



Council of the  
European Union

Brussels, 3 July 2017  
(OR. en)

10800/17

INF 120  
API 84

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 15/c/02/17

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 13 May 2017 and registered on 15 May 2017 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 27 June 2017 ([Annex 2](#));
- confirmatory application dated 28 June 2017 and registered on 29 June 2017 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 13 May 2017- 13:16]

From: Mathias Schindler [mailto:ask+request-4290-a3b41d7e@asktheeu.org]

Sent: Saturday, May 13, 2017 1:16 PM

To: SECRETARIAT DGF Access

Subject: access to documents request - Cyber Toolbox

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

Any documents related to a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox), including but not limited to the following documents.

- \* 7923/17 REV1 and other revisions, including the initial revision
- \* 8146/17 REV1 and other revisions, including the initial revision
- \* 8946/17 and other revisions
- \* 8907/17 and other revisions

Yours faithfully,

Mathias Schindler



**Council of the European Union**

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

*Head of Unit*

Brussels, 27 June 2017

Mr Mathias Schindler

Email: ask+request-4290-a3b41d7e@asktheeu.org

Ref. 17/1168-ld/nb

Request made on: 13.05.2017

Registered on: 15.05.2017

Deadline extension: 08.06.2017

Dear Mr Schindler,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

Please find attached documents **7923/16**, **7923/17 REV1** and **8907/17** you requested.

I regret however to inform you that access to documents **8146/17**, **8146/17 REV1** and **8946/17** cannot be given for the reasons set out below.

Document **8146/17 and its REV1** are notes of 18 April 2017 and 8 May 2017 respectively, from the General Secretariat of the Council to Delegations related to the "Joint Diplomatic Response to Cyber Operations (Cyber Toolbox)" containing Member States' preliminary comments.

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<sup>1</sup> 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).

Document **8946/17** is a note of 11 May 2017 from the Presidency to Delegations related to the "Joint Diplomatic Response to Cyber Operations (Cyber Toolbox)- presentation of the revised text and initial views" and incorporates written comments made following discussions in the relevant Council Working Party on 22 March 2017.

This "Cyber Toolbox" initiative follows-up the Council Conclusions on a framework for a Joint EU Diplomatic Response to malicious cyber activities ("Cyber Diplomatic Toolbox") which were adopted by the Council on 19 June 2017 and which are publicly available on the Council's Website. Preparatory work on this framework instrument started in parallel with the preparations for the Council Conclusions but is still ongoing.

As you may learn from the Council conclusions, documents **8146/17, its REV1 and 8946/17** relate to the Common Foreign and Security Policy. They are by nature very sensitive since they reveal proposals for diplomatic actions and Member States comments thereto in an area which is also under discussion in other international fora such as the UN, NATO, WTO as well as in bilateral dialogues.

Release of the information and positions contained in these documents could provide misleading information on provisional positions which ultimately have not been agreed. It may also lead interested third parties to take strategic positions to weaken the EU's and Member States' negotiating powers and have a negative impact on the relations between the European Union and its Member States and international organisations and third countries concerned.

Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access to documents **8146/17, its REV1 and 8946/17**.<sup>2</sup>

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<sup>2</sup> Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001

Furthermore, the content of documents **8146/17, its REV1 and 8946/17** compiles and integrates comments of certain Member States on preliminary consultations which were drafted before the formal adoption of the Council Conclusions referred to above. Since these documents do not contain the views of all Member States, disclosure of this information could lead to misperceptions and/or create expectations which may not be confirmed. This may however incite stakeholders to intervene on an issue which is still under discussion in the preparatory bodies of the Council.

Release to the public of the information contained in these documents would therefore affect the Council's negotiating process and diminish its chances of reaching an agreement as it is likely to put delegations under additional pressure. Disclosure of documents **8146/17, its REV1 and 8946/17** would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this subject.

Disclosure of these documents would therefore seriously undermine the decision making-process of the Council.

Concerning the exception related to protection of the decision-making process, the General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations.

Having examined the context in which the documents were drafted and the current state of play on this matter, 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 also for this reason to refuse access to the documents<sup>3</sup>.

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<sup>3</sup> Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

We have also looked into the possibility of releasing parts of the documents<sup>4</sup>. 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).<sup>5</sup>

Yours sincerely,

Fernando PAULINO PEREIRA

Enclosures: 3

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

<sup>5</sup> 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](mailto:access@consilium.europa.eu) on 28 June 2017 - 22:42]

From: Mathias Schindler [mailto:ask+request-4290-a3b41d7e@asktheeu.org]

Sent: Wednesday, June 28, 2017 10:42 PM

To: SECRETARIAT DGF Access

Subject: Internal review of access to documents request - Cyber Toolbox

Dear SECRETARIAT DGF Access,

Dear Mr. Fernando Paulino Pereira,

thank you for your letter dated June 27.

I would like to maintain my confirmatory application from June 9 and I strongly urge you to send me a confirmation of having registered that confirmatory application.

I also wish to make the following remarks for the confirmatory application process:

1. Scope of the access to documents request

In my initial request from May 13, I requested :

"Any documents related to a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox), including but not limited to the following documents.

\* 7923/17 REV1 and other revisions, including the initial revision

\* 8146/17 REV1 and other revisions, including the initial revision

\* 8946/17 and other revisions

\* 8907/17 and other revisions

The reply does only speak about the documents named in the lower part of the request. It is not plausible that no other documents concerning the "Cyber Toolbox" exist and they are clearly in the scope of the request.

## 2. Overriding public interest

An overriding public interest for a disclosure of the documents exist, not only in light of current cyber security related events and ongoing public discussions in other relevant EU institutions.

## 3. Faulty statements

The letter denying access claims that the documents 8146 are very sensitive by nature, a statement that is disproven by the apparent classification of these documents as LIMITE. As explained in the note on Handling of documents marked LIMITE (5847/06), LIMITE is a distribution marking, not a classification level. If they were sensitive as claimed, they would be classified with all the implications of such as classification.

The claim that information and positions contained in these documents could provide misleading information on provisional positions which ultimately have not been agreed is irrelevant to this access to documents request or, if any, would require the release of \*additional\* documents to convey the proper positions. It is not a factor to access to documents requests to anticipate if and how any third party will read and interpret any document and whether this interpretation is intended or shared by anyone else.

Yours sincerely,

Mathias Schindler

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