



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - 2022/4283**

Dear sir,

I am writing in reference to your confirmatory application of 17 August 2022, registered on 19 August 2022, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 25 July 2022, attributed to the Directorate-General for Trade and registered under number 2022/4283, you requested access to, I quote:

‘Any documents, for example flash reports, meeting minutes, e-mails, letters, attachments, or instant messages concerning digital aspects, for example source code, trade secrets, algorithms, artificial intelligence or digital trade or electronic commerce more broadly, from the negotiations held between the EU and India in New Delhi from 27 June to 1 July for a potential free trade agreement’.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

The Directorate-General for Trade identified the following documents as falling within the scope of your request:

- 1) EU textual proposal for a chapter on Digital Trade in an EU-India Free Trade Agreement (FTA), presented in the 1st round of FTA negotiations held in New Delhi from 27 June to 1 July 2022, reference Ares(2022)5779125 (hereafter ‘document 1’);
- 2) Public report of the First Round of Negotiations On a Free Trade Agreement between the European Union and India, 27 June – 1 July 2022, New Delhi, reference Ares(2022)5779125 (hereafter ‘document 2’);
- 3) Internal report of the First Round of EU-India FTA Negotiations, 27 June – 1 July 2022, New Delhi, reference Ares(2022)4940311 (hereafter ‘document 3’).

In its reply of 17 August 2022, the Directorate-General for Trade:

- granted full access to documents 1 and 2;
- refused access to document 3, on the basis of the third indent of Article 4(1)(a) (protection of international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I would like to inform you that partial access is granted to document 3. Nonetheless, access to the redacted parts must be refused based on the exceptions laid down in the third indent of Article 4(1)(a) (protection of international relations) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

Please note that some parts of document 3 were redacted as falling outside the scope of your request.

The reasons are set out below.

2.1. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) of Regulation (EC) No 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 [...]’.

As far as the interests protected by virtue of Article 4(1)(a) of Regulation (EC) No 1049/2001 are concerned, the Court of Justice has confirmed that it ‘is clear from the wording of Article 4(1)(a) [of Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine

the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests’³.

The Court of Justice stressed in the *In ‘t Veld* ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’⁴.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’⁵.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution 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 complexity and delicacy that call for the exercise of particular care.

Such a decision requires, therefore, a margin of appreciation’⁶. This was further confirmed by the Court of Justice⁷.

As the Court recognised in Case T-301/10 ‘[...] establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise’⁸.

As a first remark, India is one of the EU’s most important trading partners with whom the EU has closely aligned objectives in a number of policy fields. At the same time, the EU is India's third largest trading partner, accounting for €88 billion worth of trade in goods in 2021 or 10.8% of total Indian trade. The EU is the second-largest destination for Indian exports (14.9% of the total).

³ Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison v Council*, EU:C:2007:75, paragraph 46.

⁴ Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁵ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁶ Judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

⁷ Judgment of the Court of Justice of 19 March 2020, *ClientEarth v Commission*, C-612/18 P, EU:C:2020:223, paragraphs 68 and 83.

⁸ Judgment of the General Court of 19 March 2013, *Sophie in’t Veld v Commission*, T-301/10, EU:T:2013:135, paragraph 126.

On 8 May 2021, the EU and Indian leaders agreed to resume negotiations for a ‘balanced, ambitious, comprehensive and mutually beneficial’ trade agreement, and to launch separate negotiations on an investment protection agreement and an agreement on geographical indications (hereafter ‘GIs’). Leaders also agreed to link trade negotiations to finding ‘solutions to long-standing market access issues’⁹.

The first round of EU-India Free Trade Agreement negotiations (hereafter ‘FTA negotiations’) took place in New Delhi between 27 June and 1 July 2022¹⁰.

The redacted parts of document 3 contain the EU’s and the Indian authorities’ negotiating positions, views and internal policy considerations, with regard to the digital trade aspects of the future FTA. This information was shared with the Commission officials with the expectation that it would not be published. Moreover, should such information enter the public domain, in some cases even after the conclusion of the negotiations with India, it could be used by third countries to bring undue pressure on the European Commission in support of their own interests, unduly limit the room for manoeuvre of the EU on the international stage, and jeopardise the EU’s international position.

The redacted passages contain the strategic objectives of the European Commission for the Free Trade Agreement, which, if disclosed, would undermine the negotiations position of the EU. Moreover, they contain statements regarding the progress of the discussions and negotiations, which could impact on the ongoing discussions with India, if disclosed.

Furthermore, it would undermine the trust enjoyed by the institution to hold free exchange of views concerning the work it carries out with third countries and would negatively affect efforts to build constructive and effective relations with them, thus having a negative impact on its international activity.

In addition, certain redacted parts contain internal and sensitive assessments of India’s positions that have been shared within the European Commission in confidence in the context of the ongoing FTA negotiations.

I would like to remind you that the documents released under Regulation (EC) No 1049/2001 become available to the public at large (*‘erga omnes’*), and not only to the applicant who had requested them.

In this regard, 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’¹¹.

⁹ https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en.

¹⁰ https://policy.trade.ec.europa.eu/news/eu-and-india-kick-start-ambitious-trade-agenda-2022-06-17_en.

¹¹ Judgment of the General Court of 19 March 2013, *Sophie in’t Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

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’¹².

There is therefore a reasonably foreseeable and not purely hypothetical risk that the disclosure of the redacted parts of document 3 under this exception would undermine the international relations between the EU with India and, in view of its content implying positions to be taken for possible future similar situations, possible future negotiations in similar topics.

Consequently, I must conclude that the redacted parts of document 3 need to be redacted under the exception laid down in the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 and that access to them must be therefore refused on that basis.

2.2. Protection of the decision-making process

The first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that ‘access 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 redacted parts of documents 3 also contain the positions and views of the European Commission and representatives of the Indian Government in the context of the first round of EU-India negotiations on a free trade agreement. This content is subject to ongoing negotiations between the EU and India until the conclusions of the agreement in object. The risk of disclosing sensitive information regarding the Commission services’ and Indian government’s views and negotiating positions would deter them from freely expressing their opinions and having frank discussions.

Speculations and misinterpretations of the public on the views, positions, considerations put forward in an early stage of the decision-making process would affect the exploration of different options and unduly restrict the European Commission’s internal space to think, exposing the European Commission to external pressure and also affecting its relations with other countries. Full disclosure of document 3 would therefore seriously undermine the ongoing decision-making process. This risk is also reasonably foreseeable and not purely hypothetical.

¹² Id., paragraph 125.

Consequently, full access to document 3 should be refused also based on the exception laid down in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal¹³.

In your confirmatory application, you do not mention any overriding public interest. Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) and (3) of Regulation (EC) No 1049/2001.

Please note also that Article 4(1)(a) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to document 3.

As mentioned above, partial access is granted to document 3.

¹³ Judgment of the General Court of 9 October 2018, *Anikó Pint v Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v Commission*, T-875/16, EU:T:2018:877, paragraph 84.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Ilze JUHANSONE
Secretary-General

Enclosures: (1)