



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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***By registered letter with
acknowledgment of receipt***

Mrs Lora Verheecke
Corporate Europe Observatory (CEO)
26, rue d'Edimbourg
1050 Bruxelles

Advance copy by email:
[ask+request-3725-
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Subject: Your application for access to documents – Ref GestDem No 2017/0311

Dear Ms Verheecke,

I refer to your request of 17 January 2017 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered under the above mentioned reference number on 18 January 2017.

Please accept our apologies for the delay in answering to your request. Even though we could agree with you to narrow down the request, a high number of other requests for access to documents were being processed by DG Trade at the same time. So at the end it took a bit longer than expected.

1. SCOPE OF YOUR REQUEST

You requested access to:

"1) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, public consultancies and think tanks in which the Japan-EU Free Trade Agreement (JEFTA) was discussed (between January 2014 and today);

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.

2) minutes and other reports of these meetings;

3) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, public consultancies as well as think tanks regarding the Japan-EU Free Trade Agreement (JEFTA) (between January 2014 and today)".

On 1 March 2017 we sent you a list with 266 documents identified falling under the scope of your request. We also asked if you could narrow down the scope of your request to a more manageable amount of documents, according to article 6(3) of Regulation 1049/2001. This article provides that in the event of an application relating to a very long document or to very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

On 2 March 2017 you selected 35 meeting reports of the initial list. On 7 March you clarified that you will consider your request closed once those 35 reports have been disclosed.

I inform you that of these 35 documents, the report of the ESF meeting of 31 March 2015 (document 20 in that list) was subsequently considered to be out of scope, as the EU-Japan Free Trade Agreement was not discussed at that meeting. One further document, containing the report of an ESF policy committee meeting (document 26 in that list) was found to be a duplicate of document number 15 of 16 December 2014.

Therefore, 33 documents and 2 related annexes have been identified as reports or minutes of meetings with stakeholders under your request. A list of the documents is enclosed in Annex 1. For each of the documents the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², 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 4.2 and 4.3 of Regulation 1049/2001, the institution is required “*to ascertain whether there is any overriding public interest justifying disclosure*”³.

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.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, *"the exceptions to that right [...] must be interpreted and applied strictly"*⁵.

Having examined the requested documents under the applicable legal framework, I am pleased to grant partial access to all the meeting reports identified and to one of the annexes.

In particular, personal data have been redacted in all these documents, pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001")⁶.

In documents 3 and 8, in addition to personal data, additional information was redacted in accordance with article 4(2) first indent (protection of commercial interests). In document 8, additional information was redacted in accordance with articles 4(1)(a) third indent (protection of the public interest as regards international relations).

I regret to inform you that access cannot be granted to the annex to document 8, in accordance with article 4(2) first indent (protection of commercial interests).

Please note that parts of documents that do not relate to your request have been redacted as falling out of scope.

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2 and 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

2.1 Protection of the public interest as regards 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*

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

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

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.

*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.

The General Court found that *"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"*.⁹ Moreover, *"the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union"*.¹⁰

Certain passages in document 8 have been withheld as they reveal the external stakeholders' main business concerns, strategic interests, priorities and their internal assessment and input for the negotiations. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics which the EU could consider pursuing in its trade negotiations.

This information was in general meant for internal use as a basis to establish EU positions, strategies, objectives and way forward on specific aspects of the negotiations. Even if the information contained in these documents was related to the negotiations with Japan, there is a reasonably foreseeable risk that its public disclosure would undermine and weaken the position of the EU in its ongoing trade negotiations with other third countries. Indeed, the information that the EU's trading partners may collect on the basis of the public disclosure of certain detailed positions, concerns, views and strategies of the Commission and of individual stakeholders may allow them to extract specific concessions from the EU in the context of the ongoing negotiations, thus to the disadvantage of the EU's international relations, and the interests of its citizens, consumers and economic operators. Third countries may also anticipate or deduce certain negotiating position of the EU ahead of the trade talks on the basis of the information contained in the withheld passages.

Indeed, the success of trade negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in function of how the discussions evolve in its trade negotiations. Exposing internal views and considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partner to obtain specific results, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations. Moreover, the disclosure of internal views, comments and positions of individual staff members on issues on which an official position has not been adopted would

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

⁹ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

¹⁰ *Id.*, paragraph 125.

weaken the credibility of the Commission in the negotiations as well as lead the EU's negotiating partners to potential misleading conclusions, thus jeopardising the public interest as regards the EU's international relations.

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

The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and 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 data¹¹.

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”¹².

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’”¹³ and that “surnames and forenames may be regarded as personal data”¹⁴, including names of the staff of the institutions¹⁵.

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”¹⁶.

All documents contain personal information, such as names, e-mail addresses, that allow the identification of natural persons. In line with the Commission's commitment to ensure transparency and accountability¹⁷, the names of the Members of Cabinet are disclosed, as

¹¹ Regulation (EC) No 45/2001 of the European Parliament and 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 the free movement of such data, OJ L 8, 12.1.2001, p. 1.

¹² 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.

¹³ 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.

¹⁴ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁵ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁶ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

¹⁷ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

well as the names of the senior management of the Commission (Director level and above). For the private bodies, the names of the CEOs, Presidents, Directors or equivalent are also disclosed.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested without including these personal data.

If you wish to receive these personal data, we invite you to provide us with arguments showing the need for having these personal data transferred to you and the absence of adverse effects to the legitimate rights of the persons whose personal data should be disclosed.

2.3 Protection of commercial interest

Article 4(2) first indent of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure”.

Certain parts in documents 3 and 8, as well as the annex to document 8 have been withheld because they reveal specific views, concerns and interests of the European Services Forum and Cosmetics Europe regarding the negotiations with Japan. They contain commercial priorities, strategies and concerns these stakeholders have. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the entities and companies concerned, as it could be exploited by competitors to undermine their competitive positions in third countries and their relationship with the other economic operators in such markets.

All this information was shared with the Commission in order to provide useful input and support for the EU’s objectives in its trade negotiations with Japan. Economic operators typically share information with the Commission so that the latter can determine how to best position itself in the negotiations in order to protect its strategic interests and those of its industry, workers and citizens. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission, are key elements for the success of the internal and external policies of the EU and its international negotiations. Bringing in the public domain specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have also considered whether the risks attached to the release of the withheld parts of documents 3 and 8 and of the annex to document 8 are outweighed by the public

interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure that the Commission continues to receive useful contributions for its ongoing negotiations with third countries without undermining the commercial position of the entities involved.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 "*if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*". Accordingly, we have also considered whether partial access can be granted to the attachment to document 8. However, this document is entirely covered under the exception set out in Article 4(2) first indent of Regulation 1049/2001 as it is impossible to disclose any parts without undermining the protection of the commercial interests of Cosmetics Europe.

In case you would disagree with the assessment contained in this reply, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, 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
Secretary-General
Transparency unit SG-B-4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,

Jean-Luc DEMARTY

Encl.:

- Annex 1: List of documents
- (Partially) released documents