



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

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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 2020/3406

Dear Madam,

I refer to your application dated 05/06/2020, in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ('Regulation 1049/2001'), registered on the same date under the above mentioned reference number.

Please accept our apologies for the delay in preparing the reply to your request, which is due to a high number of access to documents requests being processed at the same time by DG Trade and the more complex nature of this particular request that required clarification.

1. SCOPE OF YOUR REQUEST

In your request, you asked for access to *'the documents related to joint committee, specialized committees, and dialogues meeting of South Korea FTA, especially the documents that were about the negotiation process before 2011'*.

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).

At first glance, your request seemed not to be clear enough in order to identify the documents in your interest so we requested you to provide us with additional information about the requested documents and the study you were working on. After some exchanges between TRADE services and yourself the following new scope of your application was established: *‘all reports of negotiation rounds of both South Korea FTA and CETA issued by the Commission’*.

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 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 Article 4(2) and Article 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

In reply to your request, I can inform you that we have identified **16 documents** that fall within the scope of your request. The identified documents are listed for ease of reference in Annex I. For each of the documents the Annex provides a description and indicates whether parts or entire documents are withheld and if so, on which grounds pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed to this letter.

Having examined the requested documents under the applicable legal framework, I am pleased to grant you partial access to **documents 1-16**.

In **documents 1-16** some parts have been redacted according to article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations).

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 52-64.

⁴ See Regulation 1049/2001, recital (4).

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

In **documents 2 and 4-9** additionally some parts have been redacted covered by the exception set out in article 4(3) (protection of the institution's decision-making process).

In **documents 10-16** 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 2018/1725.

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

2.1 Protection of the public interest as regards international relations (documents 1-16)

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 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 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.

Parts of **documents 1-16** contain sensitive information on third countries' negotiating tactics, policy positions and domestic consultation procedures that have been shared with the

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35.

⁷ Judgment in *Council v Sophie in 't Veld*, C-350/12P, 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.

⁹ *Id.*, paragraph 125.

Commission in confidence in the context of trade negotiations, as well as internal Commission deliberations concerning these elements. Disclosure of such specific and sensitive information could risk undermining the dialogue, trust and relations with third countries concerned, and would therefore undermine the protection of the public interest as regards international relations.

In fact, the direct or indirect disclosure of such information could reveal the third countries' as well as the EU's trade strategies and, consequently, have an adverse impact on the on-going and future relations with these countries. Therefore, such disclosure is likely to upset the mutual trust between the EU and Canada or South Korea and thus undermine our relations.

Furthermore, it may also jeopardise the mutual trust between the EU and other trading partners, as they may fear that in the future their policy positions could be exposed and as a result may 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 be revealed publicly in the future. 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"¹⁰.

2.2 Protection of the privacy and integrity of the individual (documents 10-16)

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

The applicable legislation in this field is Regulation (EC) No 2018/1725 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/EC¹¹ ('Regulation 2018/1725').

Documents 10-16 contain personal information, such as names, e-mail addresses, telephone numbers that allow the identification of natural persons, as well as other personal information.

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,

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

¹¹ Official Journal L 205 of 21.11.2018, p. 39.

is linked to a particular person is to be considered as personal data.¹² 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.¹³

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹⁴, 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.¹⁵

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.

In your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

However, in line with the Commission's commitment to ensure transparency and accountability, the names of the Members of Cabinet and the names of the senior management of the Commission are disclosed.

2.3 Protection of decision-making process (document 2 and 4-9)

Article 4(3), second subparagraph of Regulation 1049/2001 provides that '*[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*'.

Furthermore, the jurisprudence of the EU Courts has 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*'¹⁶ and that the capacity of the individuals involved to express their opinions freely must be preserved¹⁷ so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, the result of such self-censorship would be that the institutions '*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 [...]*'.

Documents 1 to 9 were prepared in function of the Commission's reporting and transparency obligations on on-going trade negotiations vis-à-vis the EU Member States in the Council's Trade Policy Committee. The withheld parts of documents 2 and 4-9 describe the preliminary positions adopted by both parties during the negotiating rounds and Commission assessment thereof, as well as internal deliberations between the Commission and the Council.

The Commission and Member States rely on the confidential exchange of such information, to enable them to exchange information freely and frankly and ensure a transparent internal consultation process. Furthermore, the disclosure of this information could reveal EU purposes, objectives and negotiating tactics related to the processes concerned by this request, which could however also be applied within the negotiations

¹⁶ Judgement in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

¹⁷ Judgement in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

with other countries. It could negatively influence EU relations with this negotiating partner and weaken the EU's position in other future trade negotiations. In consequence, the exception laid down in Article 4(3) of Regulation 1049/2001 applies.

3. OVERRIDING PUBLIC INTEREST

The exception laid down 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 considered whether the risks attached to the release of the withheld parts of **documents 2 and 4-9** 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 risks posed to the decision-making process. The public interest in this specific case rather lies on the protection of the legitimate confidentiality interests of the stakeholders concerned to ensure a proper functioning of the decision-making process.

4. MEANS OF REDRESS

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:

Secretary-General
European Commission
Transparency, Document Management & Access to Documents
BERL 7/76
Rue de la Loi 200/Wetstraat 200
1049 Brussels
Belgium

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

Yours faithfully,



Sabine WEYAND

Enclosures: 1. List of documents
 2. Disclosed documents