



EUROPEAN COMMISSION

Directorate-General for Trade
Directorate F- WTO, Legal Affairs and Trade in Goods
F2- Dispute Settlement and Legal Aspects of Trade Policy
The Head of Unit

Brussels

By registered letter with acknowledgment of receipt

Bart-Jaap Verbeek
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Advance copy by e-mail: ask+request-5970-168e9281@asktheeu.org

Subject: Your application for access to documents – Ref. GestDem No 2018/5698

Dear Mr Verbeek,

I refer to your application of 6 November 2018 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001¹ (hereinafter, Regulation 1049/2001). Your request relates to a previous application registered on 20 August 2018 under reference number 2018/4448 in relation to which you agreed as per the correspondence of 13 and 19 September 2018 to reduce its scope. This was done in accordance with Article 6.3 of Regulation 1049/2001 which provides that in the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution. We are grateful for your flexibility in this regard. The present application therefore relates to the documents that were excluded from that first part of the request, the reply to which was transmitted to you on 28 November 2018.

Please accept our apologies for the delay in answering your request, which is mainly due to the high number of requests for access to documents being processed at the same time by DG TRADE.

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.

1. SCOPE OF YOUR REQUEST

In the present application GESTDEM 2018/5698 you request access to a set of 27 documents earmarked with the following numbers on the list provided by us under GESTDEM 2018/4448: **2, 5, 6, 10, 12, 13, 22-39, 48, 50 and 51**. Five of these documents include annexes, which amounts to a total of 36 documents.

Following a closer assessment, we realised that nine of those 36 documents (documents 13, 14, 25, 26 and 27 and their respective annexes, according to the new numbering) fall outside the scope of your original request, either because they were dated prior to 1 January 2017 (documents 25, 26 and 27 and annexes) or because their content does not relate to your request (documents 13 and 14). One paragraph in document 2 and some wording in document 9 are also deemed to fall outside the scope of the request. In addition, document 5 was already released with the first part of your request.

We enclose for ease of reference a list of the relevant documents in Annex 1. For each of them, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed as Annex 2.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² 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*".³ In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁴ "*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 annex 1 to document 11, document 17 and annexes 1 to 3 thereof,

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.

while partial access is granted to documents 1 to 4, 6 to 12, 15, 16, annex 4 to document 17 and 18 to 24.

In this regard the following documents are publicly available and can be found under following links:

- Annex 1 to document 11: http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2017/mini_briefing_consultation-final.pdf
- Annex 2 to document 17: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/investment_court_system_isds_in_disguise_10_reasons_why_the_eus_proposal_doesnt_fix_a_flawed_system_english_version_0.pdf
- Annex 3 to document 17: <https://corporateeurope.org/sites/default/files/attachments/s2b-isds-at-a-dangerous-crossroads.pdf>

Personal data have been redacted from all documents that are partially released, pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 1725/2018⁶.

The reasons justifying the application of the exception in Article 4.1(b) of Regulation 1049/2001 are set out below.

2.1 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".

The applicable legislation in this field is Regulation (EC) No 2018/1725. Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data "*means any information relating to an identified or identifiable natural person [...]*". The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁷ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.⁸

⁶ Regulation (EC) No 1725/2018 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98.

⁷ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

⁸ Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁹, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable.¹⁰

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests". Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

Redacting e-mails and other internal documents that contain personal information such as names, e-mail addresses or telephone numbers is necessary to protect the concerned natural persons' identity and privacy. In line with the Commission's commitment to ensure transparency and accountability, the names of the senior management of the Commission (i.e. Director level and above) are disclosed.

The exception on privacy of the individual, whether Commission officials or external citizens, applies to all documents that are partially released, i.e., documents 1 to 4, 6 to 12, 15, 16, Annex 4 to document 17 and documents 18 to 24. In fact, a disclaimer that, unless otherwise specified, redactions are made pursuant to this exception, has been included at the top left hand corner of each partially released document.

Full pages have been redacted in certain documents where the entire page contains protected personal information to be withheld and, for ease of handling, such pages have been deleted from the documents that are otherwise partially disclosed. In particular, pages 3 and 4 of document 6 and pages 2 and 3 of document 9 have been deleted inasmuch as they contained

⁹ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹⁰ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

lists of attendants to meetings in a manner that the information is entirely covered by the exception in Article 4.1(b) of Regulation 1049/2001. Similarly, pages 2 to 19 of annex 4 to document 17 have been deleted for the reason that they solely contain names of citizens.

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
Transparency, Document Management & Access to Documents unit SG-C-1
BERL 7/076
1049 Bruxelles

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

Yours sincerely,

Martin LUKAS

Encl.: Annex 1 (List of documents), Annex 2 (Released documents).