



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Ref. Ares(2018)93845 - 08/01/2018

Brussels,
trade(2017)6946262

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

Ms Lora Verheecke
Corporate Europe Observatory (CEO)
Rue d'Edimbourg 26
1050 Brussels

Advance copy by email:
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Subject: Your application for access to documents – Ref GestDem No 2017/6171

Dear Ms Verheecke,

I refer to your request of 26 October 2017 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered with reference number GestDem 2017/6171 on the same date.

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 Miguel Ceballos Baron and the European Council on Foreign Relations (ECFR) on 19th July 2017*".

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

- An email from the ECFR to the Deputy Head of Cabinet of Commissioner Malmström requesting a meeting ("**document 1**") and an attachment containing a note prepared by the ECFR ("**annex to document 1**") (both registered under the reference number Ares(2017)3384259);
- a chain of emails containing the reply by the Cabinet confirming the meeting to take place on 19 July 2017 (Ares(2017)3384699) ("**document 2**"); and
- the report of the meeting on 19 July 2017 ("**document 3**") (Ares(2017)5867375).

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 examined the requested documents under the applicable legal framework, I am pleased to grant access to the content of **documents 1, 2 and 3**. In documents 1 and 2 some 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.

I regret to inform you that access cannot be granted, however, to the **annex to document 1**, as this document is protected by the exceptions set out in Article 4(1)(a) third indent (protection of the public interest as regards international relations) and Article 4(2) first indent (protection of commercial interests) of Regulation 1049/2001.

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 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”.

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.

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 annex to document 1 is a note prepared by ECFR containing policy options, recommendations, and interim conclusions on the topic of foreign investment screening, with a focus on specific actors and initiatives. As such, this note was meant for internal use as a basis to inform the internal reflections in relation to EU positions, strategies and objectives on various aspects of the initiative on screening of foreign direct investment. It also includes specific considerations with regard to the impact of this initiative on the relations of the EU with third countries. Disclosing the content of this document may provide the partners of the EU with information on specific strategic concerns, options and objectives which could be used to the detriment of the EU and its Member States, including in the context of ongoing or future trade negotiations. This would ultimately undermine in a reasonably foreseeable manner the public interest as regards the international relations of the EU.

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"*.

Documents 1 and 2 contain personal information, such as names, telephone numbers or e-mail addresses.

The applicable legislation in this field is Regulation (EC) No 45/2001. Article 2(a) of Regulation 45/2001 provides that *"'personal data' shall mean any information relating to an identified or identifiable natural person [...]"*. In this respect, the jurisprudence of the EU Courts has clarified that activities of a professional nature may fall within the notion of *'private life'*⁹ and that *"surnames and forenames may be regarded as personal data"*¹⁰, including names of the staff of the institutions¹¹.

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 *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁰ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹¹ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

In accordance with Article 8(b) of Regulation 45/2001 personal data may 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"*¹². I consider on the basis of your application, that these conditions have not been met. Therefore, in order to ensure the protection of the privacy and integrity of the individuals concerned, the personal data in question cannot be transferred.

However, in line with the Commission's commitment to ensure transparency and accountability¹³, the names of the Members of Cabinet are disclosed. For the ECFR, the name of the Director for the Asia Program is also disclosed.

2.3 Protection of commercial interest

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"*.

The annex to document 1 is a note marked "private and confidential" prepared by ECFR and shared with the Commission as an input for reflections and discussions in relation to the initiative on the screening of foreign direct investment. Public disclosure of this document would harm in a reasonably foreseeable manner the commercial interests of the authors of the document and of ECFR, including breaching their intellectual property rights.

The commercial interests of ECFR and its experts consist in conducting researches and producing policy papers that are paid for. The result of their work is protected by intellectual property rights. Disclosing the annex to document 1 would mean, in practice, putting it in the public domain for free and against the intellectual property rights of both the authors of the document and the organisation for which they work. This assessment is confirmed by ECFR and its authors, who upon consultation by DG TRADE, opposed the release of the document on the ground that this would undermine their commercial interests.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(2) first indent of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have also considered whether the risks attached to the release of the annex to document 1 are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of ECFR and the authors of the document. The public interest in this specific case rather lies in the protection of the legitimate confidentiality interests of the entity and

¹² The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"* (C-127/13 P, paragraph 107; see also judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77).

¹³ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

individuals concerned to ensure that the Commission continues to receive useful contributions without undermining the commercial position of the actors involved.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 "*[i]f 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 annex to document 1. However, this document is entirely covered by the exceptions set out in Article 4(1)(a) third indent and in Article 4(2) first indent of Regulation 1049/2001 as it is impossible to disclose any parts without undermining the protection of the international relations of the EU and of the commercial interests of ECFR.

In case you would disagree with the assessment contained 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
Secretary-General
Transparency unit SG-B-4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

- (Partially) released documents