



**Friends of
the Earth
Europe**

European Commission
Secretary General
Transparency Unit SG-B-5
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Brussels, Tuesday March 18th 2014

Re: Confirmatory application GESTDEM 2013/5998

In conformity with Article 7(2) of Regulation (EC) 1049/2001, I hereby submit a confirmatory request for access to documents on behalf of Friends of the Earth Europe (GESTDEM 2013/5998). The original request was filed on 28 November 2013.

Position of the European Commission: partial access granted by the European Commission

The original request concerned the following documents:

All the documents (including letter and email exchanges as well as lists of meetings, agendas and minutes of these meetings) in relation to contacts between Commissioner De Gucht, Members of his cabinet, GD Trade members of staff and external stakeholders about the link between the Transatlantic Trade and Investment Partnership (TTIP) and unconventional fuels (in particular shale gas and high-volume hydraulic fracturing or 'fracking'), since 1st January 2013.

1. Friends of the Earth Europe Europe (the applicant) received a reply to its request on 26 February 2014.
2. In its reply, the European Commission granted partial access to the applicant's request. Out of the five documents identified, the European Commission decided to fully withhold one meeting report between European Commission Department General for Trade (DG Trade) and energy company ExxonMobil (document 3, 17 October 2013, 5:35PM), on the basis of articles 4.2 and 4.3 of Regulation 1049/2001 on public access to EU documents.

3. The European Commission argues that:

“The meeting report contains sensitive information. First, commercial interests of ExxonMobil could be undermined by release of this report which reveals company’s strategy (Article 4.2 of the Regulation). Second, it contains also sensitive information relating to the EU’s internal decision-making process regarding the FQD. Disclosure of this information would reveal the EU’s position and would undermine the Commission’s decision-making process (Article 4.3 of the regulation). The exceptions laid down in Article 4.2 and 4.3 of the Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Accordingly, the presence of an overriding public interest in disclosure has also been assessed. In the present case, there is no such evidence. On the contrary, the prevailing interest in this case rather lies in protecting the purpose of the Commission’s internal consultations as well as the decision-making process at the heart of these consultations.”

The Commission argues the partial disclosure is justified by a lack of overriding public interest

Considering that Article 1 of the Treaty of the functioning of the European Union¹ states that decisions in the European Union are taken as openly as possible and as closely as possible to the European citizens, the principles of the European institutions are openness and transparency rather than confidentiality. Article 15(1) further states that each institution, body or agency shall ensure that its proceedings are transparent and that any citizen of the Union shall have a right of access to documents.

Exchanges between European decision-makers and external stakeholders in relation to unconventional fossil fuels as well as legislations made on the same topic relate to emissions in the environment. They have a direct impact on citizens’ health and safety, and the environment in which they live. In particular, information about the Fuel Quality Directive (FQD) falls within the scope of “environmental” information as defined by the Aarhus Convention. As a result Regulation (EC) No 1367/2006² on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, applies to our request, and justifies the overriding public interest in disclosure.

Regulation 1367/2006 states that:

“The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment. The term ‘commercial interests’ covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.”

Therefore there is overriding public interest in the disclosure of information that relates to the decision-making process around the use and regulation of unconventional fuels, including in the context of the EU-US trade negotiations.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0013:EN:PDF>



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The Commission argues that access to full documents was rejected because this would harm commercial interests (Article 4(2) of (EC) regulation 1049/2001).

According to the jurisprudence of the European Court of Justice, the risk of an interest covered under Article 4 of Regulation 1049/2001 being undermined "must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical."³ The European Commission has failed to justify to which extent this would be the case here, including why the document as a whole should be kept away from public scrutiny. When meeting with external stakeholders, all staff members of DG Trade are acting in their function of public servant, employed by an EU institution, for which they are undertaking a public function. Considering that decisions taken by public servants in the European Commission affect the public as a whole, openness about who they are meeting with and what they are discussing should prevail over secrecy. As mentioned above, this is particularly the case when it comes to environmental information as defined by the Aarhus Convention.

In addition, we would like to draw your attention to an earlier ruling by the European Ombudsman (case 676/2008RT3)⁴. The Ombudsman stated that:

"Regulation 1049/2001 provides for a right of access to Commission documents as a matter of principle, and that a decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation 1049/2001. Any exception to this principle has to be interpreted strictly." [...] "Even if the letters had contained exactly the kind of information described in paragraph 28 above [information pertaining to Porsche AG's commercial interests] this fact alone would not necessarily mean that their disclosure would specifically and actually undermine the commercial interests of Porsche AG. As the Court of First Instance (now the General Court) held in a recent judgement⁴, if all information relating to a company and its business relations were regarded as being covered by the protection given to commercial interests in accordance to Article 4(2), first indent, of Regulation No 1049/2001, effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions."

He concluded that:

"By failing properly to justify why it refused access in their entirety to the three letters sent by Porsche AG to former Vice-President Verheugen, the Commission committed an instance of

³ Court of Justice, joined cases C-39/05P and C-52/05P, Sweden and Turco v. Council, ECR 2008, p.1-4723, paragraph 43

⁴ Case 676/2008RT3 Friends of the Earth Europe complaint against the Commission for maladministration after the Commission provided partial access to letters from Porsche AG on CO2 emissions from cars on grounds that the disclosure of the letters would undermine the protection of Porsche AG's commercial interests

maladministration. [...] The Commission's uncooperative attitude in this regard risks eroding citizens' trust in the Commission and undermining the capacity of the European Ombudsman and the European Parliament to supervise the Commission in an adequate and effective way. As such, it runs counter to the very principle of the rule of the law upon which the European Union is founded."

Therefore the disclosure of the full report meeting between ExxonMobil and DG Trade cannot be considered prejudicial to ExxonMobil's commercial interests, unless the Commission justifies why and how.

The European Commission argues that full disclosure of the requested document would harm the Commission's internal decision-making process (Article 4(3) of (EC) regulation 1049/2001).

The European Commission justifies the refusal to make the full meeting report between ExxonMobil and DG Trade publicly available using the argument that:

"It contains also sensitive information relating to the EU's internal decision-making process regarding the FQD. Disclosure of this information would reveal the EU's position and would undermine the Commission's decision-making process".

Again, the European Commission fails to explain why and to which extent revealing the EU's position on the topic would undermine its decision-making process.

Furthermore, the European Commission's answer suggests that such information was already shared with the company ExxonMobil during the meeting, whilst the disclosure of the meeting report to the public was refused. If this is the case, it would mean that the European Commission refuses to provide the public with the same access to its positions as ExxonMobil. It also fails to explain what justifies acting in such a way.

According to the Code of Good Administrative Behaviour⁵:

"In dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner. [...] If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case." (Article 5)

"The official shall act impartially, fairly, and reasonably." (Article 11)

- 4. Therefore the applicant would like to confirm its request for access to documents, including the full disclosure of the meeting report between ExxonMobil and DG Trade (document 3, 17 October 2013, 5:35PM).**

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http://www.ombudsman.europa.eu/showResource?resourceId=1370850557353_code_2013_EN.pdf&type=pdf&download=true&lang=en



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Please send (electronically if possible) the requested documents to natacha.cingotti@foeeurope.org

Yours sincerely,

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