



Council of the
European Union

Brussels, 20 October 2016
(OR. en)

12037/16

INF 155
API 94

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 21/c/07/16

Delegations will find attached:

- message containing a request for access to documents sent to the General Secretariat of the Council on 27 July 2016 and registered on the same day ([Annex 1](#));
- reply to the above-mentioned message from the General Secretariat of the Council dated 6 September 2016 ([Annex 2](#));
- confirmatory application dated 7 September 2016 and registered the same day ([Annex 3](#))

[E-mail message sent to SECRETARIAT DGF Access on 27 July 2016 - 16:38]

From: **DELETED**

Sent: Wednesday, July 27, 2016 4:38 PM

To: SECRETARIAT DGF Access

Subject: RE: Request for contact chair working party on information; my confirmatory application of 15 February 2016; no formal decision received from Council and working party on information.

In order to reduce the workload of the Council and the time needed to identify and assess the documents concerned, please find below a list of the limited remaining room documents in which I am interested. This means, as emphasized in my email of 26 July 2016, that I am not interested in all documents related to the period 2009-2015. For more information I also kindly refer to the spreadsheet matrix (see emails dated march 2016 and my email to the chair of the working party dated 16 July 2016). As earlier proposed by me, I would kindly agree on a time table.

Kind regards,

DELETED

LIST OF DOCUMENTS WITHIN SCOPE OF MY REQUEST

Group	Date meeting	Room doc nr
CoCG	05/02/2009	RD04
CoCG	05/02/2009	RD07A1
CoCG	23/09/2009	RD04
CoCG	20/05/2010	RD06
CoCG	20/05/2010	RD06A3
CoCG	17/02/2011	RD02
CoCG	17/02/2011	RD02A1
CoCG	17/02/2011	RD02A1ADD1
CoCG	17/02/2011	RD02A1ADD2
CoCG	17/02/2011	RD02A1ADD3
CoCG	17/02/2011	RD07
CoCG	07/02/2012	RD01
CoCG	07/02/2012	RD04
CoCG	07/02/2012	RD06
CoCG	07/02/2012	RD07
CoCG	17/04/2012	RD07
CoCG	04/06/2012	RD03
CoCG	04/06/2012	RD03R1
CoCG	04/06/2012	RD06A1
CoCG	04/06/2012	RD06A2
CoCG	04/06/2012	RD06A3
CoCG	04/06/2012	RD06A4
CoCG	04/06/2012	RD06A5
CoCG	04/06/2012	RD06A6
CoCG	04/06/2012	RD06A7
CoCG	10/09/2012	RD06
CoCG	10/09/2012	RD06A1

CoCG	10/09/2012	RD07
CoCG	10/09/2012	RD08
CoCG	17/10/2012	RD02
CoCG	08/11/2012	RD04
CoCG	08/11/2012	RD04R1
CoCG	08/11/2012	RD04R2
CoCG	08/11/2012	RD04F
CoCG	30/01/2013	RD01
CoCG	30/01/2013	RD02
CoCG	30/01/2013	RD04
CoCG	30/01/2013	RD05
CoCG	30/01/2013	RD05A1
CoCG SG	31/01/2013	RD01
CoCG SG	31/01/2013	RD01R
CoCG	20/03/2013	RD07
CoCG	29/05/2013	RD01
CoCG	29/05/2013	RD02
CoCG	29/05/2013	RD03
CoCG	29/05/2013	RD04
CoCG	29/05/2013	RD04R
CoCG	29/05/2013	RD04R2
CoCG	29/05/2013	RD07
CoCG	29/05/2013	RD08
CoCG	11/09/2013	RD01
CoCG	11/09/2013	RD02
CoCG	11/09/2013	RD04
CoCG	11/09/2013	RD05
CoCG	11/09/2013	RD06

CoCG	22/10/2013	RD01
CoCG	22/10/2013	RD05
CoCG	20/11/2013	RD01
CoCG	20/11/2013	RD01R1
CoCG	20/11/2013	RD03
CoCG	20/11/2013	RD03R1
CoCG	20/11/2013	RD05
CoCG	20/11/2013	RD06
CoCG SG	22/01/2014	RD01
CoCG SG	22/01/2014	RD02
CoCG SG	22/01/2014	RD03
CoCG SG	22/01/2014	RD04
CoCG	18/03/2014	RD02A1
CoCG	18/03/2014	RD02A2a
CoCG	18/03/2014	RD02A2b
CoCG	18/03/2014	RD02A2c
CoCG	03/06/2014	RD02
CoCG	03/06/2014	RD03A1
CoCG	03/06/2014	RD04
CoCG	03/06/2014	RD04A1
CoCG	03/06/2014	RD04A2
CoCG	03/06/2014	RD04A3
CoCG	03/06/2014	RD06
CoCG	03/06/2014	RD06R1
CoCG	03/06/2014	RD06R2
CoCG	03/06/2014	RD07
CoCG	03/06/2014	RD09
CoCG	03/06/2014	RD10

CoCG	03/06/2014	RD11
CoCG	16/09/2014	RD01
CoCG	16/09/2014	RD02
CoCG	16/09/2014	RD16
CoCG	16/09/2014	RD17
CoCG	22/10/2014	RD01A1
CoCG	22/10/2014	RD04
CoCG	22/10/2014	RD04A1
CoCG	22/10/2014	RD22
CoCG	22/10/2014	RD23
CoCG	22/10/2014	RD24
CoCG	07/04/2015	RD07
CoCG	07/04/2015	RD08
CoCG	07/04/2015	RD09
CoCG	02/06/2015	RD02A1
CoCG	02/06/2015	RD06
CoCG	02/06/2015	RD06A1
CoCG	02/06/2015	RD06R1
CoCG	02/06/2015	RD07
CoCG	02/06/2015	RD07A1
CoCG	02/06/2015	RD08
CoCG	02/06/2015	RD09
CoCG	21/10/2015	RD01
CoCG	21/10/2015	RD05
CoCG	21/10/2015	RD06
CoCG	18/11/2015	RD04R1
CoCG	18/11/2015	RD04R2
CoCG	18/11/2015	RD06
CoCG	18/11/2015	RD07
CoCG	18/11/2015	RD07A1
CoCG	18/11/2015	RD07A2
CoCG	18/11/2015	RD08
CoCG	18/11/2015	RD08R1



Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

Brussels, 6 September 2016

Mr **DELETED**
Email: **DELETED**

Ref. 16/1671 (ex 16/0591-592-593)/ws-mw

Request made on: 25.07.2016

Deadline extension: 16.08.2016

Dear Mr **DELETED**,

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

Please find attached the following documents from the Code of Conduct group:

Meetings dates	Room documents
05.02.2009	4
17.02.2011	2 annex ADD1 2 annex ADD2 2 annex ADD3
07.02.2012	1, 4, 6, 7
04.06.2012	3, 3 REV1, 6 annex1, 6 annex3, 6 annex5, 6 annex6, 6 annex7
10.09.2012	6, 6 annex, 7, 8
17.10.2012	2
08.11.2012	4, 4 REV1, 4 REV2, 4 Final,
30.01.2013	1, 2
31.01.2013	1, 1 REV1
29.05.2013	1, 2, 3, 4, 4 REV1, 4 REV2, 7, 8
11.09.2013	1, 2, 4, 5, 6
22.10.2013	1
20.11.2013	1, 1 REV1, 3, 3 REV1, 5, 6
22.01.2014	2, 3, 4
18.03.2014	2 annex1, 2 annex2a, 2 annex2b, 2 annex 2c
03.06.2014	2, 3 annex, 6, 6 REV1, 6 REV2, 7, 10, 11
16.09.2014	1, 2, 16, 17
22.10.2014	1 annex, 22, 23, 24
07.04.2015	7, 8
02.06.2015	9
21.10.2015	6
18.11.2015	4 REV1, 4 REV1 after meeting, 7, 7 annex1, 7 annex2, 8, 8 REV1

Access to the following documents cannot be granted:

Room document 7 of 17.02.2011:

Access to this document would undermine the public interest as regards international relations because it contains opinions and views which were expressed under the assumption of confidentiality and mutual trust. The document reflects a free and frank exchange of views including references to other jurisdictions and also contains candid references in respect of issues of the Code Group such that access would undermine public interest as regards international relations.

Access should also be denied because the document contains opinions for internal use as part of deliberations, disclosure of which would seriously undermine the institutions decision-making process even though these relate to closed matters.

Therefore, access to this document must be refused on the basis of Article 4(1)(a), third indent and in absence of overriding public interest in disclosure of the document, on Article 4(3) of Regulation No 1049/2001.

Room document 6 annex 2 of 04.06.2012

The document is an internal working instruction of the Austrian tax investigation department on how to apply the IT-forms on the exchange of information between Member States.

If internal working instructions on how to proceed with forms and IT systems for the application of exchange of information between tax administrations would be made public this information might be used in way that could undermine the security of these IT systems and the protection of the purpose of inspections, investigations and audits.

There is no evidence of an overriding public interest in release of this internal working instruction.

Access to this document must be refused on the basis of Article 4(1a), first indent, and Article 4(2), third indent of Regulation 1049/2001.

Since the respective document does not contain any other information than this internal working instruction we do not see any public interest in it being disclosed.

Room document 5 annex1 of 30.01.2013

This room document concerns difficult tax issues, which are still the subject of ongoing discussions, and contains 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 (Article 4(1a), four indent, of Regulation 1049/2001).

Access to this document must also be refused as release of this information would jeopardise the negotiating process and thus seriously undermine the decision making-process concerned (Article 4(3) second indent, of Regulation 1049/2001), while on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in disclosure of the document.

We have also looked into the possibility of releasing parts of each of these documents.¹ 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 room documents were identified, but could not be fully assessed within the required timeframe:

Room document 7 annex of 05.02.2009

Room document 4 of 23.09.2009

Room documents 6 and 6 annex3 of 20.05.2010

Room documents 2, 2 annex of 17.02.2011

Room document 7 of 17.04.2012

Room document 6 annex4 of 04.06.2012

Room documents 4, 5 of 30.01.2013

Room document 7 of 20.03.2013

Room document 5 of 22.10.2013

Room document 1 of 22.01.2014

Room documents 4, 4 annex1, 4 annex2, 4 annex3, 9 of 03.06.2014

Room documents 4, 4 annex of 22.10.2014

Room document 9 of 07.04.2015

Room documents 2 annex, 6, 6 annex, 6 REV1, 7, 7 annex, 8 of 02.06.2015

Room documents 1, 5 of 21.10.2015

Room document 6 of 18.11.2015

¹ Article 4(6) of Regulation (EC) No 1049/2001.

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

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).²

Yours sincerely,

Fernando PAULINO PEREIRA

Enclosures

² 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 on 7 September 2016 - 11:16]

From: **DELETED**

Sent: Wednesday, September 07, 2016 11:16 AM

To: SECRETARIAT DGF Access

Subject: RE: Ref. 16/1671-ws/mw - confirmatory application

Further to my below email I hereby provide you with my confirmatory application regarding decision 16/1671.

Best,

DELETED

DELETED

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

Re: Confirmatory application No 16-1671

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 that each document has been subject to a specific examination although it is required to do so under established case-law.
3. Furthermore, the Council has in essence applied the material grounds for exception incorrectly. The exceptions in question are the fourth indent of Article 4(1)(a) and the first subparagraph of Article 4(3) of the Transparency Regulation on (i) protecting the public interest in relation to financial, monetary or economic policy and (ii) avoiding undermining the institution's decision-making process in relation to decisions that have yet to be 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)

DELETED
