

Complaint to the European Ombudsman against the European Commission about maladministration in relation to the access to documents relating to the Transatlantic Trade and Investment Partnership Agreement

This complaint, jointly submitted by ClientEarth, the European Environmental Bureau, Friends of the Earth Europe, the Corporate European Observatory and the European Federation of Journalists (the “complainants”), concerns maladministration by the European Commission in relation to access to documents relating to the Transatlantic Trade and Investment Partnership (TTIP)¹.

The complainants note, and welcome, the own-initiative investigations launched by the European Ombudsman in relation to the transparency of the TTIP negotiations and the public consultation, and the decision published on 6 January 2015.²

We furthermore note the publication by the Commission of additional documents on its website on 7 January 2015³, and while we welcome the publication of additional documents, we do not consider that it has adequately addressed our request for documents.

What is the decision or matter about which you complain? When did you become aware of it?

This complaint relates specifically to the failure by the European Commission to grant access to the complainants to a number of TTIP-related documents, as set out in detail below.

General background

In order to put this complaint in the broader context of the ongoing TTIP negotiations, the complainants make the following general observations:

1. **Transparency is critical, but it is not an end in itself.** In the context of TTIP, access to documents is a means by which the public interest in an ongoing trade and investment agreement with enormous implications for the public can be addressed, and the **principle of public participation in European decision-making better satisfied**. Lack of access directly informs a lack of ability to participate.⁴
2. **The right of access to documents⁵ in the context of TTIP negotiations is not contested.** The European Commission has frequently espoused its commitment to transparency in respect of the

¹ OI/10/2014/RA and OI/11/2014/RA; Decision of the Ombudsman closing her own-initiative inquiry OI/10/2014/RA Concerning the European Commission, 6 January 2015 (“Ombudsman own-initiative decision”), available: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark#_ftn5

² Public Consultation OI/10/2014/MMN

³ Available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

⁴ By analogy in relation to the European legislative process, see Decision of the European Ombudsman closing the inquiry into complaint 2232/2011/(RA)FOR against the European Commission, 21 May 2014, para. 11: “...Openness in respect of access to documents relating to the adoption of EU legislation contributes to strengthening democracy by allowing citizens to follow in detail the decision-making process within the institutions taking part in legislative procedures, and thereby to scrutinise all the relevant information which has formed the basis of a particular legislative act.”

⁵ Itself a fundamental right enshrined in the Charter of Fundamental Rights of the European Union (Article 42); and interpreted in light of the Treaty of Lisbon and Regulation (EC) 1049/2001.

TTIP negotiations, and in a public response dated 1 October 2014 to the own-initiative investigation launched by European Ombudsman, the European Commission acknowledged in the context of TTIP that “access to documents is not only a right, it is also good policy”.⁶ Subsequent to that statement, the Commission issued several communications on 25 November 2014 promising “a fresh start” on transparency and in that light has promised to provide more extensive access to TTIP documents (the “**November 2014 Communication**”).⁷ The Ombudsman’s decision of 6 January 2015 further confirms the importance of transparency and public participation in the context of TTIP negotiations.

- 3. In particular, TTIP touches on a number of environmental issues, which heightens the importance of transparency as regards the negotiations.** The robust requirements of access to information under the Aarhus Convention and Aarhus Regulation (together referred to here as the “Aarhus regime”) apply and must be considered in granting access to documents requests in TTIP that relate to the environment or to environmental emissions.

The complainants consider that in such circumstances, the default practice of the European Commission in relation to all documents relating to TTIP ought to be full disclosure and public access, including disclosure of the existence of all documents even where disclosure of the contents of a particular document is considered by the Commission to fall within an exception to the right to access. As the General Court observed in *Sophie in ‘t Veld*, “the principle is that the public is to have access to the documents of the institutions and the power to refuse access is the exception.”⁸ Access to a document ought to be denied only on the basis that the specific document in question falls into an exception to Regulation 1049/2001⁹ regarding public access to European Parliament, Council and Commission documents (the “Access to Documents Regulation”), with reasons for refusal given on a document-by-document basis. We welcome the Ombudsman’s decision that an exceptions to the fundamental right of public access to documents must be interpreted restrictively by the Commission.¹⁰

Further, the Commission should give timely responses to requests for access to documents; and should ensure the means and organisation of access do not render the purpose of access – namely observation of and participation in the TTIP negotiations – toothless.

Background to the access request the subject of this complaint

The complainants first made a request for access to the following categories of documents and information relating to TTIP on 17 February 2014 (GESTDEM 2014/0884)¹¹:

- a) The text of the EU’s negotiation mandate (“**category (a)**”);
- b) The text of the EU’s positions on regulatory cooperation, ISDS, the chemical sector, food safety, sustainable development and energy as disclosed to the Government of the United States (“**category (b)**”);

⁶ Comments of the Commission on the European Ombudsman’s own-initiative inquiry – Ref. OI/10/2014/RA, available at: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58450/html.bookmark>

⁷ See Communication to the Commission concerning transparency in TTIP negotiations, C(2014) 9052 final, Strasbourg 25 November 2014, available at: http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf. See also press release: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1205>

⁸ GC, 19 March 2013, *Sophie in ‘t Veld*, T-301/10, para. 107.

⁹ OJ L 145, 31.5.2001, p. 43.

¹⁰ Ombudsman’s own-initiative decision, *supra* n.1, para. 14.

¹¹ Attached in Annex to this complaint.

- c) Any other reports or papers provided to the US by the EU on the topics identified in [category] b) above (“**category (c)**”);
- d) Any reports or papers provided to EU Member States and the European Parliament on the topics identified in [category] b) above (“**category (d)**”).

The complainants note that without a clear public record of which documents exist in the negotiations, a best-efforts approach to requesting those documents is necessarily based on conjecture – a deeply unsatisfactory corollary to the maladministration of the Commission in failing to disclose documents to begin with.

On 6 May 2014 – well after the maximum 30-day deadline provided for in Regulation (EC) 1049/2001 – the Commission replied¹², not only rejecting the complainants’ request, but failing to give substantive reasons in relation to the categories of documents requested. The Commission in that response failed to explain why those categories of documents, let alone specific documents falling within those categories, would fall into an exception under Access to Documents Regulation. Rather, the Commission stated only that Article 4(1)(a), third indent (protection of international relations) and Article 4(3), first subparagraph (protection of the decision-making process) of the Access to Documents Regulation, meant that it was not obliged to disclose any of the requested documents.

The complainants submitted a confirmatory application on 27 May 2014¹³. In that application, we requested a list of all documents covered by our request; and full access to those documents. In that application, we set out in detail the applicability of the Aarhus Convention, and Aarhus Regulation, to our document requests, and the failure of the European Commission to consider its obligations under that legally binding regime.

On 9 July 2014, the European Commission provided its response to the confirmatory application¹⁴, listing all documents it believed to be covered by the request, but again denying access to all documents not already in the public domain on the basis of the same exceptions it had originally invoked (the “international relations” exception, and the “protection of the decision-making process” exception in Article 4 of the Access to Documents Regulation). The Commission left open the question of the applicability of the Aarhus Convention in its decision but suggested that its application to the documents in question had not been substantiated.

What do you consider that the EU institution or body has done wrong?

In rejecting our request for access to documents, and denying our confirmatory application, the European Commission has:

- (i) improperly relied upon the “international relations” exception under Article 4(1)(a), third indent of the Access to Documents Regulation;
- (ii) failed to consider properly the public interest in access to documents under the Aarhus Regulation and the Aarhus Convention;
- (iii) improperly invoked the “protection of the decision-making process” exception under Article 4(3), first subparagraph of the Access to Documents Regulation;

¹² Attached in Annex to this complaint.

¹³ Attached in Annex to this complaint.

¹⁴ Attached in Annex to this complaint.

- (iv) failed to consider properly whether there is an overriding public interest in transparency in relation to each document or categories of document;
- (v) failed properly to consider the provision of partial access of documents requested;
- (vi) failed to respond in a timely manner.

More broadly, in failing to provide systematic and readily accessible information regarding the documents relevant to its TTIP negotiations, the European Commission has:

- (vii) failed to implement transparency in such a way as to provide meaningful opportunities for the complainants (and indeed other members of the public) to access documents, or to request access to documents.

These complaints are set out in more detail here:

- (i) The Commission has improperly relied upon the “international relations” exception under Article 4(1)(a), third indent of the Access to Documents Regulation;**

The Commission asserts that *all* “negotiating documents”, even those shared with the US authorities in the framework of the negotiations and those shared with Member States or others on a need-to-know basis, fall under an “international relations” exception to disclosure in the Access to Documents Regulation.

This is an improper approach to considering access to documents requests.

First, it is logically inconsistent. The Commission suggests that four of the requested “initial position papers” (**category (b)** documents 2, 3, 5 and 7 in the list of documents it provided in its decision on our confirmatory application – attached in the Annex) have been made public. The Commission has not explained why these documents fall outside the international relations exception. Nor has it considered why a fifth “initial position paper” (document 4) would not also fall outside the exception – rather, it appears to have claimed the exception for that document. (We note that on 7 January 2015, it made public a position paper on Financial Services in TTIP: this does not appear to be the same document it identified as document 4 in our request).

Nor has it confirmed (in its decision in respect of our requests, or in the November 2014 Communication) that it intends to make public any negotiating documents or position papers, like the initial position papers, that might no longer in its view fall under the international relations exception. Simply put, the final response of the Commission indicates a lack of thought and process as to which documents do legitimately fall under that exception, if any, and which are in the public interest to disclose.

Second, certain categories of documents, such as those requested by the complainants and falling into **category (b)** (“the text of the EU’s positions on ... disclosed to the Government of the US”) and **category (c)** (“... reports or papers provided to the US by the EU on the topics identified ... above”) do not clearly fall within the international relations exception. This is a matter of common sense as much as of law.

The General Court in *Bresselink* ruled, in respect of a particular negotiating directive in the negotiation on the accession to the European Convention for the Protection for Human Rights and Fundamental Freedoms, that the international relations exception could not be relied upon. It gave reasons including that (i) the directive had been communicated to the negotiating parties and therefore “the risk that the public interest as regards international relations will be undermined cannot be justified on the ground that disclosure of that directive would weaken the Union’s negotiating position”; and (ii) that since the position of the EU’s

negotiating partners had not been revealed in that directive, it could not “jeopardise the climate of confidence between the parties participating directly or indirectly in those negotiations.”¹⁵

Similarly, considering the category (c) requests of the complainants, where negotiating texts have been shared with the US negotiators, or where they do not contain positions of the US, the presumption ought to be, as set out in *Bresselink*, that the international relations exception does not apply.

Third, in relation to certain documents within **all categories of documents requested**, we submit that a distinction exists between (i) evolving negotiating positions that would specifically and actually undermine the public interest as regards the EU’s international relations; and (ii) settled negotiating positions or positions that have been advanced, which in our view do not fall into the international relations exception. It is not clear from the Commission’s response to our requests why positions previously put forward by it, either internally via reports to the European Parliament or EU Member States or externally to the US (which the Commission collectively refers to as documents 14-16), would be subject to the international relations exception. These are stated positions, already finalised internally, advanced and recorded; they are of course subject to change, but in their published form they merely record a position at a certain past time, and consequently do not pose a risk to the EU’s future negotiations or more broadly, its international relations.

We welcome the own-initiative decision of the Ombudsman in this respect, and in particular the suggestion that the Commission immediately assess whether a document can be made public as soon as it has been finalised internally; and moreover that common negotiating texts with the US be made public unless the US has provided a reasoned objection.¹⁶ We would consider that this reasoning extends to reports of negotiating rounds, which have been concluded and therefore represent finalised internal positions of both negotiating sides (documents 14-16 identified by the Commission).

As the Ombudsman has noted (in relation to legislative proposals and comments thereon by different Directorates General), with access to initial legislative proposals, “the public can follow the evolution in the Commission’s thinking and attempt to understand the rationale for its final position.”¹⁷ This is, as acknowledged by the General Court, a healthy part of democratic decision-making in the legislative sphere.¹⁸ TTIP will fundamentally affect the European public in a manner analogous to European legislation. The specific and actual risk to the European Union’s international relations in clarifying and making public for discussion its settled internal positions is, with respect, not remotely clear.

Moreover, in relation to all documents requested by the complainants, case law indicates that an institution that refuses access under the Access to Documents Regulation must explain how access to that document could specifically and effectively undermine the interest protected by an exception provided for in Article 4 of the Regulation¹⁹; and moreover that a threat to the European Union’s international relations cannot be presumed²⁰.

We respectfully submit that the Commission has not, as it confirms it will in its November 2014 Communication, assessed the international relations exception to the documents requested on a “case by case basis” – and we reiterate that the general rule is that of a right to access to documents, and the power to refuse access, the exception.

¹⁵ GC, 12 September 2013, *Bresselink*, T-331/11, paras. 48-49.

¹⁶ Ombudsman own-initiative decision, *supra*.n.1, at paras. 22 and 27.

¹⁷ Decision of the European Ombudsman closing the inquiry into complaint 2232/2011/(RA)FOR against the European Commission, 21 May 2014, *supra* n.2, para. 22.

¹⁸ See Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paras. 69-72 and 78; *ibid.*, para. 21.

¹⁹ *Ibid.*, para. 96.

²⁰ GC, 19 March 2013, *Sophie in ‘t Veld*, T-301/10, para. 52.

(ii) The Commission failed to consider properly its obligations under the Aarhus Regulation and the Aarhus Convention;

The Commission did not deny that the documents requested related to environmental information or emissions under the Aarhus regime. Nonetheless, the Commission wrongly considered that it had discharged its duty to interpret the Access to Documents Regulation in line with the Aarhus regime by, as it claimed, generally taking a restrictive approach to the exceptions invoked. Given its blanket rejections, and failure to explain why in relation to each document the exceptions could be invoked, and to consider the existence of any overriding public interest, environmental or otherwise, it is suggested that such a restrictive approach has not been taken.

As implemented in the EU, the Aarhus Regulation²¹ amends the Access to Documents Regulation²² in relation to requests for access to environmental information.

Article 6(1) of the Aarhus Regulation states that:

“As regards the other exceptions [including Article 4(1) and Article 4(3)] set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.”

As we submitted in our confirmatory application, the exceptions relied upon by the Commission must be considered in light of its obligations under the Aarhus regime.

The requested information clearly falls under the definition of environmental information as provided under Article 2(1)(d) of the Aarhus Regulation (Regulation 1367/2006). Particularly under Article 2(1)(d)(i) which defines environmental information as "any information ...on the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;" as well as under paragraph (ii) on "factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment referred to in point (i)"; (iii) "measures (including administrative measures), such as policies, legislation, plans and programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements" noting that the list is not exhaustive.

Paragraph (v) also designates "cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii)" as environmental information.

The Commission did not deny that documents or parts requested relate to environmental emissions. Its suggestion that we have not substantiated our assertion that the Aarhus Regulation is applicable is, with respect, surprising.

²¹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 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

²² Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

First, the publicly available sustainability analysis of TTIP commissioned by the Commission covers five main issues, one of which is “climate change (greenhouse gas emissions)”²³. Are there no relevant documents in the four categories requested that also implicate this most fundamental issue? If not, that ought to be specifically stated by the Commission.

Second, the response of the Commission to the complainants’ confirmatory application listed documents such as document 8 (non-paper on chemicals), document 9 (non-paper on raw materials and energy); document 13 (position paper - chapter on regulatory coherence) as falling within the scope of the request. It is not clear on what basis the Commission might contend such documents would not relate to environmental emissions, as defined broadly pursuant to *Stichting Greenpeace Nederland and Pesticides Action Network (PAN) Europe*.²⁴

Third, the Commission’s most basic FAQ in relation to TTIP indicate that “possible negative side effects of a TTIP - such as increased waste, reduced biodiversity, and more use of natural resources - should be largely offset by the benefits of more trade in environmental goods and services.”²⁵ Without access to negotiating documents it is impossible to assess fully the environmental emissions, damage and the offsets claimed. But to fail to acknowledge that some or all negotiating documents implicate the environmental information or emissions the subject of the Aarhus regime appears disingenuous and undermines public faith in the Commission’s purported attempts to increase transparency.

In assessing our requests, the Commission failed to consider whether any of the documents specifically requested fell under a restrictive interpretation of the exceptions contained in the Access to Documents Regulation pursuant to the Aarhus regime.

(iii) The Commission improperly invoked the “protection of the decision-making process” exception under Article 4(3), first paragraph of the Access to Documents Regulation;

The Commission’s reliance on the “protection of the decision-making process” exception is unfounded and is based on an error of fact. In relying on that exception, the European Commission states that the documents the subject of our request “were drawn up for internal use” and consequently cannot be disclosed because they would undermine the decision-making process of the Commission.

However, of the four categories of documents requested, three (**category (b)**: “the text of the EU’s positions on ... disclosed to the Government of the US”; **category (c)**: “any ... reports or papers provided to the US...”; and **category (d)** “any reports or papers provided to EU Member States...”) are clearly not intended for internal Commission use.

One of the two remaining categories (**category (b)** “the text of the EU’s positions on [specific topics]”) includes documents that have been either published in part or in full, and therefore clearly could be distinguished from documents legitimately falling within this exception.

In relation to the final category of documents (**category (a)** “the text of the EU’s negotiation mandate”), we note that the Commission has now made this document public.

The “protection of decision-making process” exception itself has been invoked without a consideration of the types of documents requested and whether they were in fact drawn up for internal use.

²³ Trade Sustainability Impact Assessment on the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States of America, Draft Inception Report, 17 March 2014, p. 31, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152285.pdf

²⁴ GC 8 October 2013, *Stichting Greenpeace Nederland and Pesticides Action Network (PAN) Europe*, T-545/11.

²⁵ <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>, accessed on 22 December 2014.

The blanket assessment by the Commission that the exception under Article 4(3), first paragraph of the Access to Document Regulation applies to all documents requested is based on a manifest error of assessment of the facts, and contravenes the provisions of the Access to Documents Regulation.

(iv) **The Commission failed to consider properly whether there is an overriding public interest in transparency in relation to each document or categories of document;**

The Commission did not consider (outside a brief rebuttal of the complainants' Aarhus regime analysis) whether an overriding public interest in disclosure existed. Article 4(3) is subject to such an interest irrespective of the applicability of the Aarhus regime.

In our view, an overriding public interest does exist. The outcome of the negotiations will influence the lives of some 500 million citizens in Europe and some 300 million citizens in the United States. This influence will have implications for those citizens in areas as fundamental as health, safety, and the environment. With 150,000 responses to the Commission's public consultation in relation to investment and investor-state dispute settlement, and 6000 responses to the own-initiative investigation of your office into transparency, it is a topic on which the European public has promoted with gusto its own interest. We consider that the decision of the European Ombudsman's own-initiative inquiry on 7 January 2015 likewise perceives a public interest not only in the outcome of the TTIP negotiations, but also in contributing to the negotiations.²⁶

In this respect, we support the following academic analysis of the public interest in disclosure under the Access to Documents Regulation:

“[i]t is strongly arguable that there is a public interest in disclosure in particular where the document relates to the adoption of legislation or strategies, the implementation of legislation by the institutions or the Member States, the development of policies ...[and] **particularly those with impact upon the general public (relating to external trade policy or internal market regulation, for instance).** These examples are not exhaustive and should be interpreted in the broad sense: for instance, **there is a very strong public interest not only in releasing the various drafts of a legislative text, but in releasing all the documents related to drawing up that text, including information collected on Member States' existing practice, comments made by any persons or groups who were consulted, any notes submitted by Member States, and any initial discussion papers or informal early legislative drafts and responses to them.**”²⁷

As the Ombudsman notes in a decision relating to the European legislative process:

“[t]he Ombudsman underlined that, when the Commission responds to requests for access to documents relating to the adoption of EU legislation, and especially where it analyses whether there is an overriding public interest in disclosure of documents relating to the adoption of EU legislation, the Commission must bear in mind the very special importance that obtaining access to documents relating to the adoption of EU legislation can have for citizens in a democratic legal order, such as the EU legal order. Openness in respect of access to documents relating to the adoption of EU legislation contributes to strengthening democracy by allowing citizens to follow in detail the decision-making process within the institutions taking part in legislative procedures, and thereby to scrutinise all the relevant information which has formed the basis of a particular legislative act. Doing so provides them with knowledge and understanding of the various considerations underpinning

²⁶ Ombudsman's own-initiative decision, *supra*. n.1, 53-55.

²⁷ Peers, Steve, University of Essex, 2002: Queen's Papers on Europeanisation. The New Regulation on Access to Documents: A Critical Analysis. available at <https://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/EuropeanisationFiles/FileUpload.38419.en.pdf>; emphasis added.

legislation which will affect their lives. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.”²⁸

It is critical to note that TTIP will fundamentally affect the European public in a manner analogous to European legislation.

It is not for a complainant to prove an overriding public interest. As set out above, under the EU Treaties, transparency and openness is the principle and any restriction of these fundamental principles the exception, requiring specific justification.

Consequently, we consider not only that a public interest exists, but moreover that a determination as to whether a public interest exists ought to be considered in relation to each document (or, where a list of documents does not exist or cannot be requested, each category of document requested).²⁹

Without such an analysis, it is impossible to reconcile statements of the Commission – for example in its November 2014 Communication that “it is important to ensure that the general public has accurate and full information of the EU's intentions in the negotiations” - with blanket refusals to provide access to relevant documents.

(v) The Commission failed properly to consider the provision of partial access of documents requested;

The Commission cursorily rejected the possibility of granting partial access to documents requested in accordance with Article 4(6) of the Access to Documents Regulation. It stated only that “no meaningful partial access ... is possible...”.

This, with respect, is not a satisfactory approach to an access to documents request. For example, in documents that have been disclosed to the US (eg documents 2-13 identified by the Commission), or documents relating to earlier negotiating rounds (even where not disclosed to the US, e.g. documents 14-16), it is difficult to imagine how negotiation positions already disclosed to the US, or reports of negotiations concluded over a year ago, would give rise in their entirety to real and not purely hypothetical concerns that their disclosure would undermine the EU's international relations. (We note that the Commission has said it will report “more extensively on the outcome of negotiating rounds”³⁰; we welcome this development but would likewise welcome more detail around the proposed implementation of that promise, including disclosure of the documents requested, as well as reports on more recent negotiating round.)

On its face, the refusal to grant partial access is a violation of the spirit of the Access to Documents Regulation, and of the principle that access should be the rule, not the exception.

(vi) The Commission failed to respond in a timely manner;

²⁸ Decision of the European Ombudsman closing the inquiry into complaint 2232/2011/(RA)FOR against the European Commission (infra n2), para. 11, internal citations omitted.

²⁹ Ibid.: “To prove that the public interest test has actually been applied, logically the institutions must be obliged show in respect of each document, or at least categories of documents having identical features, that it has assessed whether an overriding public interest exists in each case.”

³⁰ November 2014 Communication, p.3.

It is notable and regrettable that the response from the European Commission was received 53 working days after the applicants' initial request. This period of delay not only far exceeds that contemplated by the regulation on access to documents³¹ (Access to Documents Regulation) which provides for a 15 day time limit that can be extended, in exceptional cases, for a maximum of 15 additional days, it moreover serves substantively to undermine the purpose of an access request – namely, to observation of and to the extent possible, participation in the negotiations.

- (vii) The Commission failed to comply with its obligation to set up a public register in accordance with Article 11 of Regulation 1049/2001 in such a way as to provide meaningful opportunities for the complainants (and indeed other members of the public) to access documents, or to request access to documents.**

As mentioned above, the Commission's failure to publish a full list of documentation related to TTIP negotiations, whether or not the contents of those documents are deemed by it to be discloseable or not, provides a bar to requesting access in an efficient and meaningful way.

We agree with the Ombudsman's suggestion that a comprehensive list of TTIP documents ought to be made available on its dedicated website; that documents should be proactively made public where no exception applies; and where an exception applies, that the document reference and if possible its title should be made public, along with an explanation of why the document cannot be made available.

We would add to this that a comprehensive list of documents ought to be organised in such a way that different versions of the same document are easily identifiable. Many of the documents published by the Commission are undated, making such an exercise difficult.

By way of illustrative example, one of the documents the Commission identified in its response to our confirmatory application as falling within our request, was document 4, described by the Commission as "initial position paper: Regulatory issues in financial services, 28 June 2013". On 7 January 2015, the Commission published "EU position papers: TTIP and Financial Services"; this appears to be a different document, and is undated. However whether it has superseded the document we requested, or sits alongside it in the negotiations, is not clear.

What, in your view, should the institution or body do to put things right?

One critical failure of the Commission that is both highly relevant to our complaint and, we suspect, the complaints of other individuals and organisations, is that no comprehensive list of all TTIP-related documents has to date been made available. Consequently we are, as set out above, forced to make requests, largely of categories of documents, based on conjecture. We therefore fully support the proposal of the European Ombudsman in her own-initiative decision that the Commission publish a comprehensive list of all documents, including those the content of which is redacted, with reasons stated for why such documents could not be made public.³²

³¹ Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

³² Ombudsman's own-initiative decision, *supra*. n.1.

The November 2014 Communication indicates – at least in principle – that the Commission has re-evaluated its default (and, in our submission, in some instances unlawful and/or unreasonable) positions as to disclosure in relation to certain categories of documents, including one category that we specifically requested in our initial request – negotiating texts that the Commission already shares with Member States and Parliament (see complainants’ initial request, **category (d)**). We note that the Commission published eight such negotiating texts on 7 January 2015; however none of these eight documents include “non-papers” (documents 9-13 of those identified by the Commission as falling into our request) and none fall into the list provided by the Commission in its response to our confirmatory application.

Therefore, the documents within that category should be listed, and made fully available, to the complainants and to the public, in a coherent and easily accessible manner. In order to make that disclosure meaningful, we would propose it is done as soon as possible and in any event within 15 working days after the Ombudsman decision on this complaint.

In relation to the remaining categories of documents the subject of our request, the Commission ought to reconsider its rejection of our requests on a case-by-case basis and in light of its commitment to increased transparency as evidenced in its 1 October 2014 reply to the Ombudsman and its November 2014 Communication.

Specifically, it ought to make public all: (i) documents requested which have been disclosed to the US negotiators (**category (c)** of the initial request), as there is no clear justification for withholding them; (ii) all initial position papers requested and not yet published (**category (b)** of the initial request), consistent with the ad hoc publication of such papers by the Commission to date; (iii) reports summarising past negotiating rounds (**categories (c) and (d)** of the initial request), since these represent internally finalised positions that have been advanced, and there is no lawful reason for denying access to them; and (iv) those documents requested not falling within any category above and whose content relates to environmental emissions and consequently fall under the Aarhus regime.

Should the Commission maintain that any document initially requested is not discloseable in whole or in part, we submit that reasons should be given, with any exception considered in light of the public interest in relation to that specific document, giving due consideration of the Aarhus regime where relevant.

We would request that this is done at the latest within 15 days of the decision by the Ombudsman.

Have you already contacted the EU institution or body concerned in order to obtain redress?

As set out above, we have exhausted all non-judicial remedies and consequently are seeking redress from the European Ombudsman.