



EUROPEAN COMMISSION  
Directorate-General for Trade

The Director General

Brussels, **13 AUG 2019**

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

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**Subject: Your application for access to documents – Ref GestDem 2019/2870**

Dear Mr Verbeek,

I refer to your request of 14 May 2019 for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> ("Regulation 1049/2001"), as registered under the above mentioned reference number.

Please accept our apologies for the delay in answering your request, which is mainly due to the high number of requests for access to documents being processed at the same time by the Directorate-General for Trade (hereinafter 'DG TRADE').

**1. SCOPE OF YOUR REQUEST**

Under the present request GestDem 2019/2870, you are requesting access to documents numbered 141 to 165 from the list submitted to you by the European Commission on 21 September 2018 as part of your previous request GestDem 2018/4306.

Like the previous requests related to request GestDem 2018/4306, the present request concerns:

*1) a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society*

<sup>1</sup> 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.

groups, as well as representatives of individual companies, industry associations, law firms, academics, public consultancies and think tanks in which the EU-Indonesia Free Trade Agreement was discussed (between January 2016 and today);

2) minutes and other reports of these meetings;

3) all correspondence (including emails, letters, faxes) 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, academics, public consultancies as well as think tanks regarding the EU-Indonesia Free Trade Agreement (between January 2016 and today);

4) all correspondence (including emails, letters, faxes) and documents (including briefings, memo's, non-papers) shared between DG Trade officials and/or the Commissioner and the Cabinet in which the EU-Indonesia Free Trade Agreement was discussed (between January 2016 and today).

The present request therefore assesses a total of 25 documents.

For ease of reference, a list of the documents falling within the scope of your request is enclosed in Annex 1. For each of them the list provides a description and indicates whether parts or entire documents are withheld and if so, on which grounds 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 law<sup>2</sup>, 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 the institution 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*"<sup>3</sup>.

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

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<sup>2</sup> 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.

<sup>3</sup> *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.

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

Having examined the requested documents under the applicable legal framework, I am pleased to convey that the content of **documents 144, 149, 150, 151, 152, 153, 155, 161, 163, and 165** is fully accessible with the exception of elements concerning the protection of privacy and integrity of the individual, which were redacted pursuant to Article 4(1)(b) of Regulation 1049/2001, and of elements that fall outside the scope of your request (in respect of **documents 151, 152, 153, 155, 161, 163 and 165**).

Partial access is granted to **documents 142, 157 and 160** where, in addition to personal data, some information was redacted as it is covered by either the exceptions set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) and/or Article 4(2) first indent of Regulation 1049/2001 (protection of commercial interest of a natural or legal person).

In addition, **documents 143, 145, 146, 147, 148, 154, 159 and 162** are not disclosed, as they entirely fall outside the scope of your request.

No access is granted to **documents 141, 156 158 and 164**. In addition to parts of the documents, which fall outside the scope of your request, the information contained therein cannot be disclosed. The legal basis for denying access to the information is set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) and/or Article 4(2) first indent of Regulation 1049/2001 (protection of commercial interest of a natural or legal person). Some information in these documents is also protected pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and integrity of the individual).

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 an overriding public interest in the disclosure exists and section 4 considers whether partial access could be granted to the documents withheld.

## **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”*.<sup>5</sup> In this context, the Court of Justice has acknowledged that the institutions enjoy *“a wide discretion*

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

<sup>6</sup> 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"<sup>7</sup>.*

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".<sup>8</sup> 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".<sup>9</sup>*

The EU is currently negotiating a free trade agreement with Indonesia. More generally, under these circumstances it remains important for the EU to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Furthermore, exposing internal views and considerations would weaken the negotiating capacity of the EU as well as, in general, the protection of the public interest as regards international relations.

Certain passages in **document 142** have therefore been withheld as they reveal such views. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics, which the EU could consider pursuing in its ongoing trade negotiations.

In addition, **documents 156 and 158** are not disclosed on the same grounds.

## **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 (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725').

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<sup>7</sup> Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

<sup>8</sup> Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphes 123-125.

<sup>9</sup> *Id.*, paragraph 125.

All documents partially released contain personal information, such as names, e-mail addresses or telephone numbers that allow the identification of natural persons as well as other personal information, like signatures.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.<sup>10</sup>

In its judgment in Case C-28/08 P (*Bavarian Lager*)<sup>11</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable<sup>12</sup>.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, 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.

However, in line with the Commission's commitment to ensure transparency and accountability, the names of the Members of Cabinet and the names of the senior management of the Commission (Director level and above) are disclosed, as well as the names of individuals who are public figures and are acting in their public capacity (Heads of State, Ministers, Ambassadors, MEPs, etc.).

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<sup>10</sup> Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, [ECLI:EU:C:2017:994](#).

<sup>11</sup> Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

<sup>12</sup> Whereas this judgment specifically related to 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

### 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 [...] unless there is an overriding public interest in disclosure".

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent<sup>13</sup>, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy<sup>14</sup>. Accordingly, it must be information that is "known only to a limited number of persons", "whose disclosure is liable to cause serious harm to the person who has provided it or to third parties" and for which "the interests liable to be harmed by disclosure must, objectively, be worthy of protection"<sup>15</sup>.

Some passages in **documents 142, 157 and 160** have been withheld because they contain business sensitive information pertaining to an organisation, a company or group of companies, including details about commercial priorities, objectives, strategies, concerns and interests that they pursue in their respective business domains in the Indonesian market.

In addition, **documents 141 and 164** are not disclosed on the same grounds.

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. Companies 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. Sharing publicly 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 IN DISCLOSURE

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 142, 157 and 160** 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

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<sup>13</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>14</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>15</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

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.

The entirety of **documents 141 and 164** is withheld on the same grounds.

#### **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 could be granted to documents 141, 156, 158 and 164. However, and after a careful review, we have concluded that this is not possible.

The content of those documents is entirely covered by the exceptions described above and it is thus impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply.

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In case you 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:

Secretary-General  
Transparency unit SG-C-1  
European Commission  
BERL 7/76  
1049 Brussels

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



**p-o.** Sabine WEYAND

Encl.:

- Annex 1: List of documents
- Documents plus annexes including fully and partially released documents

