



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 13311/12

Subject : Public access to documents
- Confirmatory application No 18/c/01/12

Delegations will find enclosed a draft reply from the Council to confirmatory application No 18/c/01/12, as it stands after examination by the Working Party on Information at its meeting on 14 September 2012.

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

Concerning EULEX Kosovo Mission Reports:

DK, FI, SE: *"DK, FI and SE agree that the information contained in the documents to a large extent is covered by the secrecy exceptions regarding the protection of the public interest as regards public security and international relations. However, DK, FI and SE consider that some parts of the documents could have been released without undermining the protection of the public interest as regards public security and international relations, for instance those parts that include information on verdicts and held press conferences etc".*

Concerning document 14269/09:

DK, FI, SE: *"DK, FI and SE welcome the granted partial access to the document but consider that additional parts of the document could have been released, for instance p. 3-4".*

Concerning document 15260/1/09 REV 1:

DK, FI, SE: *"DK, FI and SE agree that the information contained in the document to a large extent is covered by the secrecy exceptions regarding the protection of the public interest as regards public security and international relations. However, DK, FI and SE consider that some parts of the document could have been released, for instance paragraphs 1-2 on page 10".*

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, French, 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 18/c/01/12,****MADE BY E-MAIL ON 9 August 2012,****pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**

for public access to documents 10081/09, 10111/09, 10439/09, 10819/09, 10676/09, 11142/09, 11332/09, 11442/09, 11459/09, 11651/09, 12863/09, 12764/09, 12754/09, 12743/09, 12690/09, 12612/09, 12644/09, 12584/09, 12503/09, 12310/09, 12163/09, 11954/09, 11262/09, 11262/1/09 REV1, 11741/09, 12946/09, 13363/09, 13369/09, 13158/09, 13514/09, 14184/09, 13893/09, 14183/09, 14503/09, 14839/09, 15081/09, 13894/09, 14025/09, 15456/09, 15852/09, 11751/09, 11751/1/09 REV1, 12083/09, 12568/09, 14269/09, 15700/09, 15260/1/09 REV1, 13775/09, 12778/09

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 49 documents:
 - a) Documents 10081/09, 10111/09, 10439/09, 10819/09, 10676/09, 11142/09, 11332/09, 11442/09, 11459/09, 11651/09, 12863/09, 12764/09, 12754/09, 12743/09, 12690/09, 12612/09, 12644/09, 12584/09, 12503/09, 12310/09, 12163/09, 11954/09, 11262/09, 11262/1/09 REV1, 11741/09, 12946/09, 13363/09, 13369/09, 13158/09, 13514/09, 14184/09, 13893/09, 14183/09, 14503/09, 14839/09, 15081/09, 13894/09, 14025/09, 15456/09, 12778/09 and 15852/09 contain various EULEX KOSOVO mission reports.

- b) Documents 11751/09 and 11751/1/09 REV 1 are notes from the Secretariat to the Committee for Civilian Aspects of Crisis Management (CivCom) and contain Draft CivCom advice on EULEX KOSOVO Monthly Report 02/09. Document 12083/09 is a note from the Committee for Civilian Aspects of Crisis Management to the Political and Security Committee, containing the corresponding adopted version of the advice.
- c) Document 12568/09 is a note from the General Secretariat of the Council to delegations and contains a Financial statement related to Council Joint Action 2009/.../CFSP of ... amending Council Joint Action 2009/137/CFSP extending the mandate of the European Union Special Representative in Kosovo (under United Nations Security Council Resolution 1244 (1999)).
- d) Document 14269/09 contains an opinion of the Legal Service on a Draft accountability concept paper proposing the setting up of a human rights review panel for EULEX Kosovo.
- e) Document 15700/09 contains the outcome of proceedings of the Foreign Relations Counsellors Working Party meeting of 9 November 2009 concerning EULEX KOSOVO – Third Party Liability Insurance.
- f) Document 15260/1/09 REV 1 is a cover note from the Council Secretariat to the Committee for Civilian Aspects of Crisis Management containing a Draft revised Operation Plan (OPLAN) for the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO. Document 13775/09 is a note from the General Secretariat of the Council to the Committee for Civilian Aspects of Crisis Management containing a Draft revised Annex A of the Operation Plan (OPLAN) for the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

2. In its reply dated 30 July 2012, the General Secretariat:

- gave full access to documents 11984/09, 15689/1/09 REV 1 and 15689/2/09 REV 2.

- refused public access to documents 10081/09, 10111/09, 10439/09, 10819/09, 10676/09, 11142/09, 11332/09, 11442/09, 11459/09, 11651/09, 12863/09, 12764/09, 12754/09, 12743/09, 12690/09, 12612/09, 12644/09, 12584/09, 12503/09, 12310/09, 12163/09, 11954/09, 11262/09, 11262/1/09 REV1, 11741/09, 12946/09, 13363/09, 13369/09, 13158/09, 13514/09, 14184/09, 13893/09, 14183/09, 14503/09, 14839/09, 15081/09, 13894/09, 14025/09, 15456/09, 12778/09, 15852/09, 11751/09, 11751/1/09 REV 1 , 12083/09, 15260/1/09 REV 1 and 13775/09 pursuant to the first and third indent of Article 4(1)(a) of Regulation No 1049/2001 (protection of the public interest with regard to public security and with regard to international relations).
- granted public access to document 12568/09, with the exception of some parts on pages 6 and 7 of the document, for which public access was refused pursuant to Article 4(1)(b) of the Regulation (protection of privacy and the integrity of the individual).
- granted public access to the introductory paragraph on pages 1 and 2 of document 14269/09 and refused public access to the rest of the document pursuant to Article 4(1)(a), first and third indents (protection of the public interest with regard to public security and to international relations) and, in the absence of any evidence suggesting an overriding public interest to warrant disclosure, also pursuant to Article 4(2) second indent (protection of court proceedings and legal advice).
- granted public access to the first paragraph of document 15700/09 and refused public access to the rest of the document pursuant to Article 4(1)(a), first and third indents (protection of the public interest with regard to public security and with regard to international relations).

3. In the confirmatory application dated 9 August 2012, the applicant asks the Council to reconsider its position without providing any arguments to support this confirmatory application.
4. The Council has thoroughly examined the requested documents and has come to the following conclusion:

5. The documents under scrutiny all concern the EULEX KOSOVO mission. This mission was set up under the Common Security and Defence Policy in February 2008 and the current mandate expires on 14 June 2014. EULEX forms part of a broader effort undertaken by the EU to promote peace and stability in the Western Balkans. The central aim is to assist and support the authorities in Kosovo in the rule of law area, specifically in the police, judiciary and customs fields.

a) *EULEX Kosovo Mission Reports*

6. Documents **10081/09, 10111/09, 10439/09, 10819/09, 10676/09, 11142/09, 11332/09, 11442/09, 11459/09, 11651/09, 12863/09, , 12764/09, 12754/09, 12743/09, 12690/09, 12612/09, 12644/09,12584/09,12503/09, 12310/09,12163/09, 11954/09, 11262/09, 11262/1/09 REV 1, 11741/09, 12946/09, 13363/09, 13369/09, 13158/09, 13514/09, 14184/09, 13893/09, 14183/09, 14503/09, 14839/09, 15081/09, 13894/09, 14025/09, 15456/09 and 15852/09** contain special reports, incident reports, weekly reports, monthly assessment reports and six-monthly reports on the functioning of EULEX KOSOVO and the environment it is working in and refer to the activities carried out in a particularly delicate political situation. They include internal assessments and analyses, as well as information on EULEX achievements and contain operational details on the mission's action. By reason of their nature and sensitive content, the reports are classified EU RESTRICTED as their disclosure would be disadvantageous to the interests of the European Union.

7. Having regard to the sensitive issues dealt with by the mission as well as to the fact that the mission has to operate in a delicate political situation at the international level, the Council considers that release to the public of the information contained in those documents would seriously jeopardise the success of the ongoing mission by negatively affecting the effectiveness of the efforts undertaken in strengthening the stability of the region and in assisting the authorities in Kosovo in a very difficult environment. Moreover, if such internal analyses and summaries which contain privileged information on the mission's operations and functioning were to be made public this would risk intensifying certain conflicts and make it more difficult to operate in the current climate. Disclosure would thus undermine the protection of the public interest as regards public security in Kosovo.

8. Furthermore, the Council considers that disclosure of the information contained in these documents would seriously prejudice the European Union's international relations by revealing in detail the steps being taken by the European Union in circumstances which have a high political impact in the whole region. It would also seriously affect relations with the countries in the region.
9. The Council therefore confirms the approach taken by the General Secretariat in its reply to the applicant's initial request. Accordingly, pursuant to Article 4(1)(a), first and third indents, of the Regulation (protection of the public interest with regard to public security and with regard to international relations), the Council is unable to grant public access to these documents.
10. The Council has also reconsidered the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation and has carried out new internal consultations within its General Secretariat in that respect. It has, however concluded that it is not possible to extract certain parts of any of the documents without compromising the protected interests referred to above.

b) Documents 11751/09, 11751/1/09, 12083/09

11. Documents **11751/09**, **11751/1/09 REV 1** and **12083/09** refer to EULEX reports mentioned above. They contain specific advice and comments on such reports. They consequently contain the same kind of information as that described under point a) above. By reason of their nature and sensitive content, these documents are classified EU RESTRICTED as their disclosure would be disadvantageous to the interests of the European Union.
12. For the reasons set out under a), the Council considers that disclosure of these documents would not only jeopardise the success of the ongoing mission but would also seriously prejudice the EU's relations at the international level. The Council confirms the approach taken by the General Secretariat in its reply to the applicant's initial request to refuse public access to these documents pursuant to Article 4(1)(a), first and third indents, of the Regulation (protection of public interest with regard to public security and international relations).

13. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but concluded that it is not possible to extract certain parts of any of the documents without compromising the protected interests referred to above.

c) Document 12568/09

14. Document **12568/09** sets out the expenditure related to the reinforced liaison presence in Belgrade of the European Union Special Representative in Kosovo. Release of parts of item 6.2.1 of this document related to the salaries of staff will make it possible to draw conclusions on the situation of individual people. As this information concerns identifiable persons, it constitutes personal data in the sense of Regulation (EC) No 45/2001¹. The dissemination of such data – including by disclosure to the public – falls within the definition of 'processing of personal data', for the purposes of that Regulation. The data subjects' legitimate interests might be prejudiced by the disclosure of such data, by revealing personal information on the data subjects' individual rights regarding the salaries. Consequently, disclosure of this information would not be in accordance with Article 8 of Regulation (EC) No 45/2001, and thus it would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data, as provided for in Article 4(1)(b) of Regulation No 1049/2001.

15. In the light of the above, the Council confirms the General Secretariat's approach in reply to the applicant's initial request which grants public access to document 12568/09, with the exception of some parts on pages 6 and 7 of the document, for which public access must be refused pursuant to Article 4(1)(b) of Regulation No 1049/2001.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data – Official Journal L 8, 12.1.2001, p. 1.

d) *Document 14269/09*

16. Document **14269/09** is an opinion of the Council Legal Service on a draft accountability concept paper proposing the setting up of a human rights review panel for EULEX KOSOVO. It analyses a number of legal questions related to the concept paper and the envisaged human rights review panel ("the panel"), including a question concerning the applicable law. The document extensively refers to and quotes the draft concept paper which is an internal, intermediate document not intended for the public and not publicly accessible. It also refers to and quotes parts of the Operation Plan for EULEX KOSOVO, which is a classified documents pertaining to an ongoing operation.
17. The panel was established on 29 October 2009 with a mandate to review alleged human rights violations by EULEX KOSOVO in the conduct of its executive mandate. It became fully operational in June 2010.
18. The panel operates in a politically sensitive context and a complex legal environment, and the conditions for its setting up and operation were subject to in-depth discussions within the Council. It was notably relevant to examine how the panel would interact with other relevant frameworks and to properly define its mandate. The legal advice reflects this complex context and analyses some of the more difficult and contentious issues.
19. Disclosure of the document would therefore reveal sensitive legal issues which were discussed in relation to the setting up of the panel. This might be exploited in generating controversies about, or challenges to the work of the panel. This would risk damaging the proper functioning of the panel, with the concrete risk of a deterioration in the conditions under which the panel works. It would also risk negatively affecting cooperation between EULEX KOSOVO and the authorities in Kosovo in a complex legal environment and a situation which is already delicate. Full release of this document would therefore undermine the protection of the public interest as regards public security and as regards the international relations of the EU.

20. It is recalled that Article 4(1)(a) of Regulation No 1049/2001 is a mandatory exception for the protection of, *inter alia*, public security and international relations. Once it is established that the protection of the invoked interests would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation consequently does not allow the institution to balance the protected interest against other interests.
21. The divulgation of the content of the document would also undermine the protection of legal advice by revealing to the public internal opinions of the Council Legal Service, intended for the members of the Council. This would entail the risk of leading the Council to display caution when requesting its Legal Service to advice on such sensitive issues, since it could find itself in a difficult situation if the opinion of the Legal Service was made public, notably if it had adopted a different approach to some of the issues analysed. Moreover, the Legal Service could come under external pressure which could affect the way in which legal opinions are drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.
22. In the light of all the above, the Council confirms the reply given by the General Secretariat in the initial phase, refusing full access to document 14269/09 under Regulation No 1049/2001, Article 4(1)(a), first and third indents (protection of the public interest with regard to public security and with regard to international relations) and, in the absence of any evidence suggesting an overriding public interest to warrant disclosure, also pursuant to Article 4(2), second indent, (protection of legal advice).
23. The Council also examined, pursuant to Article 4(6) of the Regulation, the possibility of granting further partial access to the document under scrutiny. The Council concluded that it remained justified not to grant additional partial access to the document.
- e) *Document 15700/09*
24. Document **15700/09** refers to the Third Party Liability Insurance for EULEX KOSOVO. Following the applicant's confirmatory application, the Council has thoroughly examined the document concerned. In the light of its examination, the Council has come to the conclusion that the applicant may have access to the document in its entirety.

f) Documents 15260/1/09 REV 1 and 13775/09

25. Documents **15260/1/09 REV 1** and **13775/09** refer to the Operation Plan (OPLAN) for EULEX KOSOVO which was drawn up in order to execute the mandate of EULEX KOSOVO.
26. By reason of their nature and sensitive content, these documents are classified EU RESTRICTED as their disclosure would be disadvantageous to the interests of the European Union. Given their operational nature, the Council considers that disclosure of this information would be detrimental for the effectiveness of the on-going mission in a difficult environment. Releasing this content would not only put at risk the mission's activities, but also affect relations with relevant third parties.
27. For the reasons set out under a) and b), the Council confirms the approach taken by the General Secretariat in its reply to the applicant's initial request. Disclosure of this information would undermine the protection of the public interest as regards public security and international relations and therefore must be denied pursuant to Article 4(1)(a), first and third indent, of the Regulation.
28. The Council has also looked into the possibility of granting partial access to these documents as foreseen in Article 4(6) of the Regulation, but has, however, concluded that it is not possible to extract certain parts of any of the documents, without compromising the protected interests referred to above.