



Council of the
European Union

Brussels, 9 July 2014

11655/14

INF 252
API 98

NOTE

From : General Secretariat of the Council
To : Working Party on Information
Subject: Public access to documents
- Confirmatory application No 25/c/02/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 29 April 2014 and registered on the same day ([Annex 1](#)).
- 1st reply from the General Secretariat of the Council dated 20 May 2014 and 2nd reply dated 19 June 2014 ([Annex 2](#))
- confirmatory application dated 3 July 2014 and registered the same day ([Annex 3](#)).

[E-mail message sent to DGC SANCTIONS on 29 April 2014 - 12:20pm]

From: **DELETED**

Sent: Tuesday, April 29, 2014 12:20 PM

To: DGC SANCTIONS

Subject: **DELETED**

Dear Madam or Sir,

please find attached our requests for information. The original letters will be sent by DHL.

Best regards

DELETED

Council of the European Union
General Secretariat
DG C 1C
Rue de la Loi/Wetstraat 175
1048 Bruxelles/Brussel
BELGIQUE/BELGIË

E-Mail: sanctions@consilium.europa.eu

28.04.2014

Request for information
Request for access to file
Observations

[REDACTED] have been instructed and authorised by [REDACTED]
[REDACTED], to act on his behalf in the present matter.

With its notice of 06.03.2014, 2014/C66/01, published in the Official Journal of the European Union (OJ C66, Volume 57, 6 March 2014), an announcement was made to persons subject to the restrictive measures provided for in Council Decision 2014/119/CFSP concerning restrictive measures in view of the situation in Ukraine and Council Regulation (EU) No 208/2014 concerning restrictive measures in view of the situation in Ukraine.

The persons who have been listed in the Annex to Council Decision 2014/119/CFSP concerning restrictive measures in view of the situation in Ukraine and in Annex I of Council Regulation (EU) No 208/2014 concerning restrictive measures in view of the situation in Ukraine – amongst them [REDACTED]
[REDACTED] – were informed of the following:

The Council of the European Union has decided that the persons that appear in the above mentioned Annexes should be included in the list of persons and entities subject to restrictive measures provided for in Decision 2014/119/CFSP and in Regulation (EU) No 208/2014 concerning restrictive measures in view of the situation in Ukraine. The grounds for designations of those persons appear in the relevant entries in those Annexes.

The following entry was made with regard to [REDACTED]:

"Person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine."

The persons concerned were informed of the possibility to submit a request to the Council, together with supporting documentation, that the decision to include them on the above-mentioned list should be reconsidered.

Because it is not possible for [REDACTED] to determine the reasons for his inclusion in the list, the following

REQUESTS

are submitted:

The Council of the European Union is requested to disclose all information leading to the inclusion of [REDACTED] on the list;

The Council of the European Union is also requested to give access to the documents on which it based its decision;

The Council of the European Union is requested to disclose the origin of this information;

The Council of the European Union is requested to communicate whether it has engaged in the verification of these documents and this information;

In relation to the entry concerning [REDACTED], *"Person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine"*, the Council of the European Union is requested to communicate what specific investigation was carried out by which authorities and which specific facts and circumstances substantiated a suspicion;

The Council of the European Union is moreover requested to communicate whether it provided [REDACTED] – before inclusion on the list – with an opportunity to defend himself against the allegations raised against him.

Due to the time-limit to bring an action for annulment and in view of the fact that delisting [REDACTED] would make such proceedings superfluous, we expect the Council to provide us with the information until 2 May 2014.

Faithfully





COUNCIL OF
THE EUROPEAN UNION

GENERAL SECRETARIAT

Directorate-General F
Communication
Transparency

- Access to Documents/
Legislative transparency

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access@consilium.europa.eu

Brussels, 20 May 2014

DELETED

e-mail:

DELETED

Ref. 14/0818- mjb/dm

Dear Sirs,

We have registered your request of 28 April 2014 for access to documents on behalf of **DELETED**, for which you are acting as legal representative. Your request relates to documents concerning Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine and Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine.

On 7 May 2014, you were informed by email that your request for public access under Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter Regulation (EC)1049/2001) will be handled by our service (Access to documents). The other aspects of your request will be handled by the competent service of the General Secretariat (sanctions@consilium.europa.eu).

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) 1049/2001 and specific provisions of the Council's Rules of Procedure² and has come to the following conclusion:

The following documents were identified as corresponding to your request: **6840/14**, **6840/14 ADD 1 RESTREINT UE/EU RESTRICTED**, **6840/14 COR 1**, **6903/14**,

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

6903/14 ADD 1 RESTREINT UE/EU RESTRICTED, 6903/14 COR 1, CM 1922/14, CM 1932/14, 7324/14, 7325/14, 7972/14, SN 1694/14, 8525/14, 8526/14, 8647/14, 8647/14 COR 1 and MD 65/14.

Documents **6840/14 ADD 1, 6903/14 ADD 1, 7324/14, 7325/14** and **7972/14** are already public. The full declassified versions of **6840/14 ADD 1** and **6903/14 ADD 1** are set out in documents **6840/14 ADD 1 DCL 1** and **6903/14 ADD 1 DCL 1**. These documents are available for downloading in the public register of Council documents. You will find it using the following link: <http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en>.

You may also have access to the following documents: **6840/14, 6840/14 COR 1, 6903/14, 6903/14 COR 1, CM 1922/14, CM 1932/14, SN 1694/14, 8525/14, 8526/14, 8647/14 and 8647/14 COR 1**. The documents are attached to this letter.

The remaining document, **MD 65/14**, is a document transmitted by the European External Action Service to the General Secretariat of the Council. It contains a letter from a judicial authority in Ukraine.

The consultations with Ukraine on a possible public disclosure of document **MD 65/14** are still in progress. You will be notified of a decision as soon as possible.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures



COUNCIL OF
THE EUROPEAN UNION

GENERAL SECRETARIAT

Directorate-General F
Communication
Transparency

- Access to Documents/
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Brussels, 19 June 2014

DELETED

e-mail:

DELETED

Ref. 14/0818-ADD-mjb/dm

Dear Sirs,

Further to our letter of 20 May 2014 in reply to your request for access to documents on behalf of **DELETED**, for whom you are acting as legal representatives, the General Secretariat of the Council has now completed the examination of your request on the basis of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter Regulation 1049/2001) and specific provisions of the Council's Rules of Procedure² and has come to the following conclusion:

By letter of 20 May 2014, the General Secretariat informed you that documents 6840/14 ADD 1 RESTREINT UE/EU RESTRICTED, 6903/14 ADD 1 RESTREINT UE/EU RESTRICTED, 7324/14, 7325/14 and 7972/14 were already public and granted you full public access to documents 6840/14, 6840/14 COR 1, 6903/14, 6903/14 COR 1, CM 1922/14, CM 1932/14, SN 1694/14, 8525/14, 8526/14, 8647/14 and 8647/14 COR 1. It also informed you that consultations as regards the last document of relevance to your request, namely document MD 65/14, were still in progress.

Document **MD 65/14** is a document transmitted by the European External Action Service (EEAS) to the General Secretariat of the Council. It contains a letter from a judicial authority in Ukraine.

In accordance with Article 4(4) of Regulation 1049/2001 the General Secretariat has consulted the EEAS on the possible public disclosure of document MD 65/14 originated by the Ukrainian authorities. We are now in a position to inform you that the Ukrainian authorities have requested not to disclose the information contained in the letter.

The General Secretariat has examined the document in compliance with its obligation to

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

carry out its own assessment as to whether any of the exceptions to access to documents contained in Article 4 of Regulation 1049/2001 are applicable. It considers that, in the light of its sensitive nature, unilateral disclosure of document MD 65/14, against the objection of Ukrainian authorities, would negatively affect the climate of confidence among the relevant actors and would hence prejudice the EU's relations with Ukraine. This could also seriously affect trust between the EU and other countries under similar circumstances now or in the future. In the light of the foregoing, the General Secretariat has come to the conclusion that disclosure of document MD 65/14 would undermine the protection of the public interest as regards international relations within the meaning of Article 4(1)(a), third indent, of Regulation 1049/2001.

In addition, the requested document contains information related not only to **DELETED** but also to other identifiable persons. Such information constitutes personal data within the meaning of Article 2(a) of Regulation 45/2001¹. The General Secretariat considers that the public interest in obtaining access to such personal data does not in the present case prevail over the interest of those individuals in protecting it. Public disclosure of personal data concerning persons other than **DELETED** contained in document MD 65/14 must therefore also be refused pursuant to Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation 1049/2001, in conjunction with Articles 8 and 18 of Regulation (EC) No 45/2001.

Accordingly, pursuant to Article 4(1)(a), third indent, (protection of the public interest with regard to international relations) and Article 4(1)(b) (protection of privacy and integrity of the individual) of Regulation 1049/2001 the General Secretariat is unable to grant public access to document MD 65/14.

Statutory remedy notice

Pursuant to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply².

Yours sincerely,

For the General Secretariat

Jakob Thomsen

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, 12.01.2001, p. 1).

² Confirmatory applications are published in the Council's Register of documents. If you introduce a confirmatory application, your personal data will be published in the documents related to your confirmatory application only if you have given your explicit consent for this. Your reply relating to the publication of your personal data will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[E-mail message sent to DGC SANCTIONS on 3 July 2014 - 9:03am]

From: **DELETED**

Sent: Thursday, July 03, 2014 9:03 AM

To: DGC SANCTIONS

Cc: **DELETED**

Subject: 14/0817-ADD; 14/0818-ADD

Council
General Secretariat
DG F

Herewith, we submit two confirmatory applications in files 14/0817-ADD and 14/0818-ADD as attached.

Sincerely,

DELETED

Council of the European Union
General Secretariat
DG F

Rue de la Loi/Wetstraat 175
1048 Bruxelles/Brussel
BELGIQUE/BELGIË

E-Mail: sanctions@consilium.europa.eu

Ref. 14/0818-ADD-mjb/dm

3 July 2014

On behalf of [REDACTED], we, herewith,
submit a

Confirmatory Application

according to Article 7(2) of 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, 31/05/2001, p. 43) asking the Council to reconsider its position.

By letter of 20 May 2014, the General Secretariat informed us that documents 6840/14 ADD 1 RESTREINT UE/EU RESTRICTED, 6903/14 ADD 1 RESTREINT UE/EU RESTRICTED, 7324/14, 7325/14 and 7972/14 were already

public and granted you full public access to documents 6840/14, 6840/14 COR 1, 6903/14, 6903/14 COR 1, CM 1922/14, CM 1932/14 and SN 1694/14. We were also informed that consultations as regards the last document of relevance to your request, namely document MD 65/14, were still in progress.

By letter of 19 June 2014, the General Secretariat denied disclosure of documents MD 65/14 on several grounds:

- Ukraine's request not to disclose the document;
- undermining the protection of the public interest as regards international relations;
- undermining the protection of personal data.

Our confirmatory application is based on the following reasoning.

(1) Preliminary remarks

When assessing a request for getting access to documents, the Council has to respect the principles laid down by the Union courts. According to their established case law, the General Secretariat should have followed the following basic rules:

First of all, it should be recalled that Reg. 1049/2001 is intended, as is apparent from recital 4 thereto and from Article 1, to give **the fullest possible effect** to the right of public access to documents of the institutions¹ and to give the public the widest possible access.²

¹ Joined Cases C-39/05 P and C-52/05 P, Sweden and Turco v Council, [2008] ECR I-4723, para 33; Case T-63/10, Jurašinović v Council, judgment 3 October 2012, para 28.

² Case T-331/11, Besselink v Council, judgment 12 September 2013, para 28.

Second, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 Reg. 1049/2001. In view of the objectives pursued by Regulation No 1049/2001, **those exceptions must be interpreted and applied strictly.**³

Third, the decision to be adopted by the institution on whether to give access to a document is of a complex and delicate nature which calls for the exercise of **particular care.**⁴

In adopting a very superficial assessment, the General Secretariat has violated those principles.

(2) Protection of the public interest as regards international relations

After getting a negative reply from Ukrainian authorities, the General Secretariat carried out its own assessment as to whether any of the exceptions to access to documents contained in Article 4 Reg. 1049/2001 are applicable.

In that context, it construed and applied the exception laid down in Article 4(1)(a) third indent. Finally, it came to the conclusion that disclosing document MD 65/14 would undermine the protection of the public interest as regards international relations.

The only reasoning given for the negative reply was the 'sensitive nature' of the said document the disclosure of which 'would negatively affect the climate of confidence among the relevant actors and would hence prejudice

³ Joined Cases C-39/05 P and C-52/05 P, Sweden and Turco v Council, [2008] ECR I-4723, para 35 et seq; Case T-63/10, Jurašinović v Council, judgment 3 October 2012, para 31; Case T-331/11, Besselink v Council, judgment 12 September 2013, para 31.

⁴ Case C-266/05 P, Sison v Council, [2007] ECR I-1233, para 35; Case T-63/10, Jurašinović v Council, judgment 3 October 2012, para 32; Case T-331/11, Besselink v Council, judgment 12 September 2013, para 32.

the EU's relations with Ukraine'. In addition, that 'could also seriously affect trust between the EU and other countries under similar circumstances now or in the future'.

That interpretation and application of Article 4(1)(a) third indent was erroneous.

First, it has to be underlined that legal reasoning must be based on precise reasons not on vague assumptions or on empty phrases and formula. Trust between the EU and other countries cannot be affected by respecting the rule of law. On the contrary, especially the relations with Ukraine are dominated by aligning its political and judicial system to EU standards. It seems contravening the Union's own requirements in the field of judicial protection to renounce to EU standards in specific cases. In addition, the Union would accept applying a low standard in its own legal order at the request of a Third State.

The protection of international relations does not require such a policy. The notion international relation must be construed in the light of the specific circumstances which characterise its relations with Ukraine.

If an institution decides to refuse access to a document which it has been asked to disclose, it must in principle explain how disclosure of that document could specifically and effectively⁵ (or actually⁶) undermine the interest protected by Article 4(1)(a) third indent.

According to established case law, the risk of undermining that interest must be reasonably foreseeable and not purely hypothetical.⁷ That criterion is not

⁵ Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, [2008] ECR I-4723, para 49; Case T-331/11, *Besselink v Council*, judgment 12 September 2013, para 50.

⁶ Case C-477/10 P, *Commission v AgrofertHolding*, [2012] ECR, para 57; Opinion of AG Sharpston in Case C-350/12 P, *Council / in 't Veld*, point 47.

⁷ See e.g. Case C-506/08 P, *Sweden v MyTraveland Commission*, [2011] ECR I-6237, para 75; Opinion of AG Sharpston in Case C-350/12 P, *Council / in 't Veld*, point 47.

fulfilled in the case before us. Moreover, the General Secretariat did not even try to give reasons for that risk being real.

The General Secretariat limited itself to give a pure formalistic reasoning. Doing so, it gave an abstract and unsubstantiated statement.

Moreover, the disclosure of the document MD 65/15 cannot jeopardise 'the climate of confidence among the relevant actors' as was stated by the General Secretariat. The General Secretariat itself did not give reasons for such negative consequences. According to established case law, the General Secretariat should have indicated the specific elements on which it might be concluded that disclosure of the specific document would undermine the public interest in dispute.⁸ There must be a sufficient basis for concluding that the protected interest may be undermined; a mere fear does not fulfil that condition.⁹

(3) Protection of personal data

In its letter of 19 June 2014, the General Secretariat added a further reason for denying access to document MD 65/15. It argued that the requested document contains information related not only to the applicant but also to other identifiable persons.

Without giving reasons it stated simply that '[s]uch information constitutes personal data within the meaning of Article 2(a) of Regulation 45/2001'.

Apart from the fact that presenting the interpretation and application of a legal rule without reasoning violates the duty to state reasons, such an approach is vitiated by another error of law.

⁸ Case T-331/11, *Besselink v Council*, judgment 12 September 2013, para 60.

⁹ Case T-529/09, in *'t Veld v Council*, judgment 4 May 2012, para 50.

Even in case that the document in question contains data which are to be qualified as personal data, access to that document cannot be denied. At least, access must be given to those parts which concern the applicant. In relation to him, those elements do not fall under the protection of personal data.

Refusing access applying Article 4(1)(b) Reg. 1049/2001 in conjunction with Articles 8 and 18 of Regulation (EC) No 45/2001, is, at least, cynical as Article 4(1)b protects privacy and integrity of the individual. Denying the access to one's own personal data is a manifest and serious violation of that protection.

In that regard, the relationship between Regulations Nos 1049/2001 and 45/2001, should be borne in mind. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices. The second is designed to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data.

Insofar as the applicant's data are concerned, it is quite impossible that other data subjects' legitimate interests might be prejudiced.

According to the Union's courts case-law, 'it must be held that the disclosure of personal data exclusively concerning the applicant for access in question cannot be refused on the ground that it would undermine the protection of privacy and the integrity of the individual.'¹⁰

¹⁰ Case T-300/10, *Internationaler Hilfsfonds v European Commission*, judgment of 12 May 2012, para 107.

Therefore, the legally correct solution would have been to release the expurgated version of the document with the personal data of other persons than the applicant removed therefrom.

Conclusio

It follows from all these considerations that access to document MD 65/14 must not be refused on the grounds on which the General Secretariat based its conclusions.

Therefore, we renew our request for access to document MD 65/14 and, in application of Article 7 (2) Reg. 1049/2001, ask the Council to reconsider its position.

Finally, we would like to continue our communication in German in accordance with the linguistic regime of the Union. Certainly, if a document is available in another language only, it can be sent in that language (preferably in EN or FR).

Yours sincerely,

