



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL
MARKETS UNION

The Director-General

Brussels
FISMA.B.3/

Mr Nicholas Lee
Le Mairekade 64
1013CD Amsterdam
The Netherlands

[ask+request-10396-
52684fc1@asktheeu.org](mailto:ask+request-10396-52684fc1@asktheeu.org)

Subject: Your application for access to documents – Ref GestDem No 2021/5724

Dear Mr Lee,

We refer to your e-mail dated 14/12/2021, in which you make a request for access to documents, registered on 14/12/2021 under the above mentioned reference number.

You request DG FISMA to provide you access to all documents and preparatory documents pertaining to the United States Foreign Account Tax Compliance Act (FATCA) or contributing to statements, guidelines and decisions referencing FATCA. On 10/02/2022, you accepted our fair solution proposal limiting the temporal scope of your request to the period from 01/01/2021 until 14/12/2021. As agreed with you, we have not included in the scope of your request the documents which fell under the scope of your previous access requests GestDem 2021/6161, 6162, 6163, 6164 and 6165. Please note that based on the past correspondence we have understood that you are interested in documents held by DG FISMA and therefore we have included only such documents in the scope of this request.

Your application concerns the documents listed in Annex 2. Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we regret to inform you that access to the requested documents cannot be granted, as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation and most of the documents are also out of the material scope of your request. However, we can provide you with some publicly available documents about FATCA; you will find them listed in Annex 1.

The documents which you seek to obtain are related to a matter under discussion between the European Union and the United States of America. The disclosure of the documents listed in Annex 2 would undermine the protection of the public interest as regards international relations under Article 4(1) of Regulation (EC) No 1049/2001, in particular in relation to preliminary views and policy options which are currently under consideration by both the EU and the US. Thus disclosure of these documents could jeopardise the climate of mutual trust between both administrations as recognized by the Court of Justice: *“any form of international negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust”*.¹

Furthermore, these documents are covered by the exception in Article 4(3)^{2nd} indent of the Regulation that establishes the exception related to the *“access 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”*. Documents 1 to 11 refer to internal exchanges by the Commission officials on the developments of this file. The Commission's services must be free from external pressure to explore all possible options in preparation of a decision and to freely express their views in writing in the context of internal exchanges. The disclosure of such internal documents would jeopardise the free flow of information within the Commission, as officials would refrain from expressing themselves in a frank manner in the context of their duties. Therefore, the exception laid down in Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 applies to these documents.

Additionally, documents 12 and 13 concern an on-going investigation of a complaint which partially relates to FATCA. The disclosure is prevented by an exception to the right of access laid down in Article 4 of this Regulation which states that *“(t)he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.”*

The disclosure of the documents at the investigative, pre-litigation phase would have a negative effect on the assessment of the documents provided by the complainant and would harm the climate of mutual trust between the authorities of the Member State concerned and the Commission. The approach to protect the conduct of the investigations within the pre-infringement and infringement proceedings has been notably confirmed in the *Petrie* judgment²:

“68. (...) the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. ”

¹Judgment of the General Court of 19 March 2013 in case T-301/10, *In 't Veld v Commission*

²Case T-191/99, judgment of 11 December 2001, [2001] ECR I-3677.

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the these documents of Annex 2. You make no mention of such an interest in your request and we have not been able to identify it.

We have also considered whether partial access could be granted to these documents requested but it is not possible as the parts which are not covered by the exceptions are out of the scope of your request (as they do not concern FATCA).

In accordance with Article 7(2) of Regulation (EC) No 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:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

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

Yours sincerely,

John BERRIGAN

Enclosure: Annex 1: List of publicly available documents on FATCA
 Annex 2: List of documents under the scope of GestDem 2021/8087

Annex 1

1) EU US Forum 24-25 March 2021 - a detailed joint statement can be found at:

https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210329-eu-us-joint-financial-regulatory-forum-joint-statement_en.pdf

2) EU US Forum 29-30 September 2021 - a detailed joint statement can be found at:

https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/211004-eu-us-joint-financial-regulatory-forum-joint-statement_en.pdf

3) EBA Opinion and Annexed Report on de-risking can be found here:

[EBA Opinion and annexed report on de-risking.pdf \(europa.eu\)](#)

4) Information on the Government Expert Group on Retail Financial Services (GEGRFS) can be found here:

[Register of Commission expert groups and other similar entities \(europa.eu\)](#)

Disclaimer:

You may reuse public documents, which have been produced by the European Commission or by public and private entities on its behalf based on the [Commission Decision on the reuse of Commission documents](#). You may reuse the documents disclosed free of charge and for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

Annex 2

	REGISTRATION NUMBER	TITLE	REGISTRATION DATE
1	Ares(2021)2391355	Briefing FISMA/2307 - U.S.-EU Joint Financial Regulatory Forum	07-04-2021
2	Ares(2021)7412292	Minutes - 29 November 2021	01-12-2021
3	Ares(2021)7238407	Minutes - 22 November 2021	24-11-2021
4	Ares(2021)7610875	Minutes - 6 December 2021	09-12-2021
5	Ares(2021)6457670	Briefing FISMA/2495 - Meeting	20-10-2021
6	Ares(2021)7288859	Minutes - 24 November 2021	26-11-2021
7	Ares(2021)2539461	Briefing FISMA/2315 - EU-US Forum debrief	14-04-2021
8	Ares(2021)6192041	Briefing EVP4/2021/222.05	11-10-2021
9	Ares(2021)7073812	Minutes - 15 November 2021	17-11-2021
10	Ares(2021)6908863	Minutes - 8 November 2021	10-11-2021
11	Ares(2021)6643499	Minutes - 25 October 2021	28-10-2021
12	Ares(2021)6292244	CHAP(2021)03279 - additional info	15-10-2021
13	Ares(2021)7461389	CHAP (2021)03279 – additional documents	03-12-2021