



## EUROPEAN COMMISSION

DG for Internal Market, Industry, Entrepreneurship and SMEs

The Director-General

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Mr Martin PIGEON  
Corporate Europe Observatory  
26, rue d'Edimbourg  
1050 Bruxelles

Registered mail with  
acknowledgement of receipt

Advance copy by email:  
[ask+request-1666-  
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Dear Mr Pigeon,

**Subject: Your application for access to documents pursuant to Regulation (EC)  
No 1049/2001 regarding public access to European Parliament,  
Council and Commission documents – Ref No GestDem 2014/6151  
4<sup>th</sup> batch**

We refer to your e-mail dated 17/12/2014 in which you make a request for access to documents, registered on 19/12/2014 under the above mentioned reference number.

### **Content of the request**

**Your request concerns the following information:** the correspondence (in all forms) as well as meeting minutes (including summaries), in the period between January 2010 and December 2013, on the subject of Trade Secrets and Confidential Business Information (in particular the preparation of the European Commission's draft Directive on the protection of trade secrets), between DG Internal Market and Services as well as Commissioner Barnier and his cabinet, on the one hand, and the following organisations, on the other hand:

- The Trade Secrets and Innovation Coalition (TSIC); White & Case LLP and Hill & Knowlton; and the following members of the TSIC: Alstom, CEFIC, DuPont de Nemours, Michelin, Nestlé, Procter & Gamble and Solvay;

- IFRA (International Fragrance Association); EFPIA (European Federation of Pharmaceutical Industries and Associations); ECPA (European Crop Protection Association); BusinessEurope; AFEP; MEDEF; and
- Hogan Lovells and Baker & McKenzie.

### **The first three batches of documents**

DG Internal Market, Industry, Entrepreneurship and SMEs already replied to you as regards the first three batches of documents by letter of 10 February 2015 (Ref. Ares(2015)551709); by letter of 19 March 2015 (Ref. Ares(2015)1212892) and of 10 April 2015 (Ref. Ares(2015)1543970).

### **The last batch of documents**

The **fourth and last batch of documents** relates to the correspondence and meeting reports between DG Internal Market and Services of the European Commission, on the one hand, and Baker and McKenzie, as regards a tender procedure (MARKT/2011/128) for a study on trade secrets protection and the implementation of the contract for such study. *N.B. some correspondence with Baker and McKenzie was included in the first batch, as it was related to the public conference organised in June 2012 and related follow-up work (pilot survey).*

**A list of the documents that fall within your request is attached.** It has been divided into an A list (documents in relation to the tender procedure) and B list (documents related to the implementation of the contract). Given the wide formulation of your request, this list of documents relates to the correspondence with and meeting reports of meetings with *Studio Professionale Associato a Baker & McKenzie* and it is established to the best of our knowledge.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that **most of these documents can only be partially disclosed**. Some parts of the documents have been blanked out as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation, namely those set out in Article 4(1)(b), as regards privacy, and Article 4(2)1<sup>st</sup> indent, as regards the protection of the commercial interest of natural and legal persons.

*Article 4(1)(b), as regards privacy.*

Most of the documents to which you have requested access contain personal data (e.g. such as names of individuals acting for the Commission).

Pursuant to Article 4(1) (b) of Regulation (EC) No 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 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 data<sup>1</sup>.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>2</sup>. 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 to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and 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 expunged from this 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.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, 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 5/327  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

*Article 4(2)1<sup>st</sup> indent, as regards the protection of the commercial interest of natural and legal persons*

This exception applies to the following documents: in the **A list**: doc.3 and annex 4b to doc.4; in the **B list**: annex 1a to doc.1, doc.2, annexes 10a to 10j to doc.10; annex 27a to doc.27, annexes 28a, 28b, 28c, and 28d to doc.28, annex 29a to doc. 29, annex 30a to doc.30, annexes 31a, 31b, 31c and 31d to doc.31, annexes 32a, 32c, 32d and 32f to doc. 32, annex 35a to doc.35, annex 37a to doc.37, doc. 38, annexes 38a and 38b to doc.38, doc.39, annex 41a to doc.41, annexes 42a, 42b and 42c to doc.42, annex 43a to doc.43, annexes 45a, 45b and 45d to doc.45, annex 46b to doc.46, annex 49a to doc.49, doc. 50, annex 50a to doc.50, doc. 51, doc. 53, annexes 57a and 57c to doc.57, annexes 58a, 58b

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<sup>1</sup> OJ L 8 of 12.1.2001, p. 1

<sup>2</sup> Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

and 58c to doc. 58, annexes 60a, 60b and 60d to doc.60, doc. 63, doc. 64, doc. 71, doc. 74, doc. 80, annex 80ter a to doc. 80ter, annex 81ter a to doc. 81ter, annex 85a to doc.85, annexes 86a, 86b and 86c to doc.86, annexes 87a and 87b to doc.87, annex 89b to doc.89, annex 92a to doc.92, annex 94a to doc. 94, doc. 95, annexes 95a and 95b to doc.95, doc. 96, doc. 97, doc. 98, annex 101a to doc.101, annexes 104a and 104b to doc.104, annex 106b to doc.106, annex 107a to doc.107, annex 108a to doc.108, annexes 109a and 109b to doc.109, doc. 112, annexes 112a, 112b and 112d to doc.112, annex 113a to doc.113, annex 114a to doc.114, annex 115a to doc.115, annex 118b to doc. 118, annex 120b to doc.120, doc. 121, annexes 121a and 121b to doc.121, doc. 123, annex 123a to doc.123, doc. 124, doc. 125, doc. 126, doc. 127, doc. 128, annex 128a to doc.128, doc. 129, annex 130a to doc.130, annex 135b to doc.135, doc. 139, doc. 141bis, annex 141bis a to doc.141bis and annex 144a to doc.144.

- Documents 3 and annex 4b to doc.4 of the A list and annex 1a to doc.1, doc.2, annex 80ter a to doc. 80ter, annex 81ter a to doc. 81ter, doc. 141bis, annex 141bis a to doc.141bis of the B list. These documents contain third party's commercially sensitive data (e.g. bank account data, financial results, balance sheets and audit reports, data on clients and work performed); they also contain third party confidential information of relevance for the tender in question which is proprietary and specific to the tenderer and not in the public domain (e.g. methodology, organisation of the work). Disclosure of such information would reveal the financial performance of those parties (Baker & McKenzie) to competitors and would therefore affect their competitive position. Disclosure of such information would also severely affect the commercial reputation or reputation in terms of know-how/expertise of the third parties concerned (Baker & McKenzie) as well as their intellectual property (including proprietary know-how). As a result, such disclosure would harm the commercial interests of those parties, including their intellectual property.
- Documents: annex 4b to doc. 4 of the A list; and annex 35a to doc.35, doc. 38, annexes 38a and 38b to doc.38, doc.39, annex 46b to doc.46, doc. 50, annex 50a to doc.50, doc. 51, annexes 57a and 57c to doc.57, docs. 71, 74, 80, 95, 96, 97, 98, 112, annexes 112a and 112b of doc.112, docs. 123 and 139 of the B list. These documents contain Commission staff opinions on how third parties (Baker & McKenzie) met the requirements of the invitation to tender as well as on the performance of the contract by Baker & McKenzie and the staff (legal and economic experts) devoted by Baker & McKenzie to that performance. Certain passages (i.e. the evaluation form) could be considered or perceived as being negative with regard to those third parties or the individual concerned (Baker & McKenzie's experts). Disclosure of those parts can severely affect the commercial reputation or reputation in terms of know-how/expertise of those third parties and/or individuals. Such disclosure could give rise to potential misrepresentation of the quality of the tender submitted by Baker & McKenzie and the quality of the study performed by Baker & McKenzie and its experts. Such occurrence would have adverse effects on the reputation of Baker & McKenzie and its experts, thereby, harm their commercial interests. [N.B. Documents including Commission services comments on the preliminary work of Baker & McKenzie related to preparation of the questionnaires for the survey have however been disclosed to the extent that the draft questionnaire for the survey was publicly presented at the June 2012 Conference and participants at that Conference were invited to provide comments on that draft questionnaire].

- Documents: annex 27a to doc.27, annexes 28a, 28b, 28c, and 28d to doc.28, annex 29a to doc. 29, annex 30a to doc.30, annexes 31a, 31b, 31c and 31d to doc.31, annexes 32a, 32c, 32d and 32f to doc. 32, annex 35a to doc.35, annex 37a to doc.37, doc. 38, annexes 38a and 38b to doc.38, doc.39, annex 41a to doc.41, annexes 42a, 42b and 42c to doc.42, annex 43a to doc.43, annexes 45a, 45b and 45d to doc.45, annex 46b to doc.46, doc. 50, annex 50a to doc.50, annexes 57a and 57c to doc.57, annexes 58a, 58b and 58c to doc. 58, annexes 60a, 60b and 60d to doc.60, doc. 80, annex 85a to doc.85, annexes 86a, 86b and 86c to doc.86, annexes 87a and 87b to doc.87, annex 89b to doc.89, annex 92a to doc.92, annex 94a to doc. 94, annexes 95a and 95b to doc.95, annex 101a to doc.101, annexes 104a and 104b to doc.104, annex 106b to doc.106, annex 107a to doc.107, annex 108a to doc.108, annexes 109a and 109b to doc.109, annex 113a to doc.113, annex 114a to doc.114, annex 115a to doc.115, annex 118b to doc. 118, annex 120b to doc.120, doc. 121, annexes 121a and 121b to doc.121, annex 123a to doc.123, doc. 124, doc.128, annex 128a to doc.128, annex 130a to doc.130, and annex 135b to doc.135 of the B list. These documents or annexes to the cover messages contain preliminary findings and assessments of Baker & McKenzie, resulting from the study, performed by Baker & McKenzie for the Commission on trade secrets and confidential business information in the internal market. Those findings and assessments are preliminary as, at the stages of the First Interim Report, Second Interim Report and successively the stage of the draft Final Report, they were still incomplete and subject to final checks. They reflect only the stage of the study at those moments. Disclosure of those parts can severely compromise the commercial interests of Baker & McKenzie. First, as described above, those annexes concern work in progress and they do not represent the final view of Baker & McKenzie. Disclosure could give rise to potential misrepresentation of the quality of the study performed by Baker & McKenzie. Such occurrence would have adverse effects on the reputation of Baker & McKenzie and, thereby, harm their commercial interests. Secondly, disclosure of those parts would reveal the know-how of Baker & McKenzie for carrying out the study and drawing up the Final Report which, if known to competitors, would give them an advantage in their business activities to the detriment of Baker & McKenzie. [N.B. Documents related to the preliminary work related to preparation of the questionnaires for the survey have however been disclosed to the extent that the draft questionnaire for the survey was publicly presented at the June 2012 Conference and participants at that Conference were invited to provide comments on that draft questionnaire].
- Documents: annexes 10a to 10j to doc.10, annex 112d to doc.112, annex 144a to doc.144 of the B list. These documents are documents published by third parties and subject to copyright. Providing a full copy of those documents would undermine the commercial interest of those third parties, in particular their intellectual property rights. For this reason, only the first page (with the title and publication details) is provided. In any event, it is noted that several of those documents are publicly accessible in the Internet, either directly or in specialised websites (such as ssrn: Social Science Research Network). In the case of annex 144a to doc.144, this concerns an article published by a legal periodical. Access to that document may require subscribing to the legal periodical, the purchase of the individual article or accessing the legal periodical in a specialised library (e.g. University).

- Documents: annex 49a to doc.49, doc. 53, doc. 63, doc. 64, doc. 124, doc. 125, doc. 126, doc. 127, doc. 128, doc. 129 of the B list. These documents (e-mails or attachments to emails) contain other relevant documents (previous emails or previous attachments to emails) to which full access has not been granted. In those cases, the relevant passages or attachments concerning the previous documents have been removed and you are kindly invited to look at the relevant previous documents: annex 41a for annex 49a; doc. 51 for docs. 53, 63 and 64; doc.123 for doc. 124; doc.124 for docs. 125, 126, 127 and 128; doc. 128 for doc.129.

For these reasons, I consider that disclosing those documents in their entirety would undermine the commercial interests of Baker and McKenzie and therefore, the exception laid down in Article 4(2), first indent, of Regulation 1049/2001 applies to the data that are omitted in the edited version of these documents.

Pursuant to Article 4(2) of Regulation 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the parts of the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly has to be public and, secondly, overriding: i.e. in this case, it must outweigh the interests protected under Article 4(2), first indent, of Regulation 1049/2001.

*Prima facie* I fail to see which public interest, of overriding nature, could justify the disclosure of all the information concerned. One could perhaps invoke that disclosure of such information is important because the Commission submitted in November 2013 a legislative proposal for the protection of trade secrets against their unlawful acquisition, use or disclosure. However, it is important to underline that the Commission only used the final version of the Baker and McKenzie study for the preparation of the legislative proposal and that final version has already been made public. The interim reports and the draft Final report, in their different versions, are therefore irrelevant for those purposes. Financial data and other commercially sensitive data contained in the tenders as well as Commission staff assessment of the tenders or data related to the technical transfer of files are also irrelevant for those purposes. It is noted that the impact assessment which accompanies the Commission proposal lists more than 180 reference documents which were used for the preparation of the impact assessment and referred to as such in the document (see pages 277 and seq.). All of these documents without exception are publicly accessible.

In any case, I note that your request has not invoked any public interest that would justify the disclosure of the parts of the documents 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.

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 5/327  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

*Access to the documents concerned*

Concerning several annexes to documents they have already been made public by the Commission in the following website:

[http://ec.europa.eu/internal\\_market/iprenforcement/trade\\_secrets/index\\_en.htm#maincontentSec3](http://ec.europa.eu/internal_market/iprenforcement/trade_secrets/index_en.htm#maincontentSec3)

This concerns: annex 30b to doc.30, annex 32b to doc. 32, annexes 43b and 43c to doc.43, annexes 44a and 44b to doc.44, annex 45c to doc.45, annexes 47a, 47b and 47c to doc.47, annexes 57b and 57d to doc.57, annexes 59a, 59b, 59c and 59d to doc.59, annex 60c to doc.60, annexes 61b, 61c and 61d to doc.61, annex 63a to doc.63, annex 86d to doc.86, annexes 87c and 87d to doc.87, annexes 88a, 88b, 88c, 88d and 88e to doc.88, annex 89a to doc.89, annexes 90a and 90b to doc.90, annexes 91a and 91b to doc.91, annexes 102a, 102b, 102c and 102d to doc.102, annexes 103a, 103b, 103c and 103d to doc.103, annexes 104c and 104d to doc.104, annexes 105a, 105b, 105c, 105d and 105e to doc.105, annex 106a to doc.106, annexes 116a, 116b, 116c and 116d to doc.116, annexes 117a, 117b, 117c and 117d to doc.117, annexes 118a, 118c and 118d to doc.118, annexes 119a, 119b, 119c, 119d and 119e to doc. 119, annexes 120a and 120c to doc.120, annex 125a to doc.125, annex 126a to doc.126, annexes 131a, 131b, 131c and 131d to doc.131, annexes 132a, 132b, 132c and 132d to doc.132, annexes 133a, 133b, 133c and 133d to doc.133, annexes 134a, 134b, 134c and 134d to doc.134, annexes 135a and 135c to doc.135, annexes 138a, 138b and 138c to doc.138, annex 140a to doc.140 of the B List. Therefore, in accordance with Article 10(2) of Regulation 1049/2001, you are kindly invited to access those documents at that place.

The remaining documents are partially or fully disclosed as attachments to this letter

You may reuse these documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the document/documents. Please note that the Commission does not assume liability stemming from the reuse.<sup>3</sup>

However, please note that some documents were received by the Commission from third parties. These documents are disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. These documents do not necessarily reflect the position of the Commission and cannot be quoted as such.

Yours faithfully,



Daniel Calleja

Encl.                      List of documents  
Documents A1-A4, B1-B20, B21-B40, B41-B60, B61-B75, B76-B80, B81-B98, B99-B99bis, B100-B112, B113-B127, B128-B144.

<sup>3</sup> See the Decision of the Commission of 12 December 2011 (2011/833/EU), OJ L 330/39 of 14 December 2011 for details; this Decision does not apply to documents for which third parties hold the copyrights, Article 2 (2) (b).