



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary-General

Brussels, 08.04.2014
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Ms Stéphane Horel

**By email only: ask+request-796-
0acc76b6@asktheeu.org**

**DECISION OF THE SECRETARY-GENERAL WITHIN THE MEANING OF ARTICLE 4 OF THE
DETAILED RULES FOR THE APPLICATION OF REGULATION (EC) 1049/2001¹**

**Subject: Confirmatory application for access to a Commission document
reference - GestDem 2013/4499**

Dear Ms Horel,

I refer to your email of 21 February 2014, registered on 26 February 2014, in which you lodge a confirmatory application for access to documents in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter Regulation 1049/2001).

I also refer to our letter of 18 March 2014, extending the time limit for responding to your application, pursuant to Article 8(2) of Regulation 1049/2001.

1. SCOPE OF YOUR REQUEST

In your initial request of 3 September 2013, registered on 6 September 2013 and addressed to the Directorate-General for TRADE (hereinafter DG TRADE), you requested access to the following:

I- on the topic of endocrine disruptors (also spelled: disruptors), all correspondence (including emails), the list of meetings with detailed minutes and any other reports of such meetings between DG [TRADE'S] officials (including the Commissioner and his Cabinet members) and representatives of the following organisations:

¹ OJ L 345, 29.12.2001, p. 94.

- CEFIC
- PlasticsEurope
- European Crop Protection Association (ECPA)
- CropLife America
- Bayer
- BASF
- Dow
- DuPont
- Syngenta
- European Centre for Ecotoxicology and Toxicology of Chemicals (ECETOC)
- American Chemistry Council
- Cosmetics Europe
- L'Oréal
- BusinessEurope
- American Chamber of Commerce to the European Union (AmCham EU)
- American Chemistry Council
- USA Government
- UK Government
- German Government
- French Government

between January 2012 and September 2013.

2- on the topic of endocrine disruptors (also spelled: disruptors), all correspondence (including emails), the list of meetings with detailed minutes and any other reports of such meetings between DG TRADE'S officials (including the Commissioner and his Cabinet members) and DG ENTERPRISE'S officials (including the Commissioner and his Cabinet members), DG SANCO's officials (including the Commissioner and his Cabinet members), DG ENVIRONMENT'S officials (including the Commissioner and his Cabinet members), and Secretariat General' officials.

between January 2012 and September 2013.

DG TRADE identified the following documents as falling within the scope of your request:

- (1) Potential impact of current draft proposal for endocrine disruption criteria, European Crop Protection Association (PP/13/1P/22658 - Rev.3);
- (2) Summary report - meeting with AmCham EU on endocrine disruptors and other TTIP-related issues - 16 September 2013, 10.00-11.00;
- (3) Meeting with ENV, ENTR, EU and US industry on endocrine disruptors in view of future EU-US TTIP negotiations;

- (4) DG ENV draft summary record of the inter-service meeting on endocrine disruptors;
- (5) Message from ECPA to DG TRADE, 21 January 2013, 16:23;
- (6) Email exchange between AmChamEU and DG TRADE, including messages sent on 2 September 2013, 15:05; 3 September 2013, 13:39; 3 September 2013, 18:36 and 13 September 2013, 17:30.

In addition to these six documents DG TRADE identified a number of documents containing email exchanges between different Commission services (hereinafter to be referred to as additional identified email exchanges).

By its letter of 31 January 2014, DG TRADE fully disclosed document 1, partially disclosed documents 2, 5 and 6, and refused access to documents 3, 4 and the additional identified email exchanges. DG TRADE redacted parts of documents 2, 5 and 6 on grounds laid down in Article 4(1)(a), third indent (international relations), Article 4(1)(b) (personal data), Article 4(2), first indent (commercial interests), and Article 4(3) (decision-making process) of Regulation 1049/2001. It withheld documents 3 and 4 and the additional identified email exchanges on the basis of Article 4(1)(a), third indent, and article 4(3) of Regulation 1049/2001.

In your confirmatory application you ask for a review of DG TRADE's position with respect to documents 2, 3 and 4, and the additional identified email exchanges. You do not oppose the redaction of personal data from the documents to which partial access was given. Instead, you request access to the remaining redacted parts of document 2, as well as to documents 3, 4 and the additional identified email exchanges.

2. DOCUMENTS CONCERNED

The following documents are subject to the present decision: documents 2, 3, 4 and the additional identified email exchanges. Document 2 concerns a summary report on the meeting between officials from DG TRADE *with AmCham EU on endocrine disruptors and other TTIP-related issues*. Document 3 concerns a *meeting with ENV, ENTR, EU and US industry on endocrine disruptors in view of future EU-US TTIP negotiations*. Document 4 is the DG ENV' *draft summary record of the inter-service meeting on endocrine disruptors*. Lastly, the additional identified email exchanges concern exchanges between different Commission services regarding the draft summary record of the inter-service meeting on endocrine disruptors, and the drafts of a Commission Staff Working Document on review of the Community Strategy for Endocrine Disruptors, a Commission Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, and a Commission Recommendation on Defining criteria for identification of endocrine disruptors.

3. EXAMINATION AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage. Having carried out a detailed assessment of your request and the documents concerned in light of the provisions of Regulation 1049/2001, I regret to inform you that I have to confirm the initial decision of DG TRADE to partially refuse disclosure of document 2, and to withhold document 3, document 4 and the additionally identified email exchanges, for reasons set out below.

However, I am pleased to announce that full access can be given to two documents which were annexed to document 2:

- (a) *AmCham EU calls for a substance by substance approach to regulate Endocrine Disruptors*, 25 June 2013;
- (b) *AmCham EU Position on endocrine disruption*, 3 September.

4. PROTECTION OF INTERNATIONAL RELATIONS

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

In document 2 DG TRADE redacted fourteen words under the seventh bullet, because – as it argued – *release of the information regarding the tactical approach towards the ongoing EU-US trade negotiations would risk [...] undermining the protection of international relations of the EU and its position when tackling the issue.* Access to document 3 was refused by DG TRADE, because it *contains information regarding the tactical approach on endocrine disruptors in the ongoing EU-US negotiations in which the chemicals sector is of particular importance. By disclosing this tactical information we would risk undermining the protection of international relations of the EU by revealing information regarding the approach towards the ongoing EU-US negotiations, which could have an impact on EU's relations with the country and undermine its position when tackling the issue.*

In the context of the trade relationship between the EU and the US, negotiations on a comprehensive trade and investment partnership, the Transatlantic Trade and Investment Partnership (hereinafter TTIP), are taking place. One of the main objectives of this partnership is to strengthen the compatibility of the regulatory regimes of both the EU and the US. The redacted information in the documents to which you request access relates to subjects that are currently under discussion/ to be discussed as part of the EU-US TTIP negotiations. The undisclosed information concerns the subject of endocrine disruptors, which subject has received a strong interest from outside organisations.

In this respect, I would like to first draw your attention to the fact that Article 4(1)(a), third indent, of Regulation 1049/2001 is of an absolute nature and does not envisage any balancing against a possible overriding public interest. Public access to the undisclosed parts would reveal positions taken and statements made by participants in the preparatory meetings and other information shared between the participants in view of EU-US TTIP negotiations. It is essential for negotiations like these to ensure a level of mutual trust between the negotiating parties, as the General Court recognised in its *in 't Veld* judgment.² In that judgment the General Court decided 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.*³ It continued considering 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 trust.*⁴ Disclosing the redacted parts, and thus revealing certain tactical considerations on the side of the Commission, would influence the level of mutual trust necessary in negotiations of such a large scale. Subsequently, the negotiation power of the EU would be affected and EU's position in these TTIP negotiations would be weakened, which in turn would complicate these negotiations and, through this same mechanism, damage the protection of the public interest as regards international relations.⁵

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent, of Regulation 1049/2001 on the ground of protecting the public interest as regards international relations, is justified, and that access to the withheld part of documents 2 and 3 must be refused on that basis.

5. PROTECTION OF COMMERCIAL INTERESTS

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.*

In document 2 DG TRADE redacted one sentence under the first bullet and one sentence under the fifth bullet on the basis of that the commercial interests of AmChamEU and its members *could be undermined by release of [these] sentence[s] which reveal their strategy on the endocrine disrupters file in the context of ongoing negotiations on TTIP.* After having examined these parts, I have to conclude that I share the analysis made by DG TRADE.

² Judgment of the General Court of 19 March 2013 in case T-301/10, *Sophie in 't Veld v European Commission* (hereinafter T-301/10).

³ T-301/10, § 119.

⁴ Ibid.

⁵ T-301/10, § 123.

For these reasons, I confirm that access to the aforementioned document has to be refused on the basis of the exception set out in Article 4(2), first indent, of Regulation 1049/2001.

6. PROTECTION OF THE DECISION-MAKING PROCESS

Article 4(3) of Regulation 1049/2001 reads as follows:

Access to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

DG TRADE redacted one sentence under the fourth bullet in document 2 *as it contains sensitive information relating to the EU's internal decision-making process regarding endocrine disruptors. Disclosure of this information would reveal the EU's position and would undermine the Commission's decision-making process.* With respect to documents 3 and 4 DG TRADE informed you that *both meeting reports contain sensitive information regarding the potential adoption by the EU of horizontal criteria for the identification of endocrine disruptors. The adoption of such horizontal criteria has an important impact on the preparation of specific endocrine disruptor criteria in the context of the EU Plant Protection Products Regulation No 1107/2009 (cf. Annex II para. 3.6.5 of Regulation 1107/2009) and the EU Biocidal Products Regulation No 528/2012 (cf. Article 5(3) of Regulation 528/2012). The issue remains open and has not yet been definitely resolved.* DG TRADE decided not to fully or partially disclose the additional identified email exchanges *because the disclosure would undermine the Commission's internal decision-making process, as the issue discussed in those emails remains open and has not yet been definitely resolved.*

The undisclosed (parts of the) documents all concern an issue which is still open in the on-going TTIP negotiations. Document 4 and the additional identified email exchanges contain opinions for internal use relating to drafts of a staff working document, a communication and a recommendation on endocrine disruptors. The Commission still has not decided on the content of these documents.

Disclosure of the information withheld by DG TRADE would lead to pre-mature conclusions and undue external pressure as it concerns the sensitive subject of endocrine disruptors, which has received a lot of outside interest from organisations. This, in turn, would negatively influence the decision-making process and the EU-US negotiations. Public access to the undisclosed parts would reveal certain tactical considerations which in light of the on-going negotiations between the EU and the US on the TTIP would be detrimental to the mutual trust between the negotiating parties, as explained under section 4 of this confirmatory reply.

Therefore, I consider that the use of the exception under Article 4(3) of Regulation 1049/2001 is justified.

7. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions under Article 4(2) and Article 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure, i.e. outweigh the protected interest.

In your confirmatory application, you do not mention any overriding public interest that would outweigh the protection of the commercial interests (Article 4(2), first indent, of Regulation 1049/2001) or of the decision-making process (Article 4(3) of Regulation 1049/2001). Nor have I been able to identify any public interest in the full disclosure of the documents that would outweigh the protection of the commercial interests or the decision-making process. Consequently, I consider that in this case there is no overriding public interest that would outweigh the protection provided for in Article 4(2), first indent, and Article 4(3) of Regulation 1049/2001.

8. PARTIAL ACCESS

I have also examined the possibility of granting further partial access to the requested documents in accordance with Article 4(6) of Regulation 1049/2001. However, further partial access is not possible considering that the information relating to the EU-US negotiations, reference to commercial information and internal opinions on drafts of Commission' documents fall entirely under the exceptions of Article 4 of Regulation 1049/2001, as explained above.

9. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Please find enclosed copies of documents (a) and (b).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Day', with a stylized flourish at the end.

Catherine Day

Enclosure: documents (a) and (b)