



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,
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By registered letter with acknowledgment of receipt

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Advance copy by email:
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Subject: Your application for access to documents - Ref GestDem 2018/3460

Dear Ms Douo,

I refer to your e-mail in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered on 26/06/2018 under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

You request access to any documents held by DG TRADE including *correspondence, including emails, agendas, records of meetings, minutes of meetings, participants lists and any other reports of such meetings involving officials/representatives/Commissioner/cabinet member of DG TRADE and officials/representatives/Commissioner/cabinet member of the EEAS about the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights being currently negotiated in the Human Rights council of the United Nations.*

On 26/06/2018, we asked you to clarify the scope of the request, suggesting that you provide us with the dates or periods during which the documents in your interest have been produced. On 27/07/2018, you clarified that your request targets all documents produced from January 2016 until the day of registration of the request.

We have identified 29 documents falling within the scope of your request. We enclose for ease

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.

of reference a list of these documents, numbered from **1 to 29**, in the Annex. For each of them, the list provides a description and indicates whether the document is released, partly released or entirely withheld, and gives information on the reasons under Regulation 1049/2001 in case a document is not fully shared. Copies of the accessible documents are enclosed as well.

Before going into the more detailed assessment, let me also apologise again for the delay in responding to your request, which - as indicated previously - was inadvertently deviated to the wrong email folder. At the same time, a significant number of requests are handled by DG TRADE at the same time, so it took us longer than expected to prepare this reply.

2. ASSESSMENT AND CONCLUSION 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 poses 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, full access is granted to documents **1 to 7** and **12**.

As regards documents 1 and 3, which are draft reports, the final version of these can be found under the following links:

Document 1 - report on the 3rd session of the OEIGWG 23-27/10/2017:
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/67

Document 3- report on the 2nd session of the OEIGWG 24-28/10/2016:
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/47

Moreover, we partially disclose documents **8 to 11**. In these documents, only some personal

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

data have been removed in accordance with Article 4(1)(b) of Regulation 1049/2001. Document 10 includes also some redacted parts covered by the exceptions of article 4(1)(a), third indent.

I regret to inform you, however, that access is not granted to documents **13 to 29**. These documents contain information which is protected pursuant to the exceptions laid down in Article 4 of the Regulation. In particular, documents 13-29 are covered by the exceptions of Article 4(3) first paragraph. Documents 13-16, 18, 21, 22, 24, 25, 26, 28 and 29 are also covered by the exceptions of Article 4(1)(a), third indent.

The reasons justifying the application of the exceptions are set out below in sections 2.1 to 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

Moreover, with respect to these documents where access is not granted, documents 18, 21, 22, 23, 28 and 29 were already identified by the EEAS in the context of your request for access to documents of 15 May 2018. The EEAS declined to give access to these documents at that time on the basis of the exceptions set out in the regulation. After having identified and assessed these same documents in the context of the present request DG TRADE has come to a similar conclusion consistent with the position of the EEAS to not disclose these above mentioned documents.

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”⁶ 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”.⁷

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 ”⁸ Moreover, “the positions taken by the Union are, by definition, subject to change depending

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

⁷ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁸ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125

*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 ”.*⁹

The documents the disclosure of which is prevented by the exception laid down under Article 4(1)(a), third indent, of Regulation 1049/2001 include detailed information on the positions of the EU as well as other UN Member States in the context of the ongoing negotiations for a potential international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Disclosure of these documents could undermine the protection of the public interest as regards international relations. Such disclosure would weaken the EU’s negotiating capacity and reduce, in a reasonably foreseeable manner, its credibility in the further negotiations of this potential instrument. Exposing the positions of other UN Member States in the negotiations would also affect the mutual trust among the members of the Working Group. Disclosing these documents would therefore jeopardise the public interest as regards the EU’s international relations.

For the reasons explained above, the exception laid down in Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 applies to documents 13-16, 18, 21, 22, 24, 25, 26, 28 and 29 as well as to parts of document 10.

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”.¹⁰

The applicable legislation in this field is Regulation 45/2001. In this respect, the Court of Justice has ruled that “the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data”.

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’”¹¹ and that “surnames and forenames may be regarded as personal data”¹², including names of the staff of the Institutions.¹³

According to Article 8(b) of this Regulation, personal data shall only be transferred to

⁹ *Id.*, paragraph 125

¹⁰ 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.

¹¹ 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

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

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

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*”¹⁴.

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 documents 8-11 without including these personal data.

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*”¹⁵ and that the capacity of its staff to express their opinions freely must be preserved¹⁶ 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.*”¹⁷

The discussions and negotiations on a possible legally binding instrument in the UN where the EU participates are still ongoing. The last session took place from 15-19 October 2018 and the next session is planned for 2019. The documents the disclosure of which is prevented under the exception laid down in Article 4(3), first subparagraph contain analysis, positions, internal assessments, and/or other elements that are part of the ongoing process to formulate one or several draft texts and eventually a final position and agreed text. In this context the negotiating members must be able to present and discuss various options free from external pressure. Therefore the exception laid down in Article 4(3), first subparagraph applies to the documents withheld.

3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in article 4(3) of Regulation 1049/2001 apply unless there is an

¹⁴ *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

¹⁵ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

¹⁶ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

¹⁷ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

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*”¹⁸ 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 act¹⁹.

After careful assessment, we have concluded that on balance, preserving the EU’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. Disclosing the withheld documents would expose the EU to have to justify preliminary positions which eventually will evolve in the decision-making process – where mixed EU competences apply - and which may endanger the relationship with third parties, i.e. UN Member States.

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 particular interest to preserve 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 shall be released*”. Accordingly, we have also considered whether partial access can be granted to documents 13 to 29.

After a careful review, we have concluded that documents 13 to 29 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 interest identified in this reply.

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

¹⁸ 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.

¹⁹ *Id.*, paragraph 67.

Unit SG-C-1
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1049 Brussels

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

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

- List of documents
- Documents fully or partially released