



EUROPEAN COMMISSION  
Directorate-General for Trade

The Director General

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

Ms Pia Eberhardt  
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Cranachstraße 48  
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***By email:*** [ask+request-2287-  
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**Subject: Your application for access to documents – Ref. GestDem N° 2015/5085**

Dear Ms Eberhardt,

I refer to your request for access to documents dated 19 September 2015, under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),<sup>1</sup> registered under the above mentioned reference number.

We have sent you the list of meetings on 11 February 2016 and six batches of documents. This reply concerns the last batch of documents under your request 2015/5085, listing 72 meetings for which we are able to provide you with 64 documents. You will find a list of these documents in Annex I. The released documents are enclosed.

## **1. 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;

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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.

<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.

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>.

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>.

Out of the 64 documents, we are pleased to grant you full access to 7 documents and partial access to 57 documents. Please note that some parts of some reports have been removed as they fall out of the scope of your request.

In all 57 documents the names of the participants to the meetings and correspondence, as well as other personal identifiers (*e.g.* e-mail addresses, telephone numbers, office numbers) 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>. Hence, the main content of these documents is accessible. Moreover, the names of members of Cabinet, senior management of the Commission starting from the Director level, and senior representatives of external stakeholders (*e.g.* CEO, Director) have all been disclosed.

As regards documents 3, 14, 15, 16, 21, 31, 47, 49, 51, 59, 65, 67 and 72, in addition to personal data covered by the exception of article 4(1)(b) of Regulation 1049/2001, other information has been redacted as it is covered either by the exception set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) or by the exception set out in Article 4(2) of Regulation 1049/2001 (protection of commercial interests) or by Article 4(3) of Regulation 1049/2001 (protection of the institution's decision-making process), or by more than one Article at the same time.

The reasons justifying the application of the abovementioned exceptions are set out below in sections 1.1, 1.2, 1.3 and 1.4. Section 2 provides an assessment of whether there exists an overriding public interest in the disclosure.

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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> See 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.

### **1.1. Protection of international relations (documents 3, 14, 15, 16, 21, 31, 51, 65, 67 and 72)**

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 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>

Documents 3, 14, 15, 16, 21, 31, 51, 65, 67 and 72, are all reports of meetings between DG Trade representatives – in a few cases including also members of the Cabinet of Commissioner Malmström – with representatives of external stakeholders, such as the IP Europe (document 14), European Generic Medicines Association (EGA) (document 15), Intellectual of the United Kingdom (document 16), Federation of the European Sporting Goods Industry (FESI) (document 21), European Environmental Bureau and European Federation for Transport and Environment (document 31), European SMEs representatives (document 51), Eurofer (document 65), Cercle de l'industrie (document 67), or European Federation of Pharmaceutical Industries and Associations (document 72).

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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.

Document 3 is the report of an event called "Promotion and Protection of Foreign Direct Investments: Which global framework is needed?" which was organised by the German association of industry (BDI) and the International Chamber of Commerce Germany (DIHK).

The selected passages in documents 3, 14, 15, 16, 21, 31, 51, 65, 67 and 72, were withheld as they reveal the external stakeholders' main business concerns, strategic interests, priorities and their internal assessment and input for the negotiations. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics which the EU could consider pursuing in its trade negotiations. In addition, certain passages contain preliminary assessments, internal commentaries, opinions and views of individual staff members in relation to certain sensitive matters or positions that emerged during the negotiations with the US, as well as internal reflections regarding possible strategies and tactics to be pursued in the discussions.

The information contained in these documents 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. Even if the information contained in these documents was related to the TTIP negotiations, there is a reasonably foreseeable risk that its public disclosure would undermine and weaken the position of the EU in its ongoing trade negotiations with other third countries in which similar topics are being discussed. Indeed, the information that the EU's trading partners may collect on the basis of the public disclosure of certain detailed positions, concerns, views and strategies of the Commission and of individual stakeholders may allow them to extract specific concessions from the EU in the context of the ongoing negotiations, thus to the disadvantage of the EU's public interests. Third countries may also anticipate or deduce certain negotiating positions of the EU ahead of the trade talks on the basis of the information contained in the withheld passages.

Indeed, the success of trade negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in function of how the discussions evolve in its trade negotiations. Exposing internal views and considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partners to obtain specific results, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations. Moreover, the disclosure of internal views, comments and positions of individual staff members on issues on which an official position has not been adopted would weaken the credibility of the Commission in the negotiations as well as lead the EU's negotiating partners to potential misleading conclusions, thus jeopardising the public interest as regards the EU's international relations.

Although the TTIP negotiations have now come to a pause while the Commission awaits clarity on the priorities of the new US administration as regards a trade agreement between

the EU and the US,<sup>11</sup> preserving the negotiating position of the EU, its margin of manoeuvre and tactical approaches is also important in order not to jeopardise the results achieved so far in the TTIP negotiations, nor any further discussions which may take place in the future between the EU and the US on commercial issues.

Finally, it should be noted that some of the withheld passages reveal, although indirectly, the position of the US. Such disclosure is likely to upset the mutual trust between the EU and the US and thus undermine their relations. It would also jeopardise the mutual trust between the EU and other trading partners as they may fear that in the future their positions would also be exposed and they may as a result refrain from engaging with the EU. 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>12</sup>.

**1.2. Protection of privacy and integrity of the individual (documents 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71 and 72)**

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 provisions, become applicable in their entirety"<sup>13</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

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<sup>11</sup> See Commissioner Malmström's blog post at [https://ec.europa.eu/commission/2014-2019/malmstrom/blog/ttip-assessment-and-pause\\_en](https://ec.europa.eu/commission/2014-2019/malmstrom/blog/ttip-assessment-and-pause_en).

<sup>12</sup> Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

<sup>13</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.

from the notion of 'private life'<sup>14</sup> and that "surnames and forenames may be regarded as personal data"<sup>15</sup>, including names of the staff of the institutions<sup>16</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>17</sup>.

Documents 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71 and 72 all 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.

### **1.3. Protection of commercial interests (document 14 and 59)**

Article 4(2) first indent, of Regulation 1049/2001 provides that "*the institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial 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>18</sup>, it appears that the type of information covered by notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy<sup>19</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*

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<sup>14</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>15</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

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

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

<sup>18</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>19</sup> See Article 339 of the Treaty on the Functioning of the European Union.

*has provided it or to third parties" and to which "the interests liable to be harmed by disclosure must, objectively, be worthy of protection"*<sup>20</sup>.

Document 14 is a report of a meeting between DG Trade representatives and IP Europe to discuss regulatory issues in TTIP negotiations.

One passage in this document has been withheld because it contains business sensitive information pertaining to a company or group of companies, including details about commercial priorities, objectives, strategies and interests which they pursue. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the entities and companies concerned, as it could be exploited by competitors to undermine their competitive positions in third countries and their relationship with the other economic operators in such markets.

Document 59 is a report of a meeting between DG Trade representatives and EUnited to present the engineering industry's views on trade.

Three sentences of this report have been withheld due to business sensitive information included. Also with regard to this document there is a reasonably foreseeable risk that the disclosure of withheld data would harm commercial interests of the entities and companies concerned.

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. Bringing in the public domain specific business related information that companies share with the Commission may prevent the Commission from receiving access to such information in the future.

#### **1.4. Protection of the decision-making process (documents 31, 47, 49, 65, 67 and 72)**

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*

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<sup>20</sup> Judgment in *Bank Austria v Commission*, T-193/03, EU:T:2006:136, paragraph 29.

*restricting access to documents relating to the decision-making process"*<sup>21</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>22</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>23</sup>

The redacted passage in documents 31, 47, 49, 65, 67 and 72 contains the personal views and impressions of a Commission official regarding the political situation in one Member State in connection with a matter, the TTIP negotiations, where a decision has not yet been taken. Exposing internal views and considerations expressed in this context would subject the Commission and the Member States to external pressure and unfounded conclusions both from external stakeholders and from our negotiating partners. It would also restrict the free exchange of views within the Commission staff and between the Commission and other relevant actors. Finally, it would have a negative impact on decisions still to be taken by the EU by giving out elements of the Commission's assessment and its possible future approaches. Protecting the confidentiality of internal views and opinions allows for the parties involved to speak freely and frankly. Reducing this degree of confidentiality would lessen the trust of the parties involved and give rise to a risk of self-censorship, which would in turn undermine the quality of the internal consultation and decision-making process.

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

The exception laid down in Article 4.2 and in Article 4.3 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 14, 31, 47, 49, 59, 65, 67 and 72 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 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. Similarly, the decision-making process linked to the TTIP negotiations prevail over

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<sup>21</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

<sup>22</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

<sup>23</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.



transparency in this specific case. The public interest would be better served by the possibility for the Commission to complete the decision-making process without external pressure.

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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 Brussels

Or by email to: [xxxxxxxxxx@xx.xxxxxx.xx](mailto:xxxxxxxxxx@xx.xxxxxx.xx)

Yours sincerely,



Jean-Luc DEMARTY

Annex I – List of documents disclosed, including justification under Regulation 1049/2001  
Annex II – Documents disclosed