

Brussels, 14 December 2015

*Klaus Welle*

*Secretary General of the European Parliament*

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**Dear Mr Welle,**

**RE: A13546/MJC/en - Confirmatory application for reconsideration of the European Parliament's response regarding the disclosure of documents discussed at the trilogue negotiations regarding the Trade Secrets Directive**

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the Parliament's response regarding disclosure of documents discussed at the trilogue negotiations on the Trade Secrets Directive.

*On 30 October 2015 ClientEarth wrote to the Parliament requesting access to "all documents connected to the trilogue meetings and technical meetings taking place between representatives of the Parliament, the Council and the Commission in connection with the Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure which have become available since our request of 28 September 2015. Such documents include the agenda for trilogue meetings, four-column documents, minutes of the meetings, documents used to brief the relevant parliamentary committees about the trilogue meetings, and position papers sent by industry representatives."*

The Parliament sent its response by email on 23 November 2015, providing full access to the only document identified as coming under the request (the Agenda to the second trilogue meeting held on 27 October 2015). The email also provided the internet link to footage of the meeting of the Legal Affairs Committee of 12 November 2015, at which the Parliament's negotiating team reported back on the trilogue meeting of 27 October 2015.

**Breach of Article 2 of Regulation 1049/2001/EC - Failure to record the activities of the European parliament**

Given that only the agenda for the meeting was identified as being in the Parliament's possession, ClientEarth presumes that representatives of the Parliament's secretariat who were present at the trilogue meeting of 27 October 2015 were not sent, and did not author, any preparatory documents ahead of the meetings, nor were they sent or did they make any record of the discussions held at the meeting.

Such a failure to record the activities of the European Parliament is in breach of Article 2 of Regulation 1049/2001/EC. Article 2 states that "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions,*

*subject to the principles, conditions and limits defined in this Regulation.” Article 3(a) of the Regulation defines “documents” as “any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility”.*

In Case T-264/04 *WWF European Policy Programme v the Council of the European Union*, the Court of First Instance held that *“it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities.”*

In the WWF case, the Court of First Instance held that it could not be concluded that the Council, in claiming that minutes of the first agenda item of its Article 133 Committee meeting did not exist, acted in an arbitrary or unpredictable manner. The Court came to this conclusion owing to the *“purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure”*. However, the same conclusion cannot be applied to the Parliament’s failure to draw up and retain documentation relating to an important step in the legislative procedure, a trilogue negotiation.

Article 10(3) and Article 11 of the Treaty on European Union and Article 15 of the Treaty on the Functioning of the European Union, emphasise the Union’s commitment to transparency and democratic decision-making. Article 10(3) TEU states that *“Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”*. Article 11 TEU adds that *“[t]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”*. Article 15 TFEU provides that *“In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible”*.

Recital 2 of Regulation No. 1049/2001 states that *“[o]penness enables citizens to participate more closely in the decision-making process”* and Recital 6 very clearly states that *“[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.”* The European Court of Justice also recognises the special status of legislative documents. In case C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European*, the Court of Justice relied on recital 6 to state that *“openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”*. The Court also referred to Article 12 of the Regulation, which recognises the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible.

The European Parliament’s own rules on access to documents, as well as the Parliament Resolution on access to documents adopted in March 2014, also afford a special status to legislative documents. Article 5(2) of the Parliament’s internal rules obliges the European Parliament to make all legislative documents

within the meaning of Article 12(2) of Regulation (EC) No 1049/2001 electronically accessible through the ERR or the Europarl internet site. Of particular relevance, Paragraphs 27-30 of the Parliament's Resolution on Access to Documents deal specifically with legislative documents. Among other things, it calls on the Commission, the Council and the Parliament to publish the minutes of trilogue meetings! This, of course, implies that minutes must be drawn up in the first place.

Given the special status afforded to "legislative documents" in the Treaties, Regulation 1049/2001, the relevant case law, and the Parliament in its rules on access to documents and its Resolution of March 2014, the failure to take minutes of trilogue meetings is both arbitrary and unpredictable, in breach of Article 2 of the Regulation.


ClientEarth also considers that documents in the possession of the MEPs fulfilling the official roles of rapporteur and shadow rapporteurs for the purpose of negotiating the Trade Secrets Directive in trilogue meetings are Parliament documents. Therefore, the documents falling under the scope of our request which are in the possession of the rapporteur and shadow rapporteurs should be identified and disclosed.

**Lack of consistency regarding the Parliament's approach to record keeping and access to documents requests in the context of trilogue negotiations**

ClientEarth would like to point out the lack of consistency in the Parliament's approach to record keeping and access to documents requests in the context of trilogue negotiations. On 10 December 2013 ClientEarth sent a request to the European Parliament to access the minutes and reports following trilogue meetings in the context of the review of the Directive on Environmental Impact Assessments (Directive 2011/92/EU). On 10 January 2014, the European Parliament provided partial access to the documents identified as corresponding to the request. These were four feedback notes drafted after trilogue meetings disclosing the EP statements in the negotiations on several topics. The statements made by representatives of the Commission and the Council had been redacted on the basis that ClientEarth had introduced similar requests to these institutions. While the Parliament's response in 2013 does not fully comply with its obligations under Regulation 1049/2001/EC, at the very least it shows that some record of its activities at the trilogue negotiations was taken and disclosed upon request. Therefore, the Parliament's approach in the context of the Trade Secrets Directive is a marked departure from its previous practice, and represents a significant reduction in transparency in the legislative process. Such a lack of consistency and procedure breaches basic principles of good administration and renders the rights of EU citizens' to transparent decision-making entirely reliant on the good will of individual Parliament officials.

For all these reasons, ClientEarth hereby request the Parliament to identify and grant full access to the requested documents.

Yours sincerely,

  
Lawyer - Environmental justice

