



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Mr Fabian Flues
Rue d'Edimbourg, 26
1050 Brussels
Belgium

Advance copy by email:
ask+request-3594-73e66331@asktheeu.org

Subject: Your application for access to documents – Ref. GestDem No 2016/6798

Dear Mr Flues,

I refer to your application of 1 December 2016 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

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

1. SCOPE OF YOUR REQUEST

You would like to receive access to "*all communication (including letters, e-mails and faxes) as well as meeting records (including agendas, Commission briefing papers and minutes) between officials at DG Trade (including the Commissioner and her cabinet) and the federal Belgian government, the Walloon regional government or any other sub-federal Belgian entity on the Comprehensive Economic and Trade Agreement (CETA) since 1 January 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.

We have identified seventeen documents falling under the scope of your request, some of which include annexes.

We enclose for ease of reference a list of these documents in Annex I. For each of them, 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 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 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.

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, partial access is granted to documents 1, 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 16 and 17.

In particular, the annexes 1 and 2 to document 1 and the annexes to documents 7 and 10 are fully disclosed. As regards the documents 8, 12, 13 and 14 and the cover letters in documents 1, 2, 3, 7, 9, 10, 11, 16 and 17 only personal data have been redacted, pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 (“Regulation 45/2001”)⁶.

In the covering emails of documents 4 and 5, in addition to personal data protected under article 4(1)(b) of Regulation 1049/2001, additional information was redacted in

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.

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.

accordance with article 4(1)(a) third indent (protection of the public interest as regards international relations) and article 4(3) first subparagraph (protection of the institution's decision-making process).

I regret to inform you that access is not granted to documents 6 (incl. annex) and 15, as well as to annexes 3, 4 and 5 to document 1 and the annexes to documents 2, 3, 4, 5, 9, 11, 16 and 17, as they are fully covered by the exceptions of articles 4(1)(a) third indent and 4(3) first subparagraph. Some information has been also withheld in the cover letters in documents 6, 11, 15, 16 and 17 pursuant to article 4(1)(b). Please also note that some parts of document 15 have been removed as they fall out of the scope of your request.

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 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*

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

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.

*negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union"*¹⁰.

Annexes 3, 4 and 5 to document 1, annexes to documents 2, 3, 4, 5, 6, 9, 11, 16 and 17 as well as some passages in covering emails of documents 4, 5 and 15 contain information exchanged with Belgian officials and authorities in connection with the approval by the relevant Belgian parliaments and governments of the text of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, needed in order for Belgium to approve the agreement in the Council of the European Union.

The information contained in these documents was in general meant to reply to the concerns raised by some counterparts in the Belgian governments and legislatures, and therefore to allow Belgium to be able to establish its position in the Council. As the information contained in these documents was related to the negotiations with Canada, 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 contained in these documents would allow the EU's trading partners to draw conclusions with respect to certain detailed positions, concerns, views and strategies of the Commission and of its Member States. This in turn may allow them to extract specific concessions from the EU in the context of other 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 positions of the EU ahead of future 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 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.

Furthermore, some of the withheld passages reveal, even if indirectly, the position of Canada. Such disclosure is likely to upset the mutual trust between the EU and Canada and thus undermine their relations. It may also jeopardise the mutual trust between the EU and other trading partners as they may fear that in the future their positions would be exposed and they may as a result refrain from engaging with the EU. Negotiating partners need to be able to confide in each other's discretion and to trust that they can

¹⁰ *Id.*, paragraph 125.

engage in open and frank exchanges of views without having to fear that these views and positions may in the future be publicly revealed. As the Court recognised in Case T-301/10 *in't Veld v Commission*, “[...] establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise”¹¹.

Please note that some of the Commission Declarations included in Annex 2 to document 5 correspond to the final versions that were eventually adopted, such as the Commission Declaration in respect of the protection of the precautionary principle in CETA, the Commission Declaration in respect of the content of the legal basis, the Commission Declaration in respect of water, or the Commission Declaration on CETA Joint Committee. The texts of these Declarations can be found following this link: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017X0114%2802%29>.

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 45/2001. In this respect, the Court of Justice has ruled that “the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data”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

¹¹ Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

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.

*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.

Covering emails of all documents and all letters contain personal information, such as names, email addresses or telephone numbers that allows the identification of natural persons. In line with the Commission's commitment to ensure transparency and accountability¹⁷, the names of the members of Cabinet (not in administrative positions) are disclosed. The names of staff occupying senior management positions (Deputy Director-General and Director) 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 the institution's decision-making process

Article 4(3) of Regulation 1049/2001 provides that "*[a]ccess 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*".

The jurisprudence of the EU Courts has also recognized that "*the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process*"¹⁸ and that the capacity of its staff to express their opinions freely must be preserved¹⁹ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court put it, the result of such self-censorship "*would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]*"²⁰.

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.

¹⁸ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

¹⁹ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

²⁰ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

The decision-making process for the ratification of the agreement is still ongoing. After the signature of the Council and the consent of the European Parliament, CETA will enter into force provisionally, once it has also been ratified on the Canadian side. CETA will be fully implemented once the parliaments in all Member States ratify the agreement according to their respective domestic constitutional requirements, and after the Council has adopted the decision on conclusion.

Annexes 3, 4 and 5 to document 1, annexes to documents 2, 3, 4, 5, 6, 9, 11, 16 and 17 as well as some passages in covering emails of documents 4, 5 and 15 contain information exchanged with the Belgian officials and authorities in connection with the approval by relevant Belgian parliaments and governments of the text of CETA, which was needed in order for Belgium to approve the agreement in the Council of the European Union.

The above-mentioned documents contain views, opinions and remarks of both the European Commission and several counterparts in the Belgian governments and legislatures regarding specific content of various drafts of documents included in the final CETA package approved by the Council which was of particular interest to Wallonia. Disclosing the withheld documents and passages would seriously undermine the decision-making process of the institution in this specific case, as it would reduce the free exchange of views between the Commission and Member States by exposing views and considerations to undue pressure and unfounded conclusions, at a time when such free exchanges of views are particularly important given the ratification process for CETA is ongoing in Member States, including Belgium.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in article 4(3) first subparagraph of Regulation 1049/2001 applies unless there is an overriding public interest in the disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for the institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution "*is acting in its legislative capacity*"²¹ as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act²².

The documents withheld under article 4(3) all pertain to the domain of the executive functions of the EU as they concern trade negotiations. In this context, the Court has acknowledged that "*public participation in the procedure relating to the negotiation and*

²¹ Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

²² *Id.*, paragraph 67.

the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations"²³.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making prevails over transparency in this specific case. In particular, disclosure at this stage of documents withheld under article 4(3) of Regulation 1049/2001 would undermine the possibility of achieving the best possible outcome in the public interest. Disclosing the withheld documents would expose the EU to have to justify preliminary positions which eventually evolved in the decision-making process and which may endanger the relationship with an important institutional partner.

Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding the Commission's decision-making process.

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 annexes 3, 4 and 5 to document 1, the annexes to documents 2, 3, 4, 5, 6, 9, 11, 16 and 17 and document 15.

After a careful review, we have concluded that the annexes 3, 4 and 5 to document 1, the annexes to documents 2, 3, 4, 5, 6, 9, 11, 16 and 17 and document 15 are entirely covered by the exceptions described above as it is impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply.

As regards the covering emails of document 6 we have come to the conclusion that the releasable content of these documents would be meaningless. According to the General Court, the Commission is entitled "*to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant*"²⁴.

In case you would disagree with the assessment provided 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


²³ Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.

²⁴ Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.

Secretary-General
Transparency unit SG-B-4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'M' followed by a long, sweeping horizontal stroke that curves upwards at the end.

For Jean-Luc DEMARTY, absent
Mauro PETRICCIONE
Deputy Director General

Encl.: - List of documents;
- Released documents.