



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels,
G3/FPC/BM/svm/(2017)7123388

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

Mr Mihkel Poola
Kannikese tänav 10-20, Saku
Harju maakond, 75501
Estonia

Advance copy by email:
ask+request-4658-6a3e802b@asktheeu.org

Subject: Your request for access to documents – Ref GestDem No 2017/5600

Dear Mr Poola,

I refer to your request dated 18 September 2017 in which you made a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on 27 September 2017 under the reference number GestDem 2017/5600.

We would like to apologise for the delay in replying to your request, which is due to a large number of complex access to documents requests pending simultaneously with DG TRADE.

1. SCOPE OF YOUR REQUEST

You requested access to:

"[...] the following documents from DG Trade concerning the period between 1 January 2012 and 17 March 2016, related to the Proposal of the European Commission for a regulation of the European Parliament and of the Council laying down rules on the making available on the market of CE marked fertilising products and amending Regulations (EC) No 1069/2009 and (EC) No 1107/2009 (hereafter: the "Proposal") and more specifically related to the topic of limits for contaminants in fertilizers, or at which such limits were discussed:

¹ OJ L 145, 31.5.2001, p. 43.

- (a) *Any document related to meetings or other communications, such as, but not limited to 1) meeting requests, 2) list of participants and parties on whose behalf such meetings were requested or whose interests were represented, 3) any materials submitted before, during or after such meetings, 4) any correspondence related to such meetings or to topics discussed or to be discussed at such meetings, 5) any follow-up documents, such as minutes, conclusions or summaries generated after such meetings, with private parties (including third parties), their representatives, associations, or other collective bodies, held or requested or received between 1 January 2012 and 17 March 2016, of which the topic was, or turned out to be, limits for contaminants in fertilizers, or at which such limits were discussed;*
- (b) *Any document related to meetings or other communications, such as, but not limited to 1) meeting requests, 2) list of participants and parties on whose behalf such meetings were requested or whose interests were represented, 3) any materials submitted before, during or after such meetings, 4) any correspondence related to such meetings or to topics discussed or to be discussed at such meetings, 5) any follow-up documents, such as minutes, conclusions or summaries generated after such meetings, with private parties (including third parties), their representatives, associations, or other collective bodies, held or requested or received between 17 March 2016 and the date of the submission of this request, of which the topic was, or turned out to be, limits for contaminants in fertilizers, or at which such limits were discussed;*
- (c) *Any document, including, but not limited to, 1) internal correspondence of EC officials, as well as with outside parties, relating to limits to be proposed, 2) documents showing why specific numbers (and not other numbers) were proposed and chosen as limits for specific contaminants in the Proposal, 3) different drafts of Proposal related to contaminants and Annex I prior to its finalization, 4) your version of the Proposal, 5) your input during the inter-service consultations on the Proposal with respect to contaminant limits, 6) any opinions of lawyers relevant to contaminant limits, held or requested or received between 1 January 2012 and the date of the submission of this request, related to the adoption of the Proposal in the part relevant to limits on contaminants in fertilizers."*

Please note that as regards point (c) of your request, any documents relating to the inter-service consultation on the Proposal will be identified and assessed by DG GROW in its reply to your request GestDem 2017/5418, including any documents originating from DG TRADE in this context.

This reply covers the remaining points of your request, in relation to which DG TRADE has identified 4 documents.² A list of these documents is provided in Annex 1, and copies of the

² Document 3 also includes an Annex, as indicated in the list enclosed in Annex 1.

documents released are enclosed. For each of the documents the list provides a description and indicates whether parts are withheld under Regulation 1049/2001.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,³ 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 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*”.⁴

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁵ “*the exceptions to that right [...] must be interpreted and applied strictly*”.⁶

Having carefully examined the documents identified above in light of the applicable legal framework, I am pleased to **release documents 1, 3, and 4. The annex to document 3** has been already released by DG GROW (Ares(2016) 688033) and is included in its reply to your request GESTDEM 2017/5418. Some personal data were removed in these documents, in accordance with Article 4(1)(b) of Regulation 1049/2001. In line with the Commission's commitment to ensure transparency and accountability⁷, the names of Members of Cabinet, senior management of the Commission at the Director level or above, as well as names of senior managers of private entities (*e.g.* Director, President, Vice-President) are disclosed.

Please note that parts of document 1 were marked “out of scope” as they concern issues unrelated to the subject matter of your request and therefore fall outside the scope of your application.

I regret to inform you that unfortunately access cannot be granted to **document 2**. Some parts of this document fall outside the scope of this request in the sense that these relate to the inter-

³ 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.

⁴ *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.

⁵ See Regulation (EC) No 1049/2001, recital (4).

⁶ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁷ See Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014.

service consultation on the Proposal, documents which will be identified and assessed by DG GROW in their reply to request GestDem 2017/5418. The remaining parts are entirely covered by the exceptions set out in Article 4.1(a) third indent (protection of the public interest as regards international relations, 4.3 first subparagraph (protection of the ongoing decision-making process) and 4.1(b) (protection of the privacy and integrity of the individual).

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2 and 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

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"*.⁸ 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"*.⁹

Parts of document 2 contain comments and opinions of DG TRADE officials on specific aspects of preliminary drafts of a proposal for a revision of the EU Fertilizer Regulation. These passages are withheld because their disclosure would undermine in a reasonably foreseeable manner the public interest as regards the international relations of the EU with its trading partners, both at bilateral and multilateral level. It also risks exposing certain EU policies to possible challenges in various contexts and fora, and could be exploited to the disadvantage of the EU by external actors.

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.”

⁸ Judgment in *Sisón v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

⁹ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

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."*¹⁰

Article 2(a) of Regulation 45/2001 provides that *"'personal data' shall mean any information relating to an identified or identifiable natural person [...]"*. In this respect, the jurisprudence of the EU Courts has clarified that activities of a professional nature may fall within 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 institutions¹³.

In accordance with Article 8(b) of Regulation 45/2001, personal data may 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."*¹⁴

Documents 1 to 4 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.

2.3. Protection of the institution's decision-making process

Article 4.3 first subparagraph 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 decision-making process for the revision of the EU Fertilizer Regulation is still ongoing as a final decision has not yet been adopted and discussions are still taking place between the EU institutions. These discussions have been characterised by a significant degree of

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.

¹⁴ 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.

complexity and controversy, and the EU institutions have been subject to concrete and tangible external pressure in this context. Exposing to the public the exchange of views, comments and opinions of individual staff members on preliminary drafts as included in document 2 would effectively deprive the Commission from having frank, internal discussions at non-political level prior to launching a formal proposal, as Commission staff would in practice be discouraged from discussing, in writing, any issues related to sensitive dossiers. In this respect, the jurisprudence of the EU Courts has recognized that the capacity of the Commission staff to express their opinions freely must be preserved¹⁵, 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 (...)”*.¹⁶

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4.3 of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure. Accordingly, we have also considered whether the risks attached to the release of document 2 are outweighed by the public interest in accessing the requested document. We have not been able to identify any such public interest, which in this specific case, rather lies on the protection of the ongoing 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 document 2. As mentioned, large parts of this document concern issues unrelated to the subject matter of your applicant, and therefore fall outside its scope. The remaining parts are entirely covered by the exceptions described above and it is impossible to disclose any parts without undermining the protection of the international relations and the ongoing decision making process of the EU. Moreover document 2 contains also personal data protected under the exception set out in Article 4.1(b) of Regulation 1049/2001.

¹⁵ Judgment of the Court of First Instance (Seventh Chamber) of 18 December 2008 in case T-144/05, *Muñiz v Commission*, (ECLI: EU:T:2008:596), paragraph 89.

¹⁶ Judgment of the General Court (First Chamber) of 10 January 2013 in case T-403/05, *MyTravel v Commission*, (ECLI: EU:T:2008:316), paragraph 52.

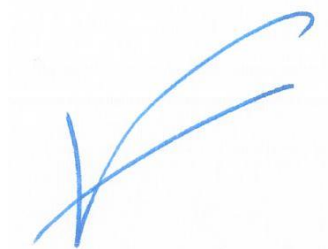
In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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
B-1049 Brussels

Or by email to: sg-acc-dxx@xx.xxxopa.eu

Yours sincerely,



Jean-Luc DEMARTY

Enclosures (2):

- Annex I: list of documents
- documents disclosed