



**EUROPEAN COMMISSION**

Directorate-General for Trade

The Director General

Brussels,  
trade.dga2.e.1(2017)2393973

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

Mr Anton Peene  
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***Advance copy by email:***  
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**Subject: Your application for access to documents – Ref. GestDem No 2016/6348**

Dear Mr Peene,

I refer to your application of 31 October 2016 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001<sup>1</sup> (“Regulation 1049/2001”). You sent your request to the Secretariat General of the Commission and, after your clarifications, the request was registered on 11 November 2016 under the above mentioned reference number for DG TRADE.

Please accept our apologies for the delay in answering to your request, which is mainly due to a high number of requests for access to documents being processed at the same time by DG TRADE and our need to consult with the Canadian authorities on the release of documents which originate from their side.

**1. SCOPE OF YOUR REQUEST**

You would like to receive access to "*all correspondence (including emails), agendas, minutes of meetings and any other reports of such meetings between officials/representatives of the European Commission (the Secretariat General and all other DGs, including all Commissioners, their cabinets and the Commission Presidents José Manuel Barroso (former) and Jean-Claude Juncker and their cabinets) and the following individuals:*

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<sup>1</sup> 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.

*-Chrystia Freeland (current Canadian Minister of International Trade)*  
*-Ed Fast (Canadian Minister of International Trade from 2011 till 2015)*  
*-Peter Van Loan (Canadian Minister of International Trade from 2010 till 2011)*  
*-Stockwell Day (Canadian Minister of International Trade from 2008 till 2010)*  
*(between May 2009 and October 2016).*

On 10 November 2016 you clarified your request as follows: "*the documents that we are requesting to be limited to documents/communications (as specified) related to the EU-Canada Comprehensive Economic and Trade Agreement (CETA); -To limit the European Institutions that fall within the scope of our request to the SG, DG TRADE, DG SANCO/SANTE, DG ENV, DG AGRI and DG ENTR/GROWTH (including all Commissioners, their cabinets and the Commission Presidents José Manuel Barroso (former) and Jean-Claude Juncker and their cabinets); -To maintain our time frame (since our request is limited to specific individuals, specific Commission departments and a specific topic).*"

In response to your clarification, we have identified correspondence consisting of 15 documents which are listed for ease of reference in Annex I. 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.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

In accordance with settled case law<sup>2</sup>, 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*"<sup>3</sup>.

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<sup>2</sup> 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.

<sup>3</sup> *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 documents<sup>4</sup>, *"the exceptions to that right [...] must be interpreted and applied strictly"*<sup>5</sup>.

Having examined the requested documents under the applicable legal framework, partial access is granted to all other documents except for documents 8, 9 and 10 which are fully withheld.

Document 4 is fully disclosed, with the exception of one paragraph which is out of the scope of your request. Some parts of documents 3, 5, 6, 7, 11, 13 are also out of the scope of your request. They all have been redacted and clearly marked in the enclosed documents.

In addition, in documents 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14 and 15 personal data have been redacted, pursuant to article 4(1)(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001<sup>6</sup> ("Regulation 45/2001").

In document 7, in addition to personal data protected under article 4(1)(b) of Regulation 1049/2001, additional information was redacted in accordance with article 4(1)(a) third indent (protection of the public interest as regards international relations)

I regret to inform you that access is not granted to documents 8, 9 and 10 as they are fully covered by the exceptions of articles 4(1)(a) third indent and article 4(3) first subparagraph (protection of the institution's decision-making process).

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*

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

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

<sup>6</sup> 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.

*appreciation".*<sup>7</sup> 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".*<sup>8</sup>

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".*<sup>9</sup> 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".*<sup>10</sup>

Documents 8, 9 and 10 and one passage in document 7 contain information exchanged with the Canadian Government in order to promote the negotiation of specific aspects of the Comprehensive Economic and Trade Agreement between the EU and Canada. This information represents comments and issues raised by both the EU Commissioner for Trade and the Canadian Minister for Trade in the exchanges during the negotiations.

The success of trade negotiations depends to a large extent on the protection of objectives, tactics and fall-back positions of the parties involved. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in function of how the discussions evolve in its trade negotiations. Exposing internal views and considerations would weaken the negotiating capacity of the EU, reduce its margin of manoeuvre and be exploited by our trading partners to obtain specific results, thereby undermining the strategic interests of the EU and consequently, the protection of the public interest as regards international relations.

It should be noticed that these documents reveal, directly or indirectly, the position of Canada. Such disclosure is likely to upset the mutual trust between the EU and Canada and thus undermine their relations. In this context, after consulting on the release of the documents, the Canadian authorities confirmed that they could not agree to disclose the withheld documents under Canadian rules on access to documents.

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

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

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

<sup>10</sup> *Id.*, paragraph 125.

Even if the information contained in these documents was related to the agreement with Canada, there is a reasonably foreseeable risk that its public disclosure would undermine and weaken the position of the EU in its ongoing trade negotiations with other third countries. Indeed, the information that the EU's trading partners may collect on the basis of the public disclosure of certain detailed positions, concerns, views and strategies of the Commission and of its Member States may allow them to extract specific concessions from the EU in the context of other negotiations, thus to the disadvantage of the EU's international relations, and the interests of its citizens, consumers and economic operators. Third countries may also anticipate or deduce certain negotiating position of the EU ahead of the trade talks on the basis of the information contained in the withheld documents and passages.

It may also jeopardise the mutual trust between the EU and other trading partners as they may fear that in the future their positions would be exposed and they may as a result 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 in the future be publicly revealed. 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"<sup>11</sup>.

## **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".

The applicable legislation in this field is 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. In this respect, 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"<sup>12</sup>.

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'"<sup>13</sup> and that "surnames and

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<sup>11</sup> Judgment in *Sophie in't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraph 126.

<sup>12</sup> 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.

<sup>13</sup> 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.

*forenames may be regarded as personal data*",<sup>14</sup> including names of the staff of the institutions.<sup>15</sup>

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"*.<sup>16</sup>

All documents contain initials and signatures that are redacted for privacy protection. In line with the Commission's commitment to ensure transparency and accountability, the names of the Commissioners and the Director-General for Trade are disclosed. Also the names of the Canadian ministers can be disclosed.

I note that you have not established the necessity of having these redacted 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) 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 jurisprudence of the EU Courts has also 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"*<sup>17</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>18</sup> 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*

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<sup>14</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>15</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>16</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

<sup>17</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71.

<sup>18</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

*deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]*".<sup>19</sup>

As you may know, the decision-making process for the ratification of the agreement is still ongoing. After the signature of the Council and the consent of the European Parliament, CETA will enter into force provisionally, once it has also been ratified on the Canadian side. CETA will be fully implemented once the parliaments in all Member States ratify the agreement according to their respective domestic constitutional requirements, and after the Council has adopted the decision on conclusion.

Documents 8, 9 and 10 contain information exchanged with the Canadian Government in order to promote the negotiation of specific aspects of the Comprehensive Economic and Trade Agreement between the EU and Canada. These documents contain views, opinions and remarks of the European Commission and Canadian government that were meant for internal use in the context of a decision-making process that led to the adoption of the text. Disclosing the withheld documents and passages would seriously undermine the decision-making process of the institution in this specific case, as it would reduce the free exchange of views of the Commission by exposing views and considerations of individual staff members to possible external manipulation, undue pressure and unfounded conclusions.

Protecting the confidentiality of certain documents allows for the actors involved in the decision-making process to speak frankly and freely, and in this way, the Commission is able to feed this information into its decision-making process. Reducing this degree of protection would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that "*constructive form of internal criticism, given free of all external constraints and pressures*" which is "*designed to facilitate the taking of decisions*". Ultimately, this would affect the quality of the consultations and deliberations, and seriously undermine the Commission's decision-making process.

### **3. OVERRIDING PUBLIC INTEREST**

The exception laid down in article 4(3) first subparagraph of Regulation 1049/2001 applies unless there is an overriding public interest in the disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for the institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution "*is acting in its legislative capacity*"<sup>20</sup> as transparency and openness of the legislative process strengthen the democratic right of

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<sup>19</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

<sup>20</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

European citizens to scrutinize the information which has formed the basis of a legislative act<sup>21</sup>.

The documents withheld under article 4(3) all pertain to the domain of the executive functions of the EU as they concern trade negotiations. In this context, the Court has acknowledged that *“public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations”*<sup>22</sup>.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making prevails over transparency in this specific case. In particular, disclosure at this stage of documents withheld under article 4(3) of Regulation 1049/2001 would undermine the possibility of achieving the best possible outcome in the public interest. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making process in question without external pressure.

Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding the Commission's 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 documents 8, 9 and 10.

After a careful review, we have concluded that they are entirely covered by the exceptions described above as it is impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply.

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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:

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<sup>21</sup> *Id.*, paragraph 67.

<sup>22</sup> Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.



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or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes that form a stylized representation of the name Jean-Luc DEMARTY.

Jean-Luc DEMARTY

Encl.: - List of documents;  
- Released documents.