



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,
trade.a.5(2017)4998346

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

Ms Lora Verheecke
Corporate Europe Observatory
26 Rue d'Edimbourg
1050 Bruxelles

Advance copy by email:
ask+request-4454-43304ea3@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2017/4007

Dear Ms Verheecke,

We refer to your application for access to documents dated 7 July 2017 under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on the same date under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

You requested access to "*all communication, including emails, and documents (agenda, minutes, list of participants, etc) related to the meeting between Cecilia Malmström and American Chamber of Commerce to the European Union (AmCham EU) on 19th June 2017*".

We have identified the following documents that fall under the scope of your request:

- A chain of emails containing an invitation by the American Chamber of Commerce to the European Union (AmCham EU) for a meeting with Commissioner Malmström and a confirmation by her Cabinet (Ares(2017)1803634) ("**document 1**"); and
- the report of the meeting which took place on 19 June 2017 (Ares(2017)3781327) ("**document 2**").

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.

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 carefully examined the documents identified above in light of the applicable legal framework, I am pleased to inform you that partial access is granted to the requested documents.

In particular, in document 1 only names and other personal data have been removed pursuant to Article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001⁶ (“Regulation 45/2001”). Hence, the main content of this document is accessible.

In document 2, in addition to personal data, other information was redacted pursuant to Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations and Article 4(3) first subparagraph of Regulation 1049/2001 concerning the protection of the ongoing decision-making process.

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 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 See 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.

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.”

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”⁷. More specifically, the General Court has stated 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”⁸. It added that “in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations”⁹.

Document 2 is the report of the meeting between Commissioner Malmström and CEOs of American multinationals representing AmCham EU's Executive Council. Some sentences in paragraphs three and four have been deleted as they contain information as regards the EU's current assessment of the situation and open issues of the trade relations with the United States and one other trading partner and how possibly to take these issues forward.

The disclosure of the redacted sentences would give indications of the EU's strategy and interests that may or may not be pursued vis-à-vis the US and other countries. 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 fall back positions in function of how the discussions evolve. Exposing those considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partner to extract specific concessions, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations. Therefore, these sentences shall remain undisclosed in order to ensure the protection of the public interest as regards international relations.

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

⁷ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, 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 126.

of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

The Court of Justice has ruled that *"the provisions of Regulation No 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation No 1049/2001 seeks to obtain access to documents containing personal data "*.¹⁰

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'"*¹¹ and that *"surnames and forenames may be regarded as personal data"*,¹² including names of the staff of the institutions.¹³

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 prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*¹⁴.

Documents 1 and 2 contain names and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed, on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

However, names of Commissioner Malmström and Members of her Cabinet, not occupying administrative positions, are disclosed.

2.3. Protection of the institution's decision-making process

Article 4(3) first subparagraph 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*

¹⁰ 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.

¹¹ 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.

¹² Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹³ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁴ Judgment in C-127/13 P *Guido Strack v Commission*, EU:C:2014:2250, paragraph 107 and judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

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"*¹⁵ and that the capacity of its staff to express their opinions freely must be preserved¹⁶ 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 [...]"*¹⁷.

As already mentioned, some sentences are redacted in document 2 as they contain information about the EU's current assessment of the EU's trade relations with the United States and one other trading partner. In addition, other sentences on the negotiations with the United Kingdom under article 50 TEU are withheld in document 2.

In all these matters internal discussions are still ongoing and it has not yet been decided how to take these issues forward. Those sentences have therefore been redacted. Exposing opinions and considerations expressed in the mentioned meeting would subject the Commission to external pressure and unfounded conclusions both from external stakeholders and from our negotiating partners. It would also restrict the free exchange of views between the Commission and other relevant actors. Finally, it would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches. Protecting the confidentiality of internal views and opinions allows for the parties involved to speak freely and frankly.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for institution concerned by the request to balance the particular interest protected by non-disclosure against the public interest. In this respect, the public interest is of particular relevance where the institution *"is acting in its legislative capacity"*¹⁸ as transparency and

¹⁵ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

¹⁶ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

¹⁷ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

¹⁸ 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.

openness of the legislative process strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act¹⁹.

The redacted sentences in document 2 pertain all to the domain of the executive functions of the EU.

After careful assessment, I have concluded that on balance, preserving the ongoing decision-making process in the context of different trade-related issues, as well as the negotiations with the UK, prevail over transparency in this specific case. The public interest would instead be better served by the possibility for the Commission to complete the decision-making process in question without external pressure.

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-B4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

Encl.: released documents

¹⁹ *Id.*, paragraph 67.