



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels, **14 AOUT 2017**
trade.dgal.c.1(2017) 4418324

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

Mr Max Bank
LobbyControl
Am Justizzentrum 7
50939 Cologne
Germany

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Subject: Your application for access to documents – Ref GestDem No 2017/2503

Dear Mr Bank,

I refer to your request of 26 April 2017 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered under the above mentioned reference number on 27 April 2017.

1. SCOPE OF YOUR REQUEST

You requested access to:

1) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, public consultancies and think tanks in which the Japan-EU Free Trade Agreement (JEFTA) was discussed (between January 2012 and December 2013);

2) minutes and other reports of these meetings;

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.

3) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, public consultancies as well as think tanks regarding the Japan-EU Free Trade Agreement (JEFTA) (between January 2012 and December 2013).

Please note that the agreement to which you refer is called the EU-Japan Economic Partnership Agreement (EPA).

On 15 June, we sent you a list with 132 documents identified falling under the scope of your request. We also 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.

On 19 June you selected 32 documents from the initial list of 132 reports or minutes of meetings with stakeholders or correspondence with stakeholders. 12 of these documents have related annexes. In all there were 20 annexed documents. The total number of documents identified under your request therefore is 52. 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 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 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*”³.

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.

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, I am pleased to grant full access to 12 main documents or annexes. Partial access is granted to 38 documents and annexes.

In particular, in 32 documents or annexes, 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 45/2001⁶ ("Regulation 45/2001"). Hence, the main content of these documents is accessible.

In main documents 12, 17, 21, 23, 30, and annex to document 12, 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.

I regret to inform you that access cannot be granted to one of the annexes to document 23 and to the annex to document 25, as they are fully covered by the exception set out in article 4(2) first indent of Regulation 1049/2001.

Please note that parts of documents that do not relate to your request have been redacted as falling out of scope.

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 thus be adopted by the institution a complex and delicate nature which calls for the exercise*

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

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

⁶ 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.

of particular care. Such a decision therefore requires a margin of appreciation".⁷ 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"⁸.

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".⁹ 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".¹⁰

Certain passages in documents 12 (main document and annex), 17, 21 and 30 have been 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.

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. Even if a political agreement was reached on the negotiations, these negotiations are not yet fully concluded. Negotiators are still finalising some remaining issues which means that the agreement is not yet fully stabilised 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.

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

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

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

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

¹⁰ *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"*¹¹.

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'"*¹² and that *"surnames and forenames may be regarded as personal data"*¹³, including names of the staff of the institutions¹⁴.

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"*¹⁵.

38 main documents and attachments (please see Annex 1) contain personal information, such as names, e-mail addresses, that 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 the CEOs, Presidents, Directors or equivalent 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*

¹¹ 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.

¹² 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.

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

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

¹⁵ *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 indent¹⁶, 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 secrecy¹⁷. 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*"¹⁸.

Document 12 (main and annex) are minutes of a meeting between Commission services and the European Automobile Manufacturer's Association (ACEA). Document 23 is an email received by British American Tobacco (BAT), as well as annex 1 to document 23 and annex to document 25.

Some passages in documents 12 and 23 and the entire mentioned annexes to documents 23 and 25 have been withheld because they contain business sensitive information pertaining to a company or group of companies, 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 related information that companies share with the Commission 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 12 (main and annex) and 23 and of annex 1 to document 23 and annex to document 25 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

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

¹⁷ See Article 339 of the Treaty on the Functioning of the European Union.

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

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.

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 the attachment to annex 1 to document 23 and to the annex to document 25. However, these documents are entirely covered under the exception set out in Article 4(2) first indent of Regulation 1049/2001 as it is impossible to disclose any parts without undermining the protection of the commercial interest of the mentioned company.

Please note that some of the documents were received by the Commission from third parties. They are disclosed for information only, they do not reflect the position of the Commission and cannot be quoted as such.

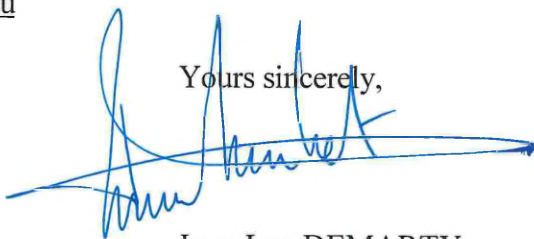
In case you disagree with the assessment contained in this reply you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

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 unit SG-B-4
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY
p.o. Maria Martin-Prat, Director

Encl.:

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