



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 May 2012

8677/12

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NOTE

from :	General Secretariat of the Council
to :	Delegations
No. prev. doc.:	8676/12
Subject :	Public access to documents - Confirmatory application made by Mr Ludo Block (No 10/c/01/12)

Delegations will find enclosed a draft reply from the Council to confirmatory application No 10/c/01/12, made by Mr Ludo Block, approved by the Working Party on Information on 11 May 2012.

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

" DK, EE, FI, SE are not convinced that the exception for the protection of the public interest with regard to public security would apply to most parts of the documents as suggested in the draft reply. However, it seems that there might be some parts of the documents where disclosure could jeopardize other interests protected under the Regulation (such as international relations). Even so, DK, EE, FI and SE, believe that partial access to the documents could have been extended."

It is suggested that the Council, by written procedure, record its agreement on the draft reply annexed to this document.

The Annex is available in English only.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 08/c/01/12,
MADE BY E-MAIL ON 8 APRIL 2012,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 13867/11, 13867/1/11 REV 1 and 13867/2/11 REV 2

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 No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to documents 13867/11, 13867/1/11 REV 1 and 13867/2/11 REV 2 which are notes from the Presidency to the Law Enforcement Working Party containing an analysis of the scale of the crime threat against cultural property in the Member States and the selected countries of the Eastern Partnership.
2. In its reply dated 20 March 2012, the General Secretariat refused full public access to the documents pursuant to the first indent of Article 4(1)(a) of Regulation No 1049/2001 (protection of the public interest with regard to public security). Partial access was granted by giving access to pages 1 - 4 and to pages 8 - 19 of all three documents.
3. In his confirmatory application dated 8 April 2012, the applicant asks the Council to reconsider its decision and make the documents public in the interest of democratic governance and to ensure its accountability. The applicant claims that the policy oriented analysis of the data based on the results of the questionnaire on cultural property crimes do not constitute sensitive data and therefore its publication cannot compromise the work of the competent law enforcement authorities. Moreover, he argues that since the documents bear only the protective marking "LIMITE" they cannot by definition contain any sensitive operational information.

4. The Council has considered this confirmatory application in the light of the applicant's arguments and has concluded as indicated below.
5. Documents 13867/11, 13867/1/11 REV 1 and 13867/2/11 REV 2 of September and October 2011 set out an analysis of the scale of the crime threat against cultural property in Member States and in selected countries of the Eastern Partnership. On 13 and 14 December 2011 the Council (Justice and Home Affairs) adopted conclusions on preventing and combating crime against cultural property. A study on preventing and fighting illicit trafficking in cultural goods in the EU drafted by the Commission served as a basis for these conclusions, while the analysis contained in the requested documents served rather as background information for delegations in that process.
6. The analysis contained in the requested documents is based on the results of the questionnaire sent on 16 March by the Presidency/Polish delegation to the Law Enforcement Working Party and on the contribution of Interpol. The purpose of the questionnaire was to identify routes and methods by which cultural property is smuggled, the modus operandi of the perpetrators and assess the potential risks related to the organisation of large-scale events. In order to reach this purpose, it was necessary to ask Member States to provide sensitive data on the aforementioned subject-matters. The Presidency took the initiative on these issues in order to ensure a reliable and thorough diagnosis of the problems in question.
7. The requested documents analyse the current scale of threat posed by crime against cultural property, the behavioural patterns of criminals, the methods for combating this phenomenon under the current legal system and the respective roles of Interpol, Europol and CEPOL. Moreover, the documents contain an assessment of the potential impact of mass events on the escalation of the reference crimes.

An examination of the requested documents further shows that they contain sensitive information on the routes and methods of travel used by the perpetrators, on the functioning of structures with a view to combat and prevent crime against cultural property in Europe, and on the methods of operation of competent law enforcement authorities as well as data on the use of a uniform system of marking cultural property in individual Member States and Eastern Partnership countries.

8. It follows from the above that the requested documents contain important operational and sensitive information on the identification and combat of occurrences of crimes against cultural property in the Member States of the European Union and selected countries of the Eastern Partnership. In the Council's view, releasing this information would enable potential offenders to pinpoint weaknesses in the infrastructures of the Member States' law enforcement systems, thereby causing significant prejudice to the effectiveness of the measures undertaken or planned by the Member States and the Eastern Partnership countries to combat this kind of criminality and thereby compromise the work of the competent authorities. It therefore risks to undermine the protection of the public interest as regards public security, first indent of Article 4(1)(a) of Regulation 1049/2001/EC.
9. In view of the above, the Council cannot share the applicant's view that the analysis of the data based on the replies to the questionnaire on cultural property crimes could not constitute sensitive data. Beyond its implication for policy-making it contains - as demonstrated - information of an operational and/or sensitive nature, which is important for preventing crime threats against cultural property. The Council's conclusion on the existence of a concrete risk for the protection of public security is not contradicted by the fact that the documents in question are not classified under the Council's Security Rules¹, but has "only" been marked "LIMITE" (non-public). Article 4 of Regulation 1049/2001 requires the Council to carry out a concrete assessment of the risk that the release of the requested document to the public would create. Classification of a document in accordance with the Council's Security Rules implies the respect of certain requirements for the handling of such information (e.g. as regards the circulation of the document and the required security clearance) but is certainly not a condition for invoking the protection of a public interest in accordance with Article 4(1)(a) of Regulation 1049/2001. For both reasons, the Council's assessment under Regulation 1049/2001 is therefore independent of the fact whether or not a document has been classified.

¹ Council Decision 2011/292/EU of 31 March 2011, OJ L 141, 27.5.2011, p. 17.

10. Moreover, it must be noted that the first indent of Article 4(1)(a) of the Regulation contains a mandatory exception for the protection the public interest as regards public security. Once it is established that the requested document falls within the sphere of public security and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests.
11. Accordingly, pursuant to the first indent of Article 4(1)(a) of the Regulation (protection of the public interest with regard to public security), the Council is unable to grant full public access to this document.
12. However, in the light of the internal consultations referred to above, the Council has come to the conclusion that, in application of Article 4(6) of the Regulation, further partial access may be granted to the following additional parts of the documents which are not covered by any of the exceptions under Regulation 1049/2001:

13867/11: pages 64 and 65

13867/1/11 REV 1: pages 63 and 64

13867/2/11 REV 2: pages 63 and 64.

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