



Council of the
European Union

Brussels, 8 September 2016
(OR. en)

11762/16

INF 149
API 89

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 20/c/06/16

Delegations will find attached:

- message containing a request for access to documents sent to the General Secretariat of the Council on 8 July 2016 and registered on the same day ([Annex 1](#));
- reply to the above-mentioned message from the General Secretariat of the Council dated 23 August 2016 ([Annex 2](#));
- confirmatory application dated 24 August 2016 and registered the same day ([Annex 3](#))

[E-mail message sent to jakob.thomsen@consiliumeuropa.eu on 8 July 2016 - 16:19]

From: **DELETED**
Sent: Friday, July 08, 2016 4:19 PM
To: SECRETARIAT DGF Access
Cc: THOMSEN Jakob
Subject: Electronic Request for Access

Title/Gender: **DELETED**
Family Name: **DELETED**
First Name: **DELETED**
E-Mail: **DELETED**
Occupation: **DELETED**
On behalf of: **DELETED**
Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): As you may know I have filed various requests for access to documents of the Code of Conduct Group. Please be informed that I really appreciate all the efforts and work of the General Secretariat of the Council in this respect. I kindly ask you to provide me with all the room documents of the Code Group (including origin Commission, etc) which have been drawn up during the Dutch Presidency (first half 2016) and are in the possession of the General Secretariat of the Council.



Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

Brussels, 23 August 2016

DELETED

Email: **DELETED**

Ref. 16-1588/ws-mw

Request made on: 08.07.2016

Deadline extension: 01.08.2016

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached the following documents:

Room documents 1 and 1 "after meeting version" of Code of Conduct group meeting of 27.01.2016;

Room document 1 of Code of Conduct group meeting of 02.02.2016;

Room documents 4, 4 Rev1, 7, 11 and 12 of Code of Conduct group meeting of 02.06.2016;

Statement from Spain for ECOFIN Council of 17.06.2016.

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).

Please find attached partially accessible versions of documents²:

Room documents 6 and 6 Rev1 of Code of Conduct group meeting of 12.04.2016;

Room documents 1 and 1 Rev1 of Code of Conduct group meeting of 02.06.2016.

I regret to inform you that access to the following documents cannot be given for the reasons set out below:

Room documents 2, 3, 4, 4 annex 2 of Code of Conduct group meeting of 02.02.2016;

Room documents 1, 2, 3, 4, 5, 6 annex, 7, 7 REV1, 8, 9, 10 of Code of Conduct group meeting of 12.04.2016;

Room documents 2, 2 REV1, 3, 3 REV1, 5, 6, 6 annex 3, 8 of Code of Conduct group meeting of 02.06.2016;

Room documents 2, 3, 5, 8 of Code of Conduct group meeting of 20.07.2016.

These room documents concern difficult tax issues, which are still the subject of ongoing discussions, and contain informally voiced internal opinions and assessments related to tax measures.

The General Secretariat considers that (full) 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.

(Full) access to these documents must be refused as (full) release of this information would jeopardise the negotiating process and thus seriously undermine the decision making-process concerned.

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 (full) disclosure.

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

We have also looked into the possibility of releasing parts of each of these documents. Documents for which a partial access is granted are listed above.

² 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.

Finally, the following documents were identified, but could not be fully assessed within the required timeframe:

Room document 5 of Code of Conduct group meeting of 02.02.2016

Room documents 9, 9 REV1, 9 REV2, 10, 10 REV1 of Code of Conduct group meeting of 02.06.2016;

Room documents 1, 4, 6, 7 of Code of Conduct group meeting of 20.07.2016.

It should be noted that the present decision does not preclude you from introducing initial request for these documents.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).³

Yours sincerely,

Jakob THOMSEN

Enclosures

³ 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 jakob.thomsen@consiliumeuropa.eu on 24 August 2016 - 12:56]

From: **DELETED**

Sent: Wednesday, August 24, 2016 12:56 AM

To: DGF SECRETARIAT Access

Subject: RE: Ref. 16/1588-ws/mw

Please find attached a confirmatory application regarding your below letter.

Kind regards,

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

Re: Confirmatory application No 16-1588/ws-mw

Dear Mr Thomsen,

1. In taking its decisions the Council invoked the various material grounds for exception laid down in Article 4(1) to (3) of the Transparency Regulation.
2. A general objection to the way in which the Council has used those material grounds for exception is that in respect of a large number of documents it refers to such grounds without clearly stating (i) which material grounds for exception it invokes and (ii) that each document has been subject to a specific examination. Both are required under established case-law.
3. Furthermore, the Council has in essence applied the material grounds for exception incorrectly. While this is, as stated, not indicated in the decision, the exceptions in this case appear to be those laid down in Article 4(1)(a), fourth indent, and Article 4(3), first paragraph, of the Transparency Regulation regarding (i) protection of the public interest in relation to financial, monetary or economic policy and (ii) preventing the decision-making process from being undermined where the decision has not been taken.

'Protection of the public interest as regards financial, monetary or economic policy'

4. In taking its decisions the Council appears to invoke the material grounds for exception concerning the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State, as referred to in Article 4(1)(a), fourth indent, of the Transparency Regulation. As regards the way in which it did that, I have the following objection.
5. The Council did not properly assess the applicability of the material ground for exception and in any case did not provide appropriate justification. With the documents in question, it is not clear, at least not immediately, how disclosure would damage the public interest as regards financial, monetary or economic policy. Hence the ground for refusal cited here cannot be invoked without justification, which is, however, lacking.
6. The material grounds for exception must be strictly interpreted and applied. As regards the material ground for exclusion here, the significance of this principle under established case-law is that it applies only if the risk of the interest in question being undermined is reasonably foreseeable. In other words, the risk should be real and not purely hypothetical. The fact that a document concerns an interest protected by an exception is therefore not enough in itself to apply this ground for exception.
7. While the room documents which I requested do touch on the financial, and possibly also the monetary, policy of the European Union and the Member States, it is unclear how disclosure of the documents in question might do real damage to that interest. I am therefore of the opinion that the Council has applied the material ground for exception too generally and thus wrongly. In any event I find the justification given completely inadequate.

'Protection of the decision-making process'

8. In its decision the Council appears to invoke the material grounds for exception regarding the protection of the decision-making process in respect of documents relating to decisions not yet taken, as referred to in Article 4(3), first paragraph, of the Transparency Regulation. (The second paragraph of this article does not seem to have been invoked by the Council). I have two objections to the way in which the Council deals with this material ground for exception.
9. Firstly, the Council uses the wrong criterion. Pursuant to the first paragraph of Article 4(3) of the Transparency Regulation, the disclosure of documents is to be refused if it would seriously undermine the decision-making process in respect of decisions not yet taken. However, according to the reasons it gave, instead of checking whether (how) this was the case, the Council simply applied the material ground for exception. To summarise the Council's argument, the documents in question concern thorny tax issues and contain statements by the participants in the discussions as well as evaluations of tax measures. This not an argument that can be used to justify the existence of a serious obstacle, but is rather a categorical exclusion of documents. The Transparency Regulation makes no provision for this, nor can it be regarded as containing one.
10. Secondly, the Council has not given a single reason to underpin the existence of a serious obstacle to the decision-making process. The general argument that the participants in the discussions must be able to count on confidentiality falls short, if only because the question of whether the obstacle to the decision-making process can be described as serious cannot be seen as separate from the question of whether a *public interest* calls for transparency and to what extent. In this regard, the fact that the decisions of the Code of Conduct Group are 'soft law' (which will or may also culminate in 'hard law' in relation to a number of issues) cannot be overlooked. Furthermore, the Code of Conduct Group's area of activity - the prevention of harmful tax competition between EU Member States - is a topic that has for some time occupied a prominent place in public debate. On this subject I believe I need merely to refer to the so-called LuxLeaks scandal and the brouhaha surrounding the tax rulings concerning Starbucks and Amazon, to name but two.

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

(Complimentary close)

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