




## 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 2018/1824**

Dear Ms Verheecke,

I refer to your request of 27 March 2018 for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> (hereafter ‘Regulation 1049/2001’), registered under the above mentioned reference number on 27 March 2018.

I further refer to our subsequent email correspondence which has enabled us to narrow down the scope of your request.

Please accept our apologies for the delay in providing you with this reply. This is due to a high number of complex and detailed requests for access to documents being dealt with by the Directorate-General for Trade (hereafter ‘DG TRADE’) at the same time.

### **1. SCOPE OF YOUR REQUEST**

You requested access to:

- 1) Minutes and other reports of the meetings of trade counsellors in Tokyo (between 25 March 2013 and today);*

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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.

- 2) *A list of meetings of staff in the Tokyo delegation with individual companies, industry associations, law firms, think tanks and lobby consultancies in which the EU-Japan EPA negotiations were discussed (between 25 March 2013 and today);*
- 3) *Minutes, correspondence and all other documents and reports related to these meetings.*

As indicated in our e-mail of 20 April 2018, our preliminary search identified 55 documents falling under the scope of point 1 of your request and 108 documents falling under the scope of points 2 and 3 of your request. We asked if you could narrow down the scope of your request to a more manageable amount of documents, according to article 6(3) of Regulation 1049/2001. This article provides that in the event of an application relating to a very long document or to very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

We then reduced the scope of your request by limiting the documents to the most recent minutes of meetings, that is from the years 2017 and 2018. Consequently, your application is understood to cover:

- 1) *minutes and other reports of the meetings of trade counsellors in Tokyo (between January 2017 and 27 March 2018);*
- 2) *minutes of meetings of staff in the Tokyo delegation with individual companies, industry associations, law firms, think tanks and lobby consultancies in which the EU-Japan EPA negotiations were discussed (between January 2017 and 27 March 2018).*

Please note that five of the documents identified in our original list were found on closer scrutiny to be outside the scope of your request. The total number of documents identified under your request therefore is 27 (25 main documents and two related annexes). A list of the documents is enclosed in Annex 1. For each of the documents the list provides a description and indicates whether parts are withheld and if so, under which grounds 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 poses a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the

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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.

protection of the interest covered by the exception. Third, if the institution 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>.

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, I am pleased to grant full access to document 23 and wide access to the remaining 26 documents and annexes.

In particular, in documents 1-3, 5-13, 15, 16, 18-22, 24, 25 and annexes to document 18, only names and other 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"). Hence, full access to the relevant policy content has been granted.

In documents 4, 14 and 17, in addition to personal data, additional information was redacted as it is covered either by the exception set out in article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations or by the exception set out in Article 4(2) first indent of Regulation 1049/2001 (protection of the commercial interest of a natural or legal person), or by both.

Please note that the parts of documents that do not relate to the EU-Japan EPA negotiations have been redacted as falling outside 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.

## **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*

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<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.

<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.

*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 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>*

Certain passages in document 4 have been withheld as they reveal the external stakeholders' main business concerns, strategic interests, priorities and their internal assessment and input for the negotiations. The Commission typically collects information from the stakeholders in order to establish the EU position. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics which the EU could consider pursuing in its trade negotiations.

This information was in general meant for internal use as a basis to establish EU positions, strategies, objectives and way forward on specific aspects of the negotiations. The agreement has not yet been ratified and continued confidential treatment is necessary.

More generally, even beyond the EPA it remains important for the EU when effectively promoting its interests vis-à-vis Japan through the various channels available to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Exposing internal views and considerations would weaken this capacity of the EU and consequently, the protection of the public interest as regards international relations. This aspect is also relevant for ongoing and future negotiations with other trade partners.

## **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

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

<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.

*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. 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>11</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>12</sup> and that *"surnames and forenames may be regarded as personal data"*<sup>13</sup>, including names of the staff of the institutions<sup>14</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 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>15</sup>.

Except document 23, all the documents contain personal information, such as names or e-mail addresses, that could allow the identification of natural persons, as well as other personal information like signatures.

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.

However, in line with the Commission's commitment to ensure transparency and accountability, the names of the Members of Cabinet are disclosed, as well as the names of the senior management of the Commission (Director level and above). For the private bodies, the names of their main representatives are also disclosed.

### **2.3 Protection of commercial interests**

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*

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<sup>11</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>12</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>13</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>14</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>15</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

*interests of a natural or legal person [...] unless there is an overriding public interest in disclosure".*

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent<sup>16</sup>, it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy<sup>17</sup>. Accordingly, it must be information that is "*known only to a limited number of persons*", "*whose disclosure is liable to cause serious harm to the person who has provided it or to third parties*" and for which "*the interests liable to be harmed by disclosure must, objectively, be worthy of protection*"<sup>18</sup>.

Document 4 is the summary of a meeting between Tokyo Delegation staff and the Union des Industries Ferroviaires Européennes (UNIFE). Document 14 is the summary of a meeting between Tokyo Delegation staff and the International Federation of Phonographic Industry (IFPI). Document 17 contains the report of the meeting between the EU Delegation and EFPIA Japan.

Some passages in documents 4, 14 and 17 have been withheld because they contain business sensitive information pertaining to a company, group of companies or an industry organization, including details about commercial priorities, objectives, strategies, concerns and interests which they pursue in their respective business domains in the Japanese market.

All this information was shared with the Commission in order to provide useful input and support for the EU's objectives in its trade negotiations. Economic operators typically share information with the Commission so that the latter can determine how to best position itself in the negotiations in order to protect its strategic interests and those of its industry, workers and citizens. Ensuring that the Commission continues to receive access to this information and that the industry engages in open and frank discussions with the Commission are key elements for the success of the internal and external policies of the EU and its international negotiations. Sharing publicly specific business or industry related information may prevent the Commission from receiving access to such information in the future.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

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 withheld parts of documents 4, 14 and 17 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 the companies concerned. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders

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<sup>16</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>17</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>18</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

concerned to ensure that the Commission continues to receive useful contributions for its ongoing negotiations with third countries without undermining the commercial position of the entities involved.

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Please note that some of the documents were received by the Commission from third parties. They are disclosed for information only and cannot be re-used without the agreement of the originators, who may hold a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

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In case you 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, Document Management & Access to Documents (SG-C.1)  
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.:

- Annex 1: List of documents
- Documents plus annexes including fully and partially released documents