



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels
TRADE/SW/E1 (2021) 650205

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

Peter Teffer
Ekko Voorkamer
Bemuurde Weerd WZ 3
3513 BH Utrecht
The Netherlands

Advance copy by email:
ask+request-8834-
cc51a1d3@asktheeu.org

Subject: Your application for access to documents – Ref GestDem 2020/7533

Dear Mr Teffer,

I refer to your application dated 4 December 2020, with which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ('Regulation 1049/2001'), registered the same date under the above mentioned reference number.

Please accept our apologies for the delay in preparing the reply to your request, which is mainly due to a high number of access to documents requests being processed at the same time by DG Trade.

1. SCOPE OF YOUR REQUEST

In your request, you asked for access to the following type of documents (between 14 October 2015 and 31 December 2016):

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).

- *All documents related to the European Commission's communication about the 2016 Dutch referendum on the EU-Ukraine association agreement, including lines to take;*
- *All e-mails, minutes and notes of conversations, between the Commission and the Netherlands related to the outcome of the 2016 Dutch referendum on the EU-Ukraine association agreement;*
- *All e-mails, minutes and notes of conversations, between the Commission and Ukraine related to the outcome of the 2016 Dutch referendum on the EU-Ukraine association agreement.*

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 pose 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 Article 4(2) and Article 4(3) 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 documents⁴, ‘*the exceptions to that right [...] must be interpreted and applied strictly.*’⁵

In reply to your request, I can inform you that we have identified **5** documents that fall within the scope of your request:

- An internal e-mail exchange of 28.9.2015 between the Commission services entitled “*RE: NL referendum on EU UA FTA - follow up*” Ares(2016)2997394 (**document 1**)
- Briefing EU-Ukraine Summit 2016 ARES (2016)7089844 (**document 2**)

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 52-64.

⁴ See Regulation 1049/2001, recital (4).

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

- Briefing for meeting with Ukraine on 13 November 2015 ARES(2021) 735705 (**document 3**)
- Briefing for the International Trade and Industry Conference 12 November 2015 ARES(2021) 735829 (**document 4**)
- Briefing for the Commissioner’s visit to Vienna 22 February 2016 Ares(2021)736582 (**document 5**).

Copies of the accessible documents are enclosed to this letter.

Having examined the requested documents under the applicable legal framework, I am pleased to grant you partial access to the following **documents**:

In **documents 1 and 3** names and other personal data have been redacted pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 2018/1725. Hence, the main content of these documents relevant to your request is accessible.

In **document 1** in addition to personal data, additional information was redacted as it is covered by the exception set out in article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations).

Please note that parts of **documents 1, 2, 3 and 5** that do not relate to your request have been redacted as falling out of scope.

The reasons justifying the application of the above-mentioned exceptions are set out below in sections 2.1 and 2.2.

2.1 Protection of the public interest as regards international relations (document 1)

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 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*’⁶. In this context, the Court of Justice has acknowledged that the institutions enjoy ‘*a wide discretion for the purpose of determining whether the*

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35.

*disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest*⁷.

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’*⁸. 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’*⁹.

Disclosure of the full content of the documents requested by you would undermine the protection of the public interest as regards international relations, because they include detailed comments and positions of the Commission, which would reveal strategic reflections and legal considerations on issues related to the EU-Ukraine Association Agreement. While the ratification process is now completed, the proper implementation and enforcement of the Agreement is an ongoing process that requires regular exchanges and discussions with Ukraine to solve issues that may be arising. In order to do so effectively, mutual trust between both parties is essential. Revealing such strategic reflections and legal considerations could therefore undermine such trust between the EU and Ukraine and hence undermine the EU’s international relations with Ukraine as well as other partners that are referred to in these comments.

2.2 Protection of the privacy and integrity of the individual (documents 1 and 3)

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation (EC) No 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/EC¹⁰ (‘Regulation 2018/1725’).

⁷ Judgment in *Council v Sophie in ‘t Veld*, C-350/12P, EU:C:2014:2039, paragraph 63.

⁸ Judgment in *Sophie in ‘t Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ *Id.*, paragraph 125.

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

Documents 1 and 3 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.

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.¹¹ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.¹²

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, 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.¹⁴

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.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

¹¹ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

¹² Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

¹³ 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.

¹⁴ 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.

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, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents 1, 2, 3, 4 and 5 as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. Means of redress

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.

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
European Commission
Transparency, Document Management & Access to Documents
BERL 7/76
Rue de la Loi 200/Wetstraat 200
1049 Brussels
Belgium

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

Yours sincerely,



Sabine WEYAND

Enclosures: 5 documents (partially) released