names of the staff of the institutions¹⁷.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish "*the necessity of having the data transferred*" and additionally "*if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced*". The Court of Justice has clarified that "*it is for the person applying for access to establish the necessity of transferring that data*"¹⁸.

Documents 1 to 6 all contain names and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

¹⁴ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

¹⁵ Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁶ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁷ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁸ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

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
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

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

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'J' and 'L' followed by a horizontal line.

Jean-Luc DEMARTY