



Council of the
European Union

Brussels, 26 May 2016
(OR. en)

9266/16

INF 83
API 56

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 12/c/04/16

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 9 March 2016 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 22 April 2015 (Annex 2);
- confirmatory application dated 10 May 2016 and registered on 10 May 2016 ([Annex 3](#))

[E-mail message sent to jakob.thomsen@consiliumeuropa.eu on 9 March 2016 - 12:27]

From: **DELETED**

Sent: Wednesday, March 09, 2016 12:27 PM

To: THOMSEN Jakob

Subject: FW: Confirmatief verzoek in Nederlandse taal (Confirmatory Application written in Dutch) re ref. 15/1896 en ref. 15/2110

Importance: High

Dear Mr. Thomsen,

Thank you very much for your time yesterday to discuss your two letters of 7 March 2016 concerning my requests (ref. 15/2110 and ref. 15/1896) for access to documents of the Code of Conduct Group.

As announced during the call, I herewith send you a brief overview of the three issues we discussed, for discussion on practical follow-up actions in our next call which is scheduled for next Friday (11 March) 4 PM. I set them out in the following order:

- identification of requested documents (period 1998-2008)

NOT REPRODUCED

Identification of requested documents

In your letter regarding request 15/1896, you have identified and assessed (i) Standard Documents ("ST") for the period 1998-2003 and (ii) Room Documents for the period 2004-2008.

(i) ST Documents (1998-2003)

A large number of ST Documents have been identified in your letter. It seems that these documents have been identified on the basis of a search in the electronic register of Council Documents, as most of the identified documents were already public and available (full or partial access was provided) for downloading in the online register of Council documents. As you may understand, I am specifically interested in documents which are not (yet) public.

As indicated during our call, a first limited review of the identified ST Documents reveals that a number documents have not been identified, which clearly should exist.

Firstly, as highlighted during the call, the annexes to a number of identified ST Documents are not enclosed in the identified documents; see e.g., ST Document 10287/99 and 11510/00.

Secondly, it also seems that a number of documents concerning "outcome of proceedings" have not been identified; see e.g., the document setting out the outcome of proceedings of the Code Group's meeting of 13/14 September 1999 has not been identified. The agenda of this meeting is included in ST Document 10671/99.

Thirdly, multiple type of documents, such as papers, summaries, notes, minutes, studies, reports, etc., have not been identified although the ST Documents contain specific references to these type of documents, on the basis of which I think it must be assumed that these documents exist. See, e.g., ST Document 11742/99, which specifically refers to Document SN 4027/99 dated 23 September 1999. However, this SN document has not been identified. See in addition e.g. ST Document 11149/99, which states that "[t]he Commission has responded to this request and has circulated for Member States' consideration, a short paper setting out the issues from the Report which merit further discussion or clarification." This Commission paper, which may be assumed to have been circulated by the General Secretariat of the Council to the Member States, has not been identified.

As indicated, it seems that various documents have not been identified which do however fall within scope of my request. Against this background, I would kindly ask you to verify which approach has been used for the identification of documents, what the considerations are for this approach and what can be done to arrive at a more comprehensive identification of ST- and similar documents, such as SN Documents.

(ii) Room Documents (2004-2008)

Following your letter of 18 December 2015, you have identified and assessed several additional Room Documents in your letter of 7 March. However, as indicated during our call, it appears that several room documents related to the period 2004-2008 have not been identified.

For your convenience, please find attached a matrix with Room Documents (i) to which access has been provided by the Council or Commission (cells colored green); (ii) to which (full) access is refused by the Council or Commission (cells colored red); and which have not been identified (cells colored orange). As you may understand, I am also interested in the Room Documents which have not yet been identified.

As we discussed during the call, it may well be that a part of these missing Room Documents have not been identified because the Council understood that full access has already been provided by the Commission. However, as I pointed out, the Commission has provided me with several (draft) room documents which do not bear any date or (precise) reference. I have been informed that the Commission does not circulate the room documents in the Council, but that it only sends draft/informal documents to the Council Secretariat which is officially responsible to circulate final room documents to the Member States. Therefore, a number of documents that I have been provided with by the Commission are not the final versions circulated to the Member States. You will understand that for me, it is of importance to avail of the final documents.

Against this background, I kindly ask you to let me know whether it would be possible to identify the missing room documents.

NOT REPRODUCED

Kind regards,

DELETED

| | RD#1 | RD#1 REV1 | RD#1 A1 | RD#2 | RD#2 REV1 | RD#3 | RD#3 REV1 | RD#4 | RD#5 | RD#6 | RD#7 | RD#8 | RD#8 REV1 | RD#9 | RD#10 | RD#10 REV1 |
|------------|-----------|-----------|---------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| 29/04/2004 | | | | | | | | COM | COM | | | | | | | |
| 11/10/2004 | Council 1 | | | | | Council 2 | | | | | | | | | | |
| 8/11/2004 | COM | | | | | Council 1 | | | | | | | | | | |
| 24/02/2005 | Council 1 | | | Council 1 | | COM | | | | | | | | | | |
| 24/05/2005 | | | | | | | | | | | | COM | | | | |
| 15/09/2005 | Council 2 | | | Council 1 | | Council 1 | | | | | | | | | | |
| 18/10/2005 | | | | | | COM | | COM | Council 1 | Council 1 | Council 1 | | | | | |
| 23/11/2005 | Council 2 | | | | | | | Council 2 | | | | | | | | |
| 1/12/2005 | | | | | | COM | | | | | | | | | | |
| 28/03/2006 | Council 2 | Council 2 | | | | | | | | | | | | | | |
| 16/05/2006 | | | COM | | | | | | | | | | | | | |
| 27/04/2006 | | | | | | COM | | Council 2 | Council 2 | Council 1 | | | | | | |
| 11/10/2006 | Council 2 | | | Council 2 | | Council 1 | | | | | | | | | | |
| 8/11/2006 | | | | Council 2 | | Council 2 | | Council 1 | COM | COM | COM | | | | | |
| 13/02/2007 | Council 2 | | | Council 2 | | Council 2 | | Council 1 | COM | Council 1 | Council 1 | | | | | |
| 17/04/2007 | | | | Council 2 | | Council 2 | Council 2 | Council 2 | | | | | | | | |
| 7/05/2007 | | | | | | | | | COM | | | | | | | |
| 19/09/2007 | Council 2 | | | COM | | COM | | COM | | | | | | | | |
| 16/10/2007 | | | | | | | | | | | | | | | | |
| 20/11/2007 | | | | Council 2 | | | | | | | | | | | | |
| 6/02/2008 | Council 2 | | | Council 1 | | Council 2 | | | | | | | | | | |
| 22/04/2008 | COM | | | Council 2 | | COM | | Council 1 | | | | | | | | |
| 7/05/2008 | | | | Council 1 | | COM | | COM | COM | COM | Council 1 | Council 2 | | | | |
| 9/09/2008 | COM | | | Council 1 | | COM | | Council 1 | | | | |
| 18/11/2008 | Council 1 | | | | | | | Council 1 | | Council 1 | Council 2 | Council 2 |

COM Provided by COM
 Council 1 Provided by Council on 18 December 2015
 Council 1 Fully refused by Council on 18 December 2015
 Council 1 Provided by Council on 7 March 2015
 Council 2 Fully refused by Council on 7 March 2015
 Council 2 Not provided at all; This concerns the final versions circulated by the General Secretariat (Note that Com provided several draft room docs without reference and date)



Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

Head of Unit

Brussels, 22 April 2016

Mr **DELETED**

Email: **DELETED**

Ref. 16/0748-mw

Request made on: 09.03.2016

Dear Mr **DELETED**,

We refer to your email dated 9 March 2016 in which you refer to your previous applications but elaborate more specifically on certain documents from the Code of Conduct Group you wish to obtain.¹

On the basis of these indications, the General Secretariat has identified some standard documents not covered by your previous applications as well as some room documents copies of which the General Secretariat received between 8 March 2016 and 5 April 2016 in the framework of interinstitutional consultations.

As a result you will find attached the following documents:

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

ST 10287/99 which contain document SEC(99)1244 issued by the Commission;

ST 11510/00 which contain document SEC(00)1539 also issued by the Commission;

SN 4027/99 (document referenced in ST document 11742/99).

Please note that we have found no outcome of proceeding of the Code of Conduct Group's meeting of 13-14 September 1999.

You will also find the following room documents attached:

| Meetings | Room documents |
|-----------------|-----------------------|
| 29.04.2004 | 1, 6, 7, 8, 9 |
| 08.11.2004 | 4 |
| 24.02.2005 | 2, 4, 5, 6, 7 |
| 24.05.2005 | 1 |
| 15.09.2005 | 4, 5, 6, 7, 8 |
| 18.10.2005 | 1, 2 |
| 23.11.2005 | 2, 3, 5 |
| 01.12.2005 | 1 REV1 |
| 27.04.2006 | 1, 2 |
| 16.05.2006 | 1 |
| 08.11.2006 | 1 |
| 17.04.2007 | 1, 1 REV1 |
| 16.10.2007 | 1, 2, 3 |
| 20.11.2007 | 1 |
| 07.05.2008 | 1, 5 |
| 18.11.2008 | 2, 3 |

Please note that the following documents are not held by the Council:

- room document 1 of Code of Conduct group meeting of 01.12.2005;
- room document 8 of Code of Conduct group meeting of 08.11.2006;
- room document 1 of Code of Conduct group meeting of 07.05.2007;
- room documents 3 and 4 of Code of Conduct group meeting of 20.11.2007.

Access to the following documents cannot be granted:

- room document 2 of Code of Conduct group meeting of 16.05.2006;
- room document 4 of Code of Conduct group meeting of 11.10.2006.

These room documents concern difficult tax issues and contain informally voiced internal opinions and assessments related to tax measures. The General Secretariat considers that release of this information would trigger reactions by businesses which would interfere with the economic and fiscal policy of the European Union and of the Member States. It would therefore undermine the protection of the public interest as regards the financial, monetary or economic policy of the EU and of the Member States.²

Access to these documents must be refused as release of this information would jeopardise the negotiating process and thus seriously undermine the decision making-process concerned.³

Having examined the contexts in which the documents were drafted and the current state of play on these matters, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their disclosure.

As a consequence, the General Secretariat has to refuse access to these documents.

We have also looked into the possibility of releasing parts of each of these documents.⁴

² Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001.

³ Article 4(3) of Regulation (EC) No 1049/2001.

⁴ Article 4(6) of Regulation (EC) No 1049/2001.

However, as the exceptions to the right of access apply to their entire content, the General Secretariat is unable to give partial access.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁵

Yours sincerely,

Jakob THOMSEN

Enclosures

⁵ Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to Access@consilium.europa.eu and jakob.thomsen@consiliumeuropa.eu on 10 May 2016 - 10:30]

From: DELETED

Sent: Monday, 9 May 2016 - 13:53

To: SECRETARIAT DGF Access; THOMSEN Jakob

Subject: Ref. 16/0748-mw

Dear Mr Thomsen,

On 22 April 2016, I received the Council's decision (ref. 16/0748) identifying and supplying some additional standard documents and room documents.

I believe that either my confirmatory application of 15 February 2016, or if that is not the case, my confirmatory application of 30 March 2016, already covers the abovementioned decision.

To cover the eventuality that you believe otherwise, in the attached letter, I am making a confirmatory application within the meaning of Article 7(2) of Regulation (EC) No 1049/2001 (the Transparency Regulation).

(Complimentary close)

Council of the European Union Jakob Thomsen
Transparency and Access to Documents Rue de la Loi 175/Wetstraat 175
1048 Bruxelles/Brussel, Belgium

Re: confirmatory application ref. 16/0748

Dear Mr Thomsen,

On 22 April 2016, I received the Council's decision (ref. 16/0748) identifying and supplying some additional standard documents and room documents.

I believe that either my confirmatory application of 15 February 2016, or if that is not the case, my confirmatory application of 30 March 2016, already covers the abovementioned decision. To cover the eventuality that you might believe otherwise, I am making a confirmatory application in the attached letter, within the meaning of Article 7(2) of Regulation (EC) No 1049/2001 (the Transparency Regulation).

My reasons are as follows:

1. By way of background, I would refer you to my confirmatory application of 15 February 2016 and my subsequent correspondence with you (my emails of 9 and 14 March 2016) as well as my confirmatory application of 30 March 2016.
2. In its letter of 22 April 2016, the Council identified additional standard documents and room documents. It identified 37 room documents to which full access is granted. On the other hand, the Council has totally refused access to two of the identified documents. The Council notes that five of the documents are not in its possession.
3. My objections to the above are as follows:

4. In its letter of 22 April 2016, the Council identified and forwarded some room documents. The Council notes that five of the documents are not in its possession. However, in reality, it is hard to believe that these documents are not in the Council's possession. After all, the Council provides the secretariat for the Code of Conduct Group and is therefore responsible for the dissemination of room documents within the Code of Conduct Group. I can therefore only conclude, also in the light of what I wrote in my emails of 9 and 14 March 2016, that the Council has simply not done the necessary to obtain these documents. For more detailed reasons and complaints regarding the way in which the Council does not identify all the documents concerned, I would refer you to my emails of 9 March 2016ⁱ and 14 March 2016ⁱⁱ.
5. Furthermore, the Council has totally refused access to two documents by invoking exceptions, which it has applied incorrectly. The exceptions in question are Article 4(1)(a) to (e) and first subparagraph of Article 4(3) of the Transparency Regulation on protecting the public interest in relation to financial, monetary or economic policy and avoiding undermining the institution's decision-making process in relation to decisions that have yet to be taken. For more detailed reasons underlying my objections on this point, I would refer you to my emails of 9 March 2016ⁱⁱⁱ and 14 March 2016^{iv}.

I would be grateful if you could send me confirmation that this confirmatory application has been registered.

(Complimentary close)

i See for instance the passage:

'In your letter regarding request 15/1896, you have identified and assessed (i) Standard Documents ('ST') for the period 1998-2003 and (ii) Room Documents for the period 2004-2008.

(i) ST Documents (1998-2003)

A large number of ST Documents have been identified in your letter. It seems that these documents have been identified on the basis of a search in the electronic register of Council Documents, as most of the identified documents were already public and available (full or partial access was provided) for downloading in the online register of Council documents. As you may understand, I am specifically interested in documents which are not (yet) public. As indicated during our call, a first limited review of the identified ST Documents reveals that a number documents have not been identified, which clearly should exist. Firstly, as highlighted during the call, the annexes to a number of identified ST Documents are not enclosed in the identified documents; see e.g., ST Document 10287/99 and 11510/00. Secondly, it also seems that a number of documents concerning 'outcome of proceedings' have not been identified; see e.g., the document setting out the outcome of proceedings of the Code Group's meeting of 13/14 September 1999 has not been identified. The agenda of this meeting is included in ST Document 10671/99. Thirdly, multiple type of documents, such as papers, summaries, notes, minutes, studies, reports, etc., have not been identified although the ST Documents contain specific references to these type of documents, on the basis of which I think it must be assumed that these documents exist. See, e.g., ST Document 11742/99, which specifically refers to Document SN 4027/99 dated 23 September 1999. However, this SN document has not been identified. See in addition e.g. ST Document 11149/99, which states that '[t]he Commission has responded to this request and has circulated for Member States' consideration, a short paper setting out the issues from the Report which merit further discussion or clarification.' This Commission paper, which may be assumed to have been circulated by the General Secretariat of the Council to the Member States, has not been identified. As indicated, it seems that various documents have not been identified which do however fall within scope of my request. Against this background, I would kindly ask you to verify which approach has been used for the identification of documents, what the considerations are for this approach and what can be done to arrive at a more comprehensive identification of ST- and similar documents, such as SN Documents.

(ii) Room Documents (2004-2008)

Following your letter of 18 December 2015, you have identified and assessed several additional Room Documents in your letter of 7 March. However, as indicated during our call, it appears that several room documents related to the period 2004- 2008 have not been identified. For your convenience, please find attached a matrix with Room Documents (i) to which access has been provided by the Council or Commission (cells colored green); (ii) to which (full) access is refused by the Council or Commission (cells colored red); and which have not been identified (cells colored orange). As you may understand, I am also interested in the Room Documents which have not yet been identified. As we discussed during the call, it may well be that a part of these missing Room Documents have not been identified because the Council understood that full access has already been provided by the Commission. However, as I pointed out, the Commission has provided me with several (draft) room documents which do not bear any date or (precise) reference. I have been informed that the Commission does not circulate the room documents in the Council, but that it only sends draft/informal documents to the Council Secretariat which is officially responsible to circulate final room documents to the Member States. Therefore, a number of documents that I have been provided with by the Commission are not the final versions circulated to the Member States. You will understand that for me, it is of importance to avail of the final documents. Against this background, I kindly ask you to let me know whether it would be possible to identify the missing room documents.

ii See for instance the passage:

*'As indicated during our call and in my email of 9 March, a first limited review of the identified documents provided to me further to our 8 March call reveals that there are a number of documents missing (i.e., not identified) that clearly should exist and fall within the scope of my request. Therefore, I have kindly asked you to inform me which approach has been used for the identification of documents, what the considerations are for this approach and what can be done to arrive at a more comprehensive identification of the missing documents. As I indicated, what is missing are in particular: (i) ST- and similar documents; such as SN documents; (ii) Room Documents; and (iii) Informal Meeting Minutes ('Compte Rendu Interne') drafted by representatives of the General Secretariat of the Council who attended meetings of the Code Group. During the 11 March call, **DELETED** and yourself have stressed that it is extremely difficult, maybe impossible to identify all the requested documents, especially the ST- and similar documents (for the period 1998-2003), as well as the Informal meeting minutes. You, and in particular **DELETED** have set out what causes the difficulties, but - as already indicated above - my counsel Martien Pelinck and myself have not been able to comprehend his explanations. **DELETED** has asked **DELETED** to provide a summary thereof in writing, but this was categorically denied. Therefore, it remains largely unclear to me what approach has been used for the identification of documents and, in particular, what the considerations are underlying the*

*adopted approach. From the explanations I did understand, however (but please correct me if my understanding is wrong), I have concluded that the search for documents has primarily been conducted electronically, and that to the extent that you have looked for documents which are not available digitally on centralized locations, you have relied on the archives. It seems more or less obvious that, when applying this approach, it is necessary to go through all the documents identified electronically, to look for references to documents that are not stored in the central location. Apart from the fact that this method is very time consuming, the result will not necessarily be complete; on the one hand as there will also be relevant documents to which no reference is made, on the other hand as not all documents will be retrievable in the archives. I have stressed that a much more efficient way to identify relevant documents is simply to look into the files that are available with the staff of DG Taxation who is directly involved in the work of the Code Group. You responded by saying this would not be a viable solution, as I understood, for the reason that you are not sufficiently familiar with the subject matter to be able to make a selection. This can of course be easily resolved if I would be allowed to come over to Brussels to assist your Unit with the identification process. You agreed, as an action point for our next call, to liaise with **DELETED** of DG Taxation of the Council to explore whether it would be possible that I would go through the files that are available with **DELETED** and his staff (such as binders and documents on the local hard drive and server) in order to identify those documents that fall under the scope of my request.'*

iii See for instance the passage:

'In both your letters (full) access to several documents has been denied on the basis of the restrictions laid down in Article 4(1)(a), fourth indent, and Article 4(3), second subparagraph, of the Transparency Regulation. During our call, you indicated that it is up to me to evaluate whether or not I would consider the application of the exceptions acceptable. However, as I set out, your letters do not contain a minimum of motivation on the basis of which I am able to assess whether the Council has properly invoked the restrictions: the letters do not even state what the subject matter of the respective documents is, let alone along what lines disclosure would pose concrete threats to the interests protected under the Articles 4(1)(a), fourth indent, and 4(3), second paragraph. You will appreciate that, lacking motivation, it is impossible for me to form any ideas on whether or not the restrictions are justified.'

iv See for instance the passage:

'Finally, I kindly remind you that in our 8 March call and my email of 9 March I also referred to the issue that your letters do not contain a sufficient motivation, on the basis of which I am able to assess whether the Council has properly invoked the restrictions. During our last call, we did not go into this matter at all. Therefore, I would like to kindly ask you to consider my remarks in my below e-mail of 9 March on this matter. I would be very much appreciated if we could discuss your preference as to how to solve this matter in our next call.'