



Council of the
European Union

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Eingelangt am 14/11/14

**Brussels, 14 November 2014
(OR. en)**

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**INF 304
API 124**

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 31/c/01/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 15 September 2014, registered on the same day ([Annex 1](#));
- reply from the GSC dated 9 October 2014 ([Annex 2](#));
- confirmatory application dated 29 October 2014, registered on the same day ([Annex 3](#)).

DELETED

**COUNCIL
OF THE EUROPEAN UNION**
Secretary-General
Rue de la Loi/Wetstraat 175
B-1048 Bruxelles/Brussel
BELGIQUE/BELGIË

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Angers, 15 September 2014

BY FAX ONLY

Fax no + 32 2 281 91 96 - three pages, including cover page

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Your ref.: Application for access to documents

Dear Sir,

As a European citizen of French nationality, I would like to request access to the following documents:

- The entire correspondence exchanged, from 7 December 2009 onwards, between the Secretary-General/High Representative and the International Criminal Tribunal for the former Yugoslavia (Office of the Prosecutor and Trial Chamber) in connection with the "Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač" case, as well as the documents other than reports drafted by the European Community Monitoring Mission, annexed to that correspondence.

I would request that these documents be sent preferably by email, or failing that by post. This application is based on Regulation (EC) No 1049/2001 and on the judgment of the General Court of 3 October 2012 (Case T-63/10 - Jurašinovič v Council).

[Complimentary close].

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Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

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Brussels, 9 October 2014

Our ref. 14/1655-ls/mi

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Your application of 15 September 2014 concerning access to Council documents was received and registered by the Access to Documents Unit on 16 September 2014.

You request access to the entire correspondence exchanged, from 7 December 2009 onwards, between the Secretary-General of the Council/High Representative ("SG/HR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") (Office of the Prosecutor and Trial Chamber) in connection with the "Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač" case, as well as the documents other than reports drafted by the European Community Monitoring Mission, annexed to that correspondence.

I note that on 1 October 2009, you already requested public access to the same documents¹, for which you also submitted a confirmatory application² dated 3 November 2009.

¹ Initial application No 09/1974.

² Confirmatory application No 26/c/02/09.

By application lodged at the General Court Registry on 10 February 2010, you brought an action for annulment of the Council's decision of 7 December 2009 refusing to grant you access to the requested documents, except those already made available to the public by the ICTY, in accordance with Article 4(2) (protection of court proceedings) of Regulation (EC) No 1049/2001. By its judgment of 3 October 2012, the General Court partially annulled the Council's decision "in so far as [the applicant] was refused access to correspondence between the Council and [the ICTY], and to documents other than the reports drawn up by the European Community Monitoring Mission, annexed to that correspondence"³.

On 22 July 2013 and 8 July 2014, the Council adopted two new partial replies to confirmatory application No 26/c/02/09 following the above judgment of the General Court⁴. In its partial reply of 22 July 2013, the Council granted access to all documents listed in Annex 1 of that reply, except for reports drawn up by the European Community Monitoring Mission, which are protected by the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 (protection of international relations). In its reply of 8 July 2014, the Council specified that certain documents listed in Annex 2 of that reply were available on the ICTY's site and granted access, after consultation with the ICTY, to all the documents, subject to the protection of personal data on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001. It also granted access to the documents listed in Annex 3 of that reply, except for the parts protected by Article 4(1)(a) (protection of international relations), Article 4(2) (protection of court proceedings) and Article 4(1)(b) (protection of personal data) of Regulation (EC) No 1049/2001. In that same partial reply, the Council also indicated that consultations with the ICTY are pending concerning two documents, referred to as numbers 4 and 6 in Case C-63/10. Those consultations are ongoing and will therefore be subject to a subsequent, final confirmatory decision as soon as the consultations with the ICTY are completed.

³ Paragraphs 96 and 98 of the judgment in Case T-63/10, confirmed by a related judgment of the General Court (see paragraphs 40 and 41 of the judgment in Case T-465/09) and by the judgment of the Court of Justice in Case C-576/12 P.

⁴ 11936/13 and 11390/14.

The General Secretariat notes that your application of 15 September 2014 is a new application under Regulation (EC) No 1049/2001, concerning a question already covered by the Council's decisions of 22 July 2013 and 8 July 2014 following the first application of 2009 and the General Court's judgment. In essence, this amounts to requesting a re-assessment of the partial replies of 22 July 2013 and 8 July 2014, at least for the documents for which you have received only partial access.

In this respect, the General Secretariat notes that both your first application of 2009 and your new application of 15 September 2014 have the same legal basis, i.e. Regulation (EC) No 1049/2001, concern the same documents, were submitted by the same person, in this case yourself, and contain no new elements.

What is more, the General Secretariat was unable to ascertain any change in the factual or legal situation⁵ as compared with the situation on which the Council based its decisions of 22 July 2013 and 8 July 2014⁶.

For the reasons given above, in relation to the documents concerned by those replies, the General Secretariat would refer to the grounds for the Council's decisions of 22 July 2013 and 8 July 2014. Concerning the documents referred to as numbers 4 and 6 in Case C-63/10, we will inform you of the decision taken once the discussions are completed.

Consequently, the General Secretariat confirms the Council's decisions of 22 July 2013 and 8 July 2014, as contained in documents 11935/13 and 11390/14. For the reasons set out in the decision of 8 July 2014, the General Secretariat is unable to grant you extended public access to the requested documents.

[Complimentary close].

For the General Secretariat
Jakob Thomsen

⁵ The Council's decisions of 22 July 2013 and 8 July 2014 were approved after the end of the proceedings relating to Mr Gotovina before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia on 16 November 2012.

⁶ See, in this connection, the Order of 8 October 2012 in Case T-62/12, ClientEarth v Council, paragraphs 31 and 32.

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Angers, 29 October 2014

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Your ref.: 14/1655-ls/mi - Confirmatory application for public access to documents

Dear Sir,

By letter dated 15 September 2014, registered on 16 September 2014 by your Access to Documents Unit, I requested access to the following documents on the basis of Regulation (EC) No 1049/2001:

- The entire correspondence exchanged, **from 7 December 2009 onwards**, between the Secretary-General/High Representative and the International Criminal Tribunal for the former Yugoslavia (Office of the Prosecutor and Trial Chamber) in connection with the "Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač" case, as well as the documents other than reports drafted by the European Community Monitoring Mission, annexed to that correspondence.

By letter dated 7 October 2014, and received on the same day, you notified me, on the basis of Article 7(3) of Regulation (EC) No 1049/2001, that you were extending the time-limit for your reply by fifteen working days.

By letter of 9 October 2014, in reply to my original application of 15 September 2014, you notified me of your refusal to supply the documents for the following reasons:

- My application of 15 September 2014 is a new application under Regulation (EC) No 1049/2001, concerning a question already covered by the Council's decisions of 22 July 2013 and 8 July 2014 following the first application of 2009 and the judgment of the General Court, which amounts to requesting a re-assessment of the partial replies of 22 July 2013 and 8 July 2014, at least for the documents for which I had received only partial access. You therefore consider that my first application of 2009 and my new application of 15 September 2014 have the same legal basis, i.e. Regulation (EC) No 1049/2001, concern the same documents, were submitted by the same person, in this case myself, and contain no new elements.
- In addition, you consider that no change in the factual or legal situation could be established as compared with the situation on which the Council based its decisions of 22 July 2013 and 8 July 2014. You conclude by referring to, and confirming, your grounds for the decisions of 22 July 2013 and 8 July 2014 for the documents concerned by those replies, while specifying that the documents referred to as numbers 4 and 6 in Case T-63/10 are currently still the subject of discussions with the ICTY which, when completed, will result in a third partial reply from you.

The Council has misconstrued the subject of my original application of 15 September 2014, which concerns documents dated after 7 December 2009.

Your legal reasoning relates to documents dated before that date and which were the subject of the General Court's judgment of 3 October 2012 (Case T-63/10).

Consequently, my new application does not concern "a question already covered by the Council's decisions of 22 July 2013 and 8 July 2014 following the first application of 2009 and the General Court's judgment." These are two separate applications concerning separate documents.

As regards documents of the same type as those disputed in Case T-63/10, you have on the contrary the obligation to apply the case-law of the General Court and to grant me access to the requested documents, if necessary within the limits of your confirmatory decisions of 22 July 2013 and 8 July 2014. I would remind you that the latter is currently the subject of illegality proceedings.

In the light of these observations, I reiterate my request of 15 September 2014 pursuant to Article 7(2) of Regulation (EC) No 1049/2001.

If my application for access is refused, I will institute court proceedings as before.

[Complimentary close].

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