




EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

 Ref. Ares(2019)1598515 - 10/03/2019

Brussels, 10 March 2019

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

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Subject: Your application for access to documents – Ref GestDem 2018/5694

Dear Mr Verbeek,

I refer to your request of 1 October 2018 for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), as registered under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

With this request GestDem 2018/5694, you request access to a set of 25 documents, ie. documents numbered 26 to 50 from the list submitted to you by the European Commission on 21 September 2018 as part of your previous request, notably GestDem 2018/4307.

After close examination, I note that we have already given you access to documents numbered 26-28 in response to your previous request GestDem 2018/4307. We also realised that certain documents appear twice on the list (notably those numbered 36, 38 and 59), certain documents form part of other documents (those numbered 42 and 50) and one document was no longer accessible (number 51). In order to treat your request for an additional 25 documents, we therefore consider your new request to cover documents 29 to 60.

Requests GestDem 2018/4307 and GestDem 2018/5694 concern:

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.

- any documents, including briefings, reports, memo's and correspondence (emails, letters, faxes etc.), in which the Indonesia-EU Vision Group was mentioned (between December 2009 and today);

- a list of meetings, as well as agendas and minutes or any other reports of such meetings, between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of the Indonesia-EU Vision Group (between December 2009 and today).

For ease of reference, a list of the documents falling within the scope of your request is enclosed in Annex 1. For each of them the list provides a description and indicates whether parts or entire documents are withheld and if so, under which ground pursuant to Regulation 1049/2001.

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 poses a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception. Third, if the institution 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 documents⁴, “*the exceptions to that right [...] must be interpreted and applied strictly*”⁵.

Having examined the requested documents under the applicable legal framework, I am pleased to grant you full access to the content of document 31. The content of documents 39, 40, 43, 47, 48, 49, 54, 56, 58 and 60 is fully accessible with the exception of elements concerning the protection of privacy and integrity of the individual, which were redacted pursuant to Article 4(1)(b) of Regulation 1049/2001.

Partial access is granted to documents 29, 32, 34, 35, 37, 41, 44, 45 and 52.

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.

With respect to documents 29, 32, 34, 35, 37, 41, 44, 45 and 52 in addition to personal data, parts were redacted based on the exceptions set out in Article 4(1)(a) third indent of Regulation 1049/2001 (protection of the public interest as regards international relations) or in Article 4(3) first indent of Regulation 1049/2001 (protection of the institutional decision-making process), or in both. Parts of documents that do not relate to your request have also been removed, as they do not fall within the scope of your request.

Finally, I regret that no access can be granted to documents 30, 33, 46, 53, 55 and 57 as these documents are fully covered by the exceptions set out in Article 4(1)(a), 4(1)(b) or Article 4(3).

The reasons justifying the application of the exceptions are set out below in Sections 2.1, 2.2 and 2.3.

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"*.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

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

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

The EU is currently negotiating a free trade agreement with Indonesia. More generally, under these circumstances it remains important for the EU to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in order to safeguard the EU's interests. Exposing internal views and considerations would weaken the negotiating capacity of the EU and, consequently, the protection of the public interest as regards international relations.

Certain passages in documents 29, 30, 32, 33, 34, 35, 37, 41, 44, 45, 46, 52, 53, 55 and 57 have therefore been withheld as they reveal important strategic interests and priorities. As such, this information directly or indirectly reveals negotiating priorities, strategic objectives and tactics, which the EU could consider pursuing in its ongoing trade negotiations.

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 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/EC¹⁰ (‘Regulation 2018/1725’).

All documents, except document 31, contain personal information, such as names, e-mail addresses or telephone numbers that allow the identification of natural persons as well as other personal information, like signatures.

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.¹¹ 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.¹²

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹⁴

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ 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.

¹² 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.

¹³ 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.

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 subjects' 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 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.

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*

¹⁴ 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.

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"*¹⁵ and that the capacity of its staff to express their opinions freely must be preserved¹⁶ 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 [...]"*¹⁷.

The EU is currently negotiating an EU-Indonesia free trade agreement. Negotiations were launched in July 2016 and have now reached their sixth round. Documents 30, 32, 33, 34, 37, 41, 44 and 46 contain information exchanged with our trade partner or experts in connection with the shaping of the public interest in the context of these negotiations. They contain views, opinions and remarks of both the European Commission and several stakeholders as well as our counterpart regarding the specific content of a possible free trade agreement. Disclosing the withheld documents or parts of them would seriously undermine the decision-making process of the institution. In particular, a disclosure would reduce the free exchange of views between the Commission and Member States and other institutions, by exposing views and considerations to undue pressure, at a time when such free exchanges of views are particularly important given the ongoing process of negotiation.

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"*¹⁸ as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act¹⁹.

¹⁵ Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

¹⁶ Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

¹⁷ Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

¹⁸ 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.

¹⁹ *Id.*, paragraph 67.

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”*²⁰.

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 negotiations in the public interest. Disclosing the withheld documents would expose the EU to have to justify preliminary positions which eventually evolved in the decision-making process and which may endanger the relationship with the negotiating partner as well as with institutional partners. Therefore, based on the considerations made above, we have not been able to identify a public interest capable of overriding the Commission's decision-making process.

In case you disagree with the assessment contained 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 (SG.C1)
BERL 5/282
1049 Bruxelles

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

Yours sincerely,



Jean-Luc DEMARTY

Encl.:

- Annex 1: List of documents
- Documents plus annexes including fully and partially released documents

²⁰ 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.