



**EUROPEAN COMMISSION**

Directorate-General for Trade

The Director General

Brussels,  
trade.dga1.b.2(2018)2383148

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

Ms Pia Eberhardt  
Corporate Europe Observatory  
Rue d'Edimbourg 26  
1050 Brussels

***Advance copy by email:***  
[ask+request-5333-  
217f81a3@asktheeu.org](mailto:ask+request-5333-217f81a3@asktheeu.org)

**Subject:       Reply to your access to documents request registered under  
GestDem No. 2018/1916**

Dear Ms Eberhardt,

I refer to your request for access to documents under Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001") dated 3 April 2018 and registered on 4 April 2018 under the reference number GestDem 2018/1916.

**1.   SCOPE OF YOUR REQUEST**

In your application you seek access to:

*1) minutes and other reports of the meetings of the Energy Charter's subgroup on modernisation, which took place in February and March 2018;*

*2) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of the Energy Charter Secretariat (since May 2017);*

*3) minutes and other reports of these meetings;*

---

<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.

4) *all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of the Energy Charter Secretariat (since May 2017);*

5) *a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies (including law firms) and business associations, in which the Energy Charter Treaty (ECT) was discussed (since March 2017);*

6) *minutes and other reports of these meetings;*

7) *all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies (including law firms) and business associations, in which the Energy Charter Treaty (ECT) was discussed (since March 2017).*

We have identified two documents falling under the scope of your request:

- 1) Flash report of the meetings in the Energy Charter on ECT Modernisation, 1-2 February 2018 (Ares(2018)2690979) (“document 1”);
- 2) Report of the meeting between the Director-General of DG Trade and the Secretary General of the ECT, 7 February 2018 (Ares(2018)750226) (“document 2”).

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

In accordance with settled case law, 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<sup>2</sup>.

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>.

---

<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 carefully examined your request in light of the applicable legal framework **partial access is granted to document 2**. In particular, 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 ("Regulation 45/2001")<sup>6</sup>. A copy of the accessible document is enclosed.

I regret to inform you that **access is not granted to document 1**. Most of its content is protected in accordance with article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations), as well as under article 4(1)(b). Disclosure of the remaining parts would be meaningless.

The reasons justifying the application of the exceptions are set out below in sections 2.1 and 2.2.

## **2.1. Protection of the public interest as regards international relations (document 1)**

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: (a) 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 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*

---

<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

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

*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>.

For these reasons, large parts of document 1 pertaining to Commission internal messages assessing and commenting on the state of play of the process of scoping (i.e. identifying the issues that will be subject of a future negotiation) must be withheld. Indeed, there is a reasonably foreseeable and not purely hypothetical risk that putting this sensitive information in the public domain would pre-empt and undermine the upcoming negotiation process, as it would allow our future negotiation partners to foresee the Commission's and the EU's positions on topics that will figure prominently in the future negotiation. This would adversely affect the EU's negotiating positions vis-à-vis third countries and would therefore undermine the protection of its international relations, in line with Article 4(1)(a) third indent of Regulation 1049/2001.

In addition, some of the withheld passages in document 1 reveal, even if indirectly, the position of other members of the ECT or of the Energy Charter Secretariat. Such disclosure is likely to upset the mutual trust between the EU and its partners in the ECT and thus undermine their relations and the functioning of the ECT. 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 these views and positions may in the future be publicly revealed. As the Court recognised 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"<sup>11</sup>.

## **2.2. Protection of the privacy and the integrity of the individual (documents 1 and 2)**

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

---

<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.

<sup>11</sup> Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

*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 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 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, and in line with the Commission's commitment to ensure transparency and accountability, the names of the senior management of the Commission (at Director level and above) are disclosed. For the ECT, the name of its Secretary General is also disclosed.

### **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 considered whether partial access can be granted to document 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.

<sup>16</sup> 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.

We have, however, come to the conclusion that disclosure of the releasable content of this document, as analysed under 2.1 and 2.2, would be meaningless. According to the General Court, the Commission is entitled "*to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant*"<sup>17</sup>.

\* \* \*

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](mailto:sg-acc-doc@ec.europa.eu).

Yours sincerely,



Jean-Luc DEMARTY

Enclosure: document 2 partially disclosed

---

<sup>17</sup> Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.