



Council of the
European Union

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Eingelangt am 14/11/14

Brussels, 14 November 2014
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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	11627/14, 11629/14
Subject:	Public access to documents - Confirmatory application No 33/c/03/14

Delegations will find attached:

- Supplementary reply by the General Secretariat of the Council on 24 October 2014 (Annex 1);
- confirmatory application dated 3 November 2014, registered on 5 November 2014 (Annex 2).

The initial request, the General Secretariat's first two replies and the applicant's first confirmatory application can be found in document 11627/14. The reply by the Council to the first confirmatory application can be found in document 11629/14.



Council of the European Union
General Secretariat

Directorate-General Communication and Document Management
Directorate Document Management
Transparency and Access to Documents Unit

DELETED

Brussels, 24 October 2014

Ref. 14/0817-ADD 2-mjb/mi/jj

Dear Sirs,

We refer to our replies of 20 May and 19 June 2014 to your request for public access dated 28 April 2014 on behalf of **DELETED**, for whom you are acting as legal representative, for 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. The General Secretariat of the Council would like to indicate that it has identified further documents which it considers as being covered by your request. We sincerely apologise for any inconvenience that this late identification may cause you.

The General Secretariat has identified documents **6761/14, 6902/14 + ADD 1, MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1)** and **MD 57/14 + ADD 1 (EU RESTRICTED)**. It has examined these documents on the basis of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter the Regulation) and specific provisions of the Council's Rules of Procedure² and come to the following conclusion:

You may have public access to documents **6761/14** and **6902/14 + ADD 1**.

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.

Documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) are all meeting room documents pertaining to the adoption of the Union's legislation imposing restrictive measures pursuant to the situation in Ukraine. The classification "EU Restricted" of document MD 57/14 ADD 1 means that the release of the information contained in the document could be disadvantageous to the interests of the European Union or of one or more of the Member States.³

The General Secretariat considers that public release of these documents would enable third countries to assess the differences between the proposals for sanctions and the final outcome. This would enable third countries to determine to what extent the Union is prepared to go with its restrictive measures policy. Revealing that information would be detrimental to the Union's ability to use restrictive measure to their maximum effect. For this reason, public access is refused under Article 4(1)(a), third indent (protection of the public interest as regards international relations). Pursuant to Article 4(6) of the Regulation, the General Secretariat has assessed whether any part of these documents would not fall within this exception but determined that this is not the case.

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 reply.⁴

Yours sincerely,

For the General Secretariat

Jakob THOMSEN

Enclosures

³ Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), Official Journal L 274, 15.10.2013, p. 1.

⁴ 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 SECRETARIAT DGF Access on 5 November - 11:34]

From: **DELETED**

Sent: Wednesday, November 5, 2014 11:34

To: SECRETARIAT DGF Access

Subject: Confirmatory applications; 14/0817-ADD and 14/0818-ADD

Council
General Secretariat,

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

Sincerely,

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DELETED

Council of the European Union
General Secretariat

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

E-Mail: sanctions@consilium.europa.eu

Ref. 14/0817-ADD-mjb/dm

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1 of 6

Vienna, November 3, 2014

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On behalf of DELETED 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 24 October 2014, the General Secretariat informed us that we may have public access to documents 6761/14 and 6902/14 + ADD 1.

In contrast, documents MD 47/14 (+ REV 1 3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) have been examined on the basis of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and

Commission documents and specific provisions of the Council's Rules of Procedure and come to the following conclusion:

The General Secretariat denied disclosure of that second group of documents on the following grounds:

- They are all meeting room documents pertaining to the adoption of the Union's legislation imposing restrictive measures pursuant to the situation in Ukraine.
- The classification "EU Restricted" of document MD 57/14 ADD 1 means that the release of the information contained in the document could be disadvantageous to the interests of the European Union or of one or more of the Member States.
- The General Secretariat considers that public release of these documents would enable third countries to assess the differences between the proposals for sanctions and the final outcome. This would enable third countries to determine to what extent the Union is prepared to go with its restrictive measures policy. Revealing that information would be detrimental to the Union's ability to use restrictive measure to their maximum effect. For this reason, public access is refused under Article 4(1)(a), third indent (protection of the public interest as regards international relations). Pursuant to Article 4(6) of the Regulation, the General Secretariat has assessed whether any part of these documents would not fall within this exception but determined that this is not the case.

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

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.

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.

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.

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 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.

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.

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

Finally, to point at the differences between the proposals for sanctions and the final outcome, on the one hand, and to deny access referring to third countries, on the other hand, is, in general, understandable. In the case before us, where the request is made by a person subject to the legal act concerned, such reasoning is not acceptable at all.

Therefore, we insist, at least, on versions expurgated, e.g. from names of other persons.

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

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.

Conclusio

It follows from all these considerations that access to documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 must not be refused on the grounds on which the General Secretariat based its conclusions.

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

Finally, we reiterate our request, already made in previous letters, 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).

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