



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 14 September 2012

13309/12

**INF 133
API 84**

"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 13308/12

Subject : Public access to documents
- Confirmatory application No 17/c/01/12

Delegations will find enclosed a draft reply from the Council to confirmatory application No 17/c/01/12, as it stands after examination by the Working Party on Information at its meeting on 14 September 2012.

The Danish, Estonian, Finnish and Swedish delegations indicated that they would vote against the draft reply and made the following statements:

FI, SE: *"Finland and Sweden welcome the partial release of the document. However, FI and SE stress the importance of the Access info -judgment and cannot concur with the interpretation presented in paragraph 9 of the draft reply. Moreover, FI and SE inform that the positions of FI and SE in the document can be identified".*

EE: *"can not concur with the conclusion in paragraph 9 of the draft reply regarding the judgment in case T-233/09 (Access Info Europe v. Council of the European Union)".*

DK: *"welcomes the fact that partial release is granted. However, Denmark does not agree with the interpretation of the Access info-judgement (case T-233/09) presented in paragraph 9 of the draft reply. Moreover, Denmark hereby informs that the information regarding Denmark contained in the document can be released"*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Estonian, Finnish and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 17/c/01/12,
made by e-mail on 30 July 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 10201/12

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 10201/12, which is a note from the Presidency to the CATS (Mixed Committee) regarding the proposal for a Council Regulation on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast).
2. In its initial reply dated 20 July 2012, the General Secretariat granted partial access to the above-mentioned document, excluding those parts of the document which would enable the delegations whose positions are reflected in the document to be identified. Public access to those parts was refused pursuant to the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 (protection of the Council's ongoing decision-making process).
3. In the confirmatory application received on 30 July 2012 and registered on 31 of July 2012, the applicant refers to the judgment of the General Court in case T-233/09¹ and in particular to the Court's argument that, "in a system based on the principle of democratic legitimacy", those responsible for the various proposals must "be publicly accountable for their actions".

¹ Judgment of the General Court of 22 March 2011 in case T-233/09, *Access Info Europe v. Council* (not yet published).

4. The Council has examined the abovementioned document in the light of the applicant's arguments and has concluded as indicated below.
5. The document under scrutiny concerns a proposal for a Council Regulation on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast). As indicated in the initial reply, the decision-making process is still on-going. The Commission presented the proposal on 3 May 2012. The proposal was discussed by the Working Party for Schengen Matters (Acquis) – Mixed Committee (EU-Iceland/Norway/Switzerland/ Liechtenstein) on 11 May 2012 and by CATS (Mixed Committee) on 24 May 2012. Following these discussions, the original proposal was divided into two identical texts of proposals for a Council Regulation in order to reflect the particular positions of Ireland and the United Kingdom. The JHA Counsellors (Mixed Committee) discussed various outstanding issues regarding the two proposals on 16 July 2012. Depending on the circumstances, a Council vote may take place before the end of the year. The discussions are thus in their final stages, and it is important to have the proposal adopted as promptly as possible to ensure the successful execution of the migration from the Schengen Information System (SIS I+) to the second generation Schengen Information System (SIS II).
6. The Council acknowledges the importance of public accountability and therefore does make public the identity of delegations having made proposals during a legislative process after adoption of one of the acts referred to in Article 11(5)(d) of Annex II to the Council's Rules of Procedure or after final adoption of the act concerned. It considers however that it is essential for delegations to be able to express their views freely so that the Council can find compromise solutions and achieve progress on delicate questions. Disclosure of those parts of a document which allow identification of the delegations that have adopted positions on a subject which is still under discussion, would therefore risk jeopardising this process by reducing delegations' flexibility to formulate and reconsider their positions in the light of the arguments exchanged in the debate, thereby affecting their capacity to reach a compromise on the outstanding points.

7. In addition, the release of the names of delegations in relation to their positions may have the effect that delegations would refrain from fully exposing their positions at the preliminary stages of discussions in the Council's preparatory bodies: this would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be prejudicial to the overall transparency of the Council's decision-making.
8. As indicated above, discussions relating to the proposal are still on-going in spite of the aim of adopting the proposal in the second quarter of 2012. Disclosure of the information concerned at this, final stage of the negotiations would under those circumstances risk being detrimental to the decision-making process and the timely adoption of the proposal.
9. The applicant refers to the judgment of the General Court in case T-233/09. It is true that the General Court held that the exception in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 did not apply to the facts present in that case which also concerns public access to parts identifying delegations expressing their positions. However, the Council would underline that the judgment is only binding upon the parties to those proceedings. As things stand, the judgment has no legal implications for the present case. Moreover, it should be pointed out that an appeal against the judgment in question is currently pending before the Court of Justice. The Council therefore maintains the position outlined in this reply and in the initial reply, which is consistent with the position that it currently defends before the Court of Justice in the abovementioned appeal case.
10. Finally, the applicant indicates that the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 does not make a distinction as regards the state of progress of the discussions but merely refers to a matter where a decision has not yet been taken. Although the actual provision does not expressly make such a distinction it remains that the state of progress of discussions is important for appreciating the concrete risk of serious prejudice on the Council's decision-making process of a full release of the identity of delegations stating their positions. The intention of the initial reply was not to operate a distinction between the various stages of the on-going procedure as such, but to provide the necessary elements on the context and the progress of the file so as to allow the applicant to understand the concrete risk that public access to the contested parts of the document would imply for the Council's on-going decision-making process.

11. In the light of the above, the Council considers that, on balance, all possible factors which would, at the present stage, plead in favour of releasing document 10201/12 in its entirety are outweighed by the need to protect the Council's decision-making process. The Council has therefore concluded that full public access to the above-mentioned document has to be refused pursuant to the first subparagraph of Article 4(3) of Regulation 1049/2001 (protection of the Council's decision-making process).

12. Finally, the Council recalls that, in accordance with the rules laid down in Article 11(6) of Annex II to the Council's Rules of Procedure, this document will be made fully available to the public after adoption of one of the acts referred to in Article 11(5)(d) of that Annex or after final adoption of the act concerned.
