



## EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

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

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**Subject: Your application for access to documents – Ref. GestDem No 2017/7598**

Dear Ms Verheecke,

I refer to your application of 18 December 2017 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001<sup>1</sup> ("Regulation 1049/2001"). Your request was registered on 21 December 2017 under the above mentioned reference number.

Please accept our apologies for the delay in replying 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 "*documents (correspondence, summary of meetings, position papers, public meetings, etc.) which contain information relating to the creation of all CETA committees. This include the CETA Joint Committee, the Regulatory Cooperation Forum, the Committee on Trade in Goods, the Committee on Agriculture, the Joint Management Committee for Sanitary and Phytosanitary Measures, the Financial Services Committee, the Committee on Government Procurement and the Committee on Services and Investment. This list is by no means exhaustive.*"

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<sup>1</sup> 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.

Before getting into a detailed analysis of your request under Regulation 1049/2001, I would like to highlight that the work on establishing the institutional framework for CETA between the EU and Canada to govern the agreement is still ongoing. CETA itself already determines the scope of responsibilities, frequency of meetings and level of participation of the CETA committees. Further operational details are being worked out in the rules of procedure to be adopted by the committees/dialogues. Work is therefore ongoing to prepare a proposal for a Council Decision on the Rules of Procedure for CETA to empower the Commission to adopt these in the relevant committees/dialogues.

At the same time, the Commission is also working on other strands of work such as for example to establish a consultative mechanism. To this end the Directorate-General for Trade (hereinafter DG TRADE) published earlier this year on its website a call for interest to be part of the CETA-EU domestic advisory group covering both labour and environment issues.

The Commission is also preparing the first meeting of the Regulatory Cooperation Forum (tentatively scheduled to take place mid-2018) and to that end has published a call for proposals open to all stakeholders with a view to develop a list of potential topics where EU and Canadian regulators can meaningfully cooperate on in the future. The link can be found here: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1781>.

As regards your request, we have identified in DG TRADE 23 documents which are listed for ease of reference 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 law<sup>2</sup>, 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*”<sup>3</sup>.

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<sup>2</sup> 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.

<sup>3</sup> *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.

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents<sup>4</sup>, *"the exceptions to that right [...] must be interpreted and applied strictly"*.<sup>5</sup>

Having examined the requested documents under the applicable legal framework, full or partial access is granted to all documents, except for documents 1c, 1d and 8, which are fully withheld.

Documents 1a, 1b and 9a are fully disclosed. In documents 2a, 3, 4, 6a, 9, 10, 12, 13, 14 and 16 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<sup>6</sup> ("Regulation 45/2001").

In addition to personal data, in documents 1, 2, 5, 6, 7, 11 and 15 additional information was redacted in accordance with article 4(1)(a) third indent (protection of the public interest as regards international relations), and in documents 1, 5, 7, 11 and 15, in accordance with 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 1c, 1d and 8, as they are fully covered by the exceptions of articles 4(1)(a) third indent and 4(3) first subparagraph. Some information is also protected in document 1c in accordance with article 4(1)(b).

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"*.<sup>7</sup> In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the purpose of determining whether the*

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<sup>4</sup> Regulation (EC) No 1049/2001, recital (4).

<sup>5</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

<sup>6</sup> 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.

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

*disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest".<sup>8</sup>*

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".<sup>9</sup> 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 negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union".<sup>10</sup>*

While the documents you are requesting do not fall under negotiation of an international agreement but rather of its implementation, there is still an equivalent need to safeguard the EU's position or reflection process leading to its proposals. Therefore, the reasoning of the General Court described above applies by analogy to the relationship between the EU and Canada, in the context of the implementation of CETA.

The withheld parts of documents 1 and 7 as well as documents 1c, 1d and 8 had been drawn up to facilitate the Commission's reflection on the way forward as regards CETA institutional provisions and the Rules of Procedure. Internal work on the matter is still ongoing. After it will be finalised, the Commission will consult the Member States through a Proposal for a Council Decision on the Rules of Procedure to enable their adoption by both Parties.

The withheld part of document 2 contains the Commission's comments on the Canadian position as regards the setup of the specialised committees.

The withheld parts of documents 5, 11 and 15 define initial suggestions or ideas of the topics to be proposed for a discussion in the specialised committees or Regulatory Cooperation Forum. These still need to be reflected on in the Commission before the final list is put forward.

The withheld part of document 6 contains a possible date for the CETA Joint Committee meeting suggested by the political leaders. This date has not been confirmed and publicly announced. Unilateral disclosure of it by the EU at this point in time would undermine our bilateral relations with Canada.

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<sup>8</sup> Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

<sup>9</sup> Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

<sup>10</sup> *Id.*, paragraph 125.

The success of the implementation of CETA will depend to a large extent on the cooperation of the parties and mutual trust needed in addressing some aspects of the agreement. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre in order to agree the Rules of Procedure with Canada but more importantly in defining its priority topics for discussion under the specialised Committees/dialogues or Regulatory Cooperation Forum. There is a foreseeable and not purely hypothetical risk that exposing these internal views and considerations would weaken the capacity of the EU, reduce its margin of manoeuvre, and thereby undermine the strategic interests of the EU, the interests of its citizens, consumers and economic operators and consequently, 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 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>11</sup> In this respect, 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 provisions, become applicable in their entirety”.<sup>12</sup>

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’”<sup>13</sup> and that “surnames and forenames may be regarded as personal data”,<sup>14</sup> including names of the staff of the institutions.<sup>15</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” and additionally “if there is no reason to assume that the legitimate interests of the data subjects might be

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<sup>11</sup> 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 the free movement of such data, OJ L 8, 12.1.2001, p. 1.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>15</sup> 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".<sup>16</sup>*

Documents 1, 1c, 2, 2a, 3, 4, 5, 6, 6a, 7, 8, 9, 9a, and 10-16, contain names, phone or office numbers, initials, titles or signatures that are redacted for privacy protection.

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.

However, the names of senior management of the Commission (at Director level and above) are 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"*<sup>17</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>18</sup> 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 [...]"*.<sup>19</sup>

Documents 1, 1c, 1d, 5, 7, 8, 11, 15 contain initial reflections, views, opinions and remarks of different Commission services that were meant for internal use in the context of an on-going decision-making process which should lead to the adoption of the Rules of Procedure, and or proposals for topics to be discussed in the Regulatory Cooperation Forum, or specialised committees in CETA. Disclosing the withheld documents and passages would seriously undermine the decision-making process of the institution, as it would reduce the free exchange of views of the Commission by exposing views and considerations of individual interlocutors and meeting participants to possible external manipulation, undue pressure and unfounded conclusions.

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<sup>16</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

<sup>17</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

<sup>18</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

<sup>19</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

Protecting the confidentiality of certain documents allows for the actors involved in the decision-making process to speak frankly and freely, and in this way, the Commission is able to feed this information into its decision-making process. Reducing this degree of protection would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that *"constructive form of internal criticism, given free of all external constraints and pressures"* which is *"designed to facilitate the taking of decisions"*. Ultimately, this would affect the quality of the consultations and deliberations, and seriously undermine the Commission's decision-making process.

### **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"*<sup>20</sup> 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 act<sup>21</sup>.

The documents withheld under article 4(3) all pertain to the domain of the executive functions of the EU as they concern the implementation of a trade agreement.

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. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making process in question without external pressure.

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 *"[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document*

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<sup>20</sup> 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.

<sup>21</sup> *Id.*, paragraph 67.

*shall be released". Accordingly, we have also considered whether partial access can be granted to documents 1c, 1d and 8.*

After a careful review, we have concluded that they 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.

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

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Jean-Luc DEMARTY

Encl.: - List of documents  
- Released documents