



Council of the
European Union

Brussels, 12 January 2015
(OR. en)

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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 41/c/01/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 20 October 2014 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 1 December 2014 ([Annex 2](#));
- confirmatory application dated 22 December 2014 and registered the following day (23 December 2014) ([Annex 3](#)).

[E-mail message sent to access@consilium.europa.eu on 20 October 2014 - 21:58

From: **DELETED**
Sent: Monday, 20 October, 2014 21:58
To: SECRETARIAT DGF Access
Subject: Request under Regulation 1049-2001 for access to documents held by the European Council

To: General Secretariat of the Council of the European Union
DGF-Public Information Service
Rue de la Loi/Wetstraat 175
1048 Bruxelles/Brussel
Belgique/Belgie

Rome, 29th July 2013

Re: Request for access to documents held by the Council of the European Union

Dear Madam/ Sir,

We would like to get access to the information contained in the decision of 12th September 2011 by the Council of the European Union "to authorise the Commission to negotiate an Agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on the legal framework for a Trans-Caspian (Natural Gas) Pipeline System" (3109th meeting, agenda point 26, General Affairs).

We would like to get the Council Decision and associated with it documents that define the mandate of the Commission to negotiate the above-mentioned agreement. In particular, we refer to the following documents:

- 12729/11 ENER 267 COEST 251 + REV 1 (fr,cs,da,de,el,es,fi,hu,lt,lv,mt,nl,pl,pt,sk,sl,sv,ro,bg)
 - 11315/3/11 REV 3 ENER 179 COEST 202 + ADD 1
- approved by COREPER, Part 1 on 07.09.2011

If full access to these documents is not available on justified grounds, we would like you to allow partial access to the following information that follows under category of environmental information as defined in Article 4(2) of Regulation 1367/2006:

- the legal ground on which the decision is based as defined in the official text of the negotiating mandate as approved by the Council - namely specific articles and clauses under the Treaty of the European Union and the Treaty on the Functioning of the European Union and any other relevant legal provision on which the decision and negotiating mandate is based;
- any environmental, social, development and human rights requirement which has been included in the negotiating mandate given to the European Commission.

We do believe that revealing this information, including the referenced legal basis for the act of the institution, is clearly in the public interest and its disclosure cannot conceivably be said to undermine the protection of international relations and the European Union's negotiating position in any circumstance. Thus no exemption can be invoked by the Council under article 4.1 (a) of the Regulation.

In this regard we would like to recall the ground-breaking decision on 9th October 2014 of the Council of the European Union to publish the EU negotiating directives for the on-going Transatlantic Trade and Investment Partnership (TTIP).

Please treat this correspondence as a formal request for access to documents under European law. We look forward to your timely reply to our request and thank you in advance for your cooperation.

Sincerely

DELETED



Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

DELETED

Brussels, 1 December 2014

Ref. 14/1865-ws/mf

Dear **DELETED**,

We registered your request of 20 October 2014 for access to documents 12279/11, 12279/11 REV 1, 11315/3/11 REV 3 and 11315/11 REV 3 ADD 1 on 21 October 2014. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents¹ (hereafter the "Access to Documents Regulation") and specific provisions of the Council's Rules of Procedure². On 10 November 2014, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

Documents **11315/3/11 REV 3** and **11315/3/11 REV 3 ADD 1** are notes from the General Secretariat of the Council to Delegations on a draft Council Decision to authorise the Commission to negotiate an agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on the legal framework for a Trans-Caspian (Natural Gas) Pipeline System.

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.

These two documents are classified as "RESTREINT UE", meaning they contain information "the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or of one or more of the Member States"³:

Documents **12729/11** and **12729/1/11 REV 1** are I/A item notes from the General Secretariat of the Council to delegations concerning the adoption of the *Council Decision to authorise the Commission to negotiate an Agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on a legal framework for a Trans-Caspian (Natural Gas) Pipeline System*.

Document **14415/11** contains the draft minutes of the *3109th meeting of the Council of the European Union (General Affairs), held in Brussels on 12 September 2011*.

All of these documents contain information on the position and the possible margins of manoeuvre of the European Union in negotiations which are still ongoing. Disclosure of this information would impede the proper conduct of these negotiations and would prejudice relations between the European Union and Azerbaijan and Turkmenistan. It would also weaken the position of the EU in the framework of these and other negotiations of the same kind. This situation is covered by the third indent of Article 4(1)(a) of the Access to Documents Regulation concerning protection of the public interest with regard to international relations. Article 4(1) mandatorily requires an institution to refuse access to a document if the protection of one of the interests mentioned there would be undermined by release. Contrary to the situation regarding the exceptions provided for in Article 4(2) and (3), no overriding public interest in release can justify giving access to it, once this assessment has been made. Accordingly, the General Secretariat is legally barred from taking into account the public interest – alleged by you – in having information contained in those documents revealed and is thus unable to accede to your request.

Please note that the Aarhus Regulation⁴ does not restrict the application of the exceptions contained in Article 4(1) of the Access to Documents Regulation, but only qualifies two of the exceptions contained in Article 4(2) (see Article 6(1) of the Aarhus Regulation). Furthermore, the fact that the Council has come to the conclusion that it was possible to publish the negotiating directives on another draft agreement at a given stage cannot prejudge the assessment of documents relating to the negotiations at issue here, as the application of Article 4 of the Access to Documents Regulation requires an individual assessment of each procedure and even of each document in a given procedure.

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 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies Official Journal L 264, 25.9.2006, p. 13.

As the exception to the principle of transparency applies to the content of the entire document 11315/3/11 REV 3 ADD 1, the General Secretariat is unable to grant you partial access to it as provided for in Article 4(6) of the Regulation. You may, however, have access to those parts of the other documents which are not covered by the above-mentioned exception; concerning document 11315/3/11 REV 3, which is classified, you will find them in document 11315/3/11 REV 3 EXT 1.

Concerning the issues that you indicated as being of special interest to you, you will see that the legal basis of the Council decision is available from document 11315/3/11 REV 3 EXT 1, but the General Secretariat unfortunately cannot make any further comment on the other issues mentioned by you without revealing information that needs to be protected for the reasons set out above.

Statutory remedy notice

Pursuant to Article 7(2) of the Access to Documents Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply⁵.

Yours sincerely,

For the General Secretariat

Jakob THOMSEN

Enclosures

⁵ 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 the Access to Documents Regulation.

[E-mail message sent to access@consilium.europa.eu on 22 December 2014 - 17:26

From: **DELETED**
Sent: Monday, 22 December, 2014 17:26
To: SECRETARIAT DGF Access
Subject: Confirmatory application re: Ref. 14/1865-ws/mf

Council of the European Union
General Secretariat
Communication and Document Management
Document Management
Transparency and Access to Documents
Rue de la Loi/Wetstraat, 175
B-1048 Bruxelles/Brussel
Belgique/Belgie
access@consilium.europa.eu

Rome, 22nd December 2014

Dear Mr. Jakob Thomsen,

Re: Confirmatory request concerning reply of Council to **DELETED request under regulation 1049 - Ref. 14/1865-ws/mf**

I would like to contest on behalf of **DELETED** the decision by General Secretariat of the Council of the European Union to refuse access to the Council Decision to authorize the Commission to negotiate an Agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on a legal framework for a Trans-Caspian (Natural Gas) Pipeline System - documents 12279/11, 12279/11 REV 1, 11315/3/11 REV 3 and 11315/11 REV 3 ADD 1.

We request your office to review this decision in particular as concerns your justification through article 4.1 (a) third indent of the regulation, because disclosure of the requested information would allegedly impede the proper conduct of these negotiations and would prejudice relations between the European Union and Azerbaijan and Turkmenistan. Furthermore it would allegedly also weaken the position of the EU in the framework of these and other negotiations of the same kind.

We kindly point out that your office has failed to give clear explanations of how your stated reasons for refusing disclosure outweighs the public interest.

In particular, we refer to the adoption by your office of a blanket approach to non-disclosure, ruling the entire document out. We do believe instead that the Council should adopt a sentence by sentence, clauses by clause approach, redacting only those parts that specifically fall within the deemed exemptions under the access to info rules. For instance, in the matter of environmental protection, we contest that the simple disclosure of a possible reference to a certain environmental standard proposed by the EU would impede the proper conduct of the negotiations or weaken the position of the EU.

Despite we agree that the disclosure of official documents requires an individual assessment of each procedure and even of each document in a given procedure, we are however very surprised that the Council does not recognise the jurisprudence that it de facto created by disclosing the negotiating mandate of the Transatlantic Trade and Investment Partnership which inevitably will be referred upon in the future by the European Ombudsman and the European Court of Justice. It is our firm belief that the disclosure of that mandate had the same or even more potential to impede the proper conduct of the negotiations and prejudice relations between the European Union and the United States.

We welcome your indirect reference to the legal basis of the Council decision we are interested in as available from document 11315/11 REV3 EXT1 and deem this as a confirmation that this is the only reference to TEU and TFEU articles in the negotiating mandate. If further reference to other articles do exist in the text of the negotiating mandate, we ask you to confirm it even without the disclosure of the exact numbers of the articles.

We kindly request your office to acknowledge via e-mail this correspondence.
We look forward to your reply to our confirmatory request - filed within 15 working days from your reply of December 1st, 2014 - in a timely manner according to provisions under the 1049 Regulation.

Sincerely

DELETED
