



Council of the
European Union

Brussels, 3 December 2014
(OR. en)

15665/14

INF 330
API 148

NOTE

From: General Secretariat of the Council
To: Working Party on Information

No. prev. doc.: 11561/14, 11563/14

Subject: Public access to documents
- Confirmatory application No 39/c/08/14

Delegations will find attached:

- Supplementary reply by the General Secretariat of the Council on 24 October 2014 (Annex 1);
- confirmatory application dated 14 November 2014, registered on the same day (Annex 2). (not including the enclosed initial application dated 14 April 2014 which can be found in document 11561/14)

The initial request, the General Secretariat's first two replies and the applicant's first confirmatory application can be found in document 11561/14. The reply by the Council to the first confirmatory application can be found in document 11563/14.



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. 14/0691-ADD 2-mjb/mi/jj

Dear **DELETED**,

We refer to our replies of 16 May and 19 June 2014 to your request for public access dated 14 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 14 November 2014 - 16:46]

From: **DELETED**

Sent Friday, November 14, 2014 4:46 PM

To: SECRETARIAT DGF Access

Cc: **DELETED**

Subject: 14/0691-ADD 2-mjb/mi/jj - Confirmatory Application

Dear Sirs,

Please see attached our letter of today's date.

Kind regards,

DELETED



14 November 2014

Secretary-General of the Council of the European Union
Rue de la Loi 175/Wetstratt 175
B-1048 Bruxelles/Brussels
BELGIQUE/BELGIE

By email to
access@consilium.europa.eu

Our ref: 
Your ref: 14/0691-ADD 2-mjb/mi/jj

Dear Sir,

Confirmatory Application Requesting the Council to Reconsider its Decision of 24 October 2014

1. We refer to our request for access to documents dated 14 April 2014 (“the initial request”) and to the Council’s replies of 16 May 2014 (“the initial decision”), 19 June 2014 (“the MD 65/14 decision”) and 24 October 2014 (“the latest decision”). By the latest decision the Council has identified, but declined to provide access to, certain additional documents which it considered were covered by the scope of the initial request, but it had failed to identify in the initial decision.
2. In accordance with 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 (“the Regulation”) we hereby submit a confirmatory application, requesting the Council to reconsider the latest decision.¹ We seek a review of the latest decision on two grounds:

- a. First, that the law, facts and matters involved did not and do not justify the latest decision by the Council that full or partial disclosure of documents MD 47/14 (+ REV 1-

¹ This confirmatory application does not deal with our separate application, by which we have requested access to the documents identified in the latest decision on the basis of our client’s rights of defence and right to effective judicial protection.

3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) would undermine the protection of the public interest as regards international relations within the meaning of Article 4(1)(a), third indent, of the Regulation; and

- b. Secondly, that the late identification of additional documents further evidences a more general failure on the Council's part to undertake a full, proper and adequate search for the documents identified in the initial request (a copy of which is attached to this confirmatory application).

Article 4(1)(a), third indent

3. The Council has refused to grant full or partial disclosure of documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) on the basis that their release would undermine the protection of the public interest as regards international relations within the meaning of Article 4(1)(a), third indent, of the Regulation.
4. According to the settled case-law, *“since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly”*² (emphasis added). Further, *“the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of [the Regulation] is not sufficient to justify the application of that provision.”*³ If an EU institution decides to refuse access to a document which it has been asked to disclose, it must explain how disclosure of that document *“could specifically and actually undermine the interest protected by the exception... upon which it is relying”* and *“the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical”*⁴ (emphasis added).
5. We submit that the law, facts and matters involved did not and do not justify the refusal to grant full or partial access to documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED). In particular:
 - a. The denial of access rests on the assumption that public release of these documents would enable third countries to assess the differences between proposals for sanctions and the final outcome. It is not justifiable, and the Council fails to explain, how the Council can rely on this point to refuse disclosure, not least because the Council has already granted public disclosure of draft proposals for sanctions in response to the initial request. Even assuming that release of these new documents would enable third countries to assess the differences between proposals for sanctions and the final outcome in some unspecified further and material respect (which is not accepted), the Council has failed to explain how, if at all, this would be in any way detrimental to the Union's ability to use restrictive measures to their maximum effect.
 - b. Further, even assuming that release of these documents would be detrimental to the Union's ability to use restrictive measures (which is not accepted), it is not at all evident, nor apparent from the Council's decision, how and/or why this could *“undermine the protection of the public interest as regards... international relations”*. It seems that the denial of access rests on an unspoken, and at least doubtful, premise that the use of

² Case C-506/08 P, *Sweden v My Travel and Commission* ECLI:EU:C:2011:496 [75] and the case-law there cited; Case C-350/12, *Council of the European Union v Sophie in 't Veld* ECLI:EU:C:2014:2039 (*“Sophie in 't Veld”*) [48] and the case-law there cited.

³ *Sophie in 't Veld* [51]; Case C-404/10 P, *Commission v Éditions Odile Jacob SAS* ECLI:EU:C:2012:393 [116].

⁴ Case C-280/11 P, *Council v Access Info Europe* ECLI:EU:C:2013:671 [31] and the case-law there cited; *Sophie in 't Veld* [52].

sanctions is conducive to good international relations. Moreover, the Council has failed to set out any facts or evidence to justify its assertion that disclosure of these documents would undermine the protection of the public interest, or to demonstrate how their disclosure could specifically and actually undermine the public interest, and/or that the risk of undermining the public interest as regards international relations is reasonably foreseeable and not purely hypothetical.

- c. Finally, the Council refuses to grant partial access to any and/or all of the documents. The Council gave no explanation for its assertion that partial access to any and/or all of the documents is not possible pursuant to Article 4(6) of the Regulation, such that it is impossible for the public (or, indeed, the Court) to determine whether the decision to refuse even partial access to these documents is well founded.
6. For all of these reasons we consider that the latest decision to refuse to grant full or partial access to documents MD 47/14 (+ REV 1-3), MD 51/14 (+ REV 1-3 + ADD 1) and MD 57/14 + ADD 1 (EU RESTRICTED) was flawed. We respectfully ask the Council to reconsider its position.

Failure to conduct an adequate search

7. Moreover, we are concerned that the extremely late identification of these documents (more than six months after the date of the initial request) further evidences a more general failure on the Council's part to undertake an adequate search for the documents identified in the initial request. We also note that the Council has not taken this opportunity to provide us with other documents that are doubtless relevant to our request, certain of which are already known to us from other sources (such as document MD 191/14, considered by the Council at a meeting on 8 July 2014, and purportedly lodged by the Council itself in ongoing proceedings against Mr V Yanukovych before the Court of Justice of the European Union on 3 October 2014, but not identified or disclosed by the Council in the latest decision).
8. In light of the Council's late discovery of additional documents, we ask that the Council now undertake a full, proper and adequate search for documents covered by the initial request.
9. We would remind you that by the initial request we requested access to all documents relevant to the making of Council Decision 2014/119/CFSP ("the Decision") and Council Regulation (EU) No 208/2014 ("the Regulation") and to the inclusion of ██████████'s name in the Annex to the Decision and Annex I to the Regulation. Our request included, but was not limited to, those matters specified in paragraphs 5-7 of the initial request.

We respectfully ask the Council to reconsider its position, in light of the points raised in this confirmatory application.

Yours faithfully,



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