



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

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By registered letter with acknowledgment of receipt

Katie Hodgetts
Friends of the Earth Europe
Mundo B, 26 Rue D'Edimbourg,
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Belgium

Advance copy by email: Katie Hodgetts
ask+request-4884-4f9e5ad2@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2017/7550

Dear Ms Hodgetts,

I refer to your application of 19 December 2017 in which you make a request for access to documents under Regulation (EC) No 1049/2001 (“Regulation 1049/2001”),¹ registered on 20 December 2017 under the reference number GestDem 2017/7550.

We would like to apologise for the delay in replying to your request, which is due to a large number of complex access to documents requests pending simultaneously with DG TRADE.

1. SCOPE OF YOUR REQUEST

You requested access to:

"documents (such as agendas, Commission briefing papers and minutes) that relate to meetings as well as correspondence (such as emails, letters, faxes) between Commissioner Cecilia Malmström, Members of her cabinet, DG Trade members of staff, and the following:

- Indonesian Embassy in Brussels*
- Indonesian Ministry of Foreign Affairs*
- Indonesian Ministry of Trade*

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.

- Indonesian Ministry of Industry
- Indonesian negotiation team for the EU-Indonesia free trade agreement, CEPA concerning:

- The revision of the renewable energy directives
- Commission response to resolution 2016/2222 of the European Parliament
- EU-Indonesian free trade negotiations for CEPA (in as far as they relate to palm oil), since January 1st, 2016".

We have identified 10 documents² that fall within the scope of your request. A list of these documents is contained in Annex 1, and copies of the documents released are enclosed. 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.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law³, 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.

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 requested documents under the applicable legal framework, I am pleased to release **documents 1, 3, 4, 5, 6, 7, 8 (including its annex), and 10.**

In particular, full access is granted to documents 3 and 4,⁶ and the annex to document 8.

As regards documents 1, 5, 6, 7, 8 and 10, personal data were removed pursuant to Article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No

² One of these documents, i.e. document n. 8, contains an annex.

³ 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.

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 Documents 3 and 4, which contain correspondence between Commissioner Malmström and the Minister of Trade of Indonesia, are publicly available on the website of Commissioner Malmström's correspondence (accessible online at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/correspondence_en).

45/2001⁷ ("Regulation 45/2001"). In line with the Commission's commitment to ensure transparency and accountability,⁸ the names of Members of Cabinet, senior management of the Commission at the Director level and above, as well as names of senior managers of external entities, ambassadors and political representatives of third countries, are disclosed.

Moreover, please note that parts of documents 5, 6 and 7 fall outside the scope of your request as they concern issues unrelated to the subject matter of your application.

I regret to inform you that unfortunately access cannot be granted to **documents 2 and 9**. The contents of these documents fall almost entirely outside the scope of your request. The remaining parts (which consist in three sentences in document 2, and two sentences in document 9) are entirely covered by the exception to the right of access set out in Article 4.1(a) third indent (protection of the public interest as regards international relations). Moreover, document 2 contains personal data which are protected under Article 4(1)(b) of Regulation 1049/2001.

The reasons justifying the application of the exceptions are set out below in Sections 2.1 and 2.2. Section 3 contains an explanation of why partial access cannot be granted to documents 2 and 9.

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".⁹ Moreover, 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" as well as "reveal, indirectly, those of other parties to the negotiations".¹⁰ 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

⁷ 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.

⁸ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

⁹ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

¹⁰ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations."¹¹

Document 2 contains the report of a meeting between Commissioner Malmström and the Minister of Foreign Affairs of Indonesia in which a number of topics were discussed, including trade and investment policy and relations with third countries. There are only three sentences in this document which relate to the subject-matter of your application. These contain suggestions, comments and possible proposals of Indonesia on specific aspects related to trade in palm oil, the disclosure of which is likely to upset the relations between EU and Indonesia, thus undermining the international relations of the EU.

Document 9 contains the joint report of the EU and Indonesia and the operational conclusions following a meeting on the Trade and Sustainable Development Chapter. Almost the entire content of this document relates to topics other than palm oil. The only two sentences that fall within the scope of your application reveal details of the negotiating position of Indonesia. Public disclosure of this information is likely to undermine the mutual trust which is essential to the success of the ongoing negotiations between EU and Indonesia.

In particular, putting in the public domain details of the negotiating position of Indonesia, or proposals, comments and ideas expressed in the course of the discussions with the EU, would undermine in a reasonably foreseeable manner the climate of confidence and trust which is essential in the context of ongoing negotiations. Negotiating partners need to be able to confide in each other's discretion and to trust that they can engage in open and frank exchanges of views without having to fear that that these views and positions may in the future be exposed. As the General Court acknowledged 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.*"¹² If the redacted information were to be disclosed, other negotiating partners of the EU may fear that in the future their negotiating positions would be revealed as well, and they may as a result refrain from engaging with 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."

The Court of Justice has ruled that "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential

¹¹ *Id.*, paragraph 126.

¹² *Id.*

provisions, become applicable in their entirety."¹³

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'*¹⁴ and that *"surnames and forenames may be regarded as personal data"*¹⁵, including names of the staff of the institutions¹⁶.

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"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data."*¹⁷

Documents 1, 2, 5, 6, 7, 8 and 10 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.

3. 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 documents 2 and 9. As mentioned above, large parts of these documents concern issues unrelated to the subject matter of your applicant, and therefore fall outside its scope. The remaining parts are entirely covered by the exceptions described above and it is impossible to disclose any parts without undermining the protection of the international relations of the EU. Moreover document 2 contains personal data protected under the exception set out in Article 4.1(b) of Regulation 1049/2001.

¹³ 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

¹⁴ 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.

¹⁵ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁶ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁷ *Id.*, paragraph 107; see also judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

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 5/282
1049 Bruxelles

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

Yours sincerely,

A handwritten signature in blue ink, consisting of a stylized 'J' and 'L' followed by a horizontal line.

Jean-Luc DEMARTY

Enclosures (2):

- Annex 1: list of documents
- Documents disclosed