



Council of the
European Union

033671/EU XXVI. GP
Eingelangt am 06/09/18

Brussels, 6 September 2018
(OR. en)

11809/18

INF 157
API 98

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 24/c/01/18

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 17 July 2018 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 14 August 2018 (Annex 2);
- confirmatory application dated 3 September 2018 and registered on 4 September 2018 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 17 July 2018 - 09:09 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): I would like to request the letter of the Greek Minister of Foreign Affairs to the EU (presumably the Council) regarding the Former Yugoslav Republic of Macedonia (FYROM), and more specifically, as covered by the media, assuring the EU that Greece had no objection for accession talks to begin with FYROM.

1st preferred linguistic version: EN - English

2nd preferred linguistic version: EL - Greek



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 14 August 2018

DELETED
DELETED

Ref. 18/1493-nh/jj

Request made on: 17.07.2018
Deadline extension: 07.08.2018

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

You are asking to get access to the letter of the Greek Minister of Foreign Affairs to the EU regarding the Former Yugoslav Republic of Macedonia (FYROM).

After having consulted the Greek Government (Art.4 (4) and (5) of Regulation 1049/2001), I regret to inform you that access to this document cannot be given for the reasons set out below.

Greece objects to the release of the requested confidential letter, which contains political opinions for internal use as part of preliminary consultations within the Council of the EU.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

Disclosure of this letter would seriously undermine international relations since it may affect the EU's future negotiating powers and have an impact on the relations between the European Union and FYROM.²

It would also seriously undermine the Council's decision making process given that there are currently ongoing procedures on which depends the entry into force of the Agreement between Greece and FYROM.³

Concerning the exception related to protection of the decision-making process, the General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations.

Having examined the context in which the document was drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in its disclosure.

We have also looked into the possibility of releasing parts of the document.⁴ However, as the exceptions to the right of access apply to its entire content, the General Secretariat is unable to give partial access.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁵

Yours sincerely,

Sally BLISS

² Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

³ Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

⁴ Article 4(6) of Regulation (EC) No 1049/2001.

⁵ Article 7(2) of Regulation (EC) No 1049/2001.

Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to access@consilium.europa.eu on 3 September 2018 - 23:03]

From: **DELETED**

Sent: Monday, September 3, 2018 11:03 PM

To: SECRETARIAT DGF Access <Access@consilium.europa.eu>

Subject: Re: Ref. 18/1493-nh/jj

Please find attached my confirmatory application for Decision ref. 18/1493-nh/jj/14.8.2018 of the Council.

Thank you in advance

Sincerely

-

DELETED

From:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Email:

[REDACTED]

CONFIDENTIAL

Date: 3.9.2018

To: Council of the European Union
Rue de la Loi/Wetstraat 175 - B-1048
Brussels, Belgium

Subject: Confirmatory Application in relation to Decision Ref. 18/1493-nh/jj/14.8.2018.

I wish to submit the present confirmatory application, in accordance with art. 8 of Regulation 1049/2001¹ (henceforth 'Regulation'), in terms of Decision ref. 18/1493-nh/jj/14.8.2018 of the Council (hence 'Decision') for non-disclosure of the letter of the Greek Minister of Foreign Affairs to the EU regarding the Former Yugoslav Republic of Macedonia (FYROM), hence 'letter'. In the Decision, the Council refuses disclosure based upon two provisions of the Regulation:

- Disclosure would undermine the protection of international relations, "*as it may affect the EU's future negotiating power and have an impact on the relations between the European Union and FYROM,*" in accordance with art 4(1)(a), third indent of the Regulation
- Disclosure would undermine the decision-making process of the Council "*given that there are currently ongoing procedures on which depends the entry into force of the Agreement and FYROM,*" in accordance with art. 4(3), second subparagraph of the Regulation. Concordantly, in relation to the second provision, the examination yielded that there is a "*general interest that progress be made in an area that is still the subject of negotiations,*" and thus, having considered relevant issues, "*the General Secretariat could not identify any evidence suggesting an overriding public interest in its disclosure*"

The above exceptions were deemed to apply to the entirety of the document, and thus partial access, in accordance with article 4(6) of the Regulation, was also denied.

¹ The confirmatory application is submitted within the 15-working-day limit provisioned by the aforementioned Regulation: confirmation of receipt of decision by email on 15.8.2018, deadline for confirmatory application ending on 5.9.2018.

Preliminarily, Recital (2) of the Regulation stipulates that “openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoy greater legitimacy and is more effective and more accountable to the citizen in a democratic system.” In addition, specifically applicable in this case, Recital (10) of the Regulation, provides that “access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them.” As the European Court of Justice (ECJ) has determined, exceptions to access of documents must be interpreted and applied strictly². While the Council enjoys discretion in determining whether any of the exceptions laid down by the Regulation apply³, it must make such determination in accordance with procedural rules and free from manifest error or misuse of power, it must provide sufficient, valid and specific reasons for refusing access, and must state the facts correctly⁴.

With this confirmatory application, I would like to argue that the arguments for non-disclosure of the letter included in the Decision are insufficient for the reasons outlined below:

A. In terms of the first argument of the Council:

1. The content of the letter in its broad outlines has already been made public and has been communicated, inter alia to the FYROM Prime Minister and relevant authorities after the signature of the Greece-FYROM June 2018 Agreement⁵. More specifically:
 - i. The Greek Minister of Foreign Affairs, author of the letter, has himself publicly revealed its content, suggesting that in the letter it was outlined “...that I have been informed by the other side (FYROM) for the ratification of the agreement from the parliament and according to the obligations and conditions we can continue.”⁶

² C-350/12, par. 48 and the case law cited ; C-266/05, par. 63 and the case-law cited.

³ C-350/12, par. 63; C-266/05, par. 26.

⁴ C-350/12, par. 63 and the case law cited; C-266/05, par. 64.

⁵ Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership between the Parties.

⁶ <http://www.efsvn.gr/arthro/stelnei-epistoles-se-ee-kai-nato>. Also, media coverage e.g. here <http://gr.euronews.com/2018/06/25/ypourgioi-exoterikon-syzitoun-gia-tin-entaxi-ton-skopion-sthn-ee>

- ii. The Greek PM, in his 18 June 2018 nation-wide address, mentioned that “Greece will then (after signature of the Agreement and ratification by FYROM’s parliament) support a decision to start the accession negotiations of North Macedonia with the European Union, in the upcoming European Council. [...] Both invitations (EU and NATO membership) will include a clear conditionality: the successful finalization of the Constitutional Reform in the neighboring country, which ensures the use of the new name for all purposes”⁷.

Therefore, there is no harm to international relations from disclosure of the letter, since its content in its broad outlines, conditions, etc., have already been released, inter alia by the author himself, on multiple forms and by multiple parties. Withholding disclosure retrospectively because the content may harm international relations is, hence, *ipso facto* unfounded⁸.

- 2. It is clear that disclosure of the letter will not affect the EU’s negotiating power vis-à-vis FYROM, neither harm the relations between the two, since the letter:
 - i. is not from an EU official but rather a Greek official,
 - ii. is confined to the subject of the disputes between FYROM and Greece, and does not (presumably) extend to other areas (e.g. *acquis* chapters),
 - iii. does not represent EU positions, but rather only the position of one EU Member State (Greece),
 - iv. originated unilaterally from the Greek Minister of Foreign Affairs without any input from any EU institution or other Member State.

B. In terms of the second argument of the Council:

- 1. Points A.1, A.2 (above) also invalidate any argument for withholding disclosure of the letter because it may potentially undermine the Council’s decision-making processes: the content of the letter has been, in one form or another, made public by officials, at least in its broad outlines, and the letter is exclusively from the Greek Minister of Foreign Affairs on bilateral Greece-FYROM issues, i.e. it does not concern any process related to EU-FYROM relations.
- 2. The Decision does not specifically outline any “ongoing procedures”, upon which the ratification of the Greece-FYROM Agreement (above A.1) depends, that affect the Council. In fact, contrary to what is argued in the Decision and according to all available public records, the letter strictly concerns bi-lateral issues, while the EU is concerned with (as per standard accession procedure) satisfaction of the *acquis*. While the bilateral issues that the letter is concerned with do affect the position of Greece in terms of accession negotiations, this issue has now been resolved with

⁷ <https://primeminister.gr/en/2018/06/18/20115>

⁸ Similarly in C-350/12, par. 60.

negotiations between Greece and FYROM having been completed and the relevant Agreement signed (above A.1). In fact, the European Council⁹, the Council¹⁰, and the President of the European Council¹¹, have all expressly recognized and/or endorsed the beginning of accession negotiations with FYROM, in fact even officially provisioning a temporal starting point (June 2019), as well as the aforementioned Greece-FYROM Agreement. Correspondingly, the letter is not meant for “*internal use as part of preliminary consultations within the Council of the EU*,” as referenced in the Decision: aside from the fact that its content has already been made public in its broad outlines, inter alia, by the author, decisions related to the content of the letter have already been taken. Therefore, relevant decisions have already been taken at the highest level and are now only contingent on elements that are irrelevant to the letter (e.g. reforms relevant to the *acquis*, etc.), which does not support non-disclosure on account of a potential danger to the Council’s decision-making. Even if it is accepted that there are ongoing negotiations related to the content of the letter, mere existence of these negotiations does not automatically justify non-disclosure without any specific reasons¹².

C. Additional arguments against refusal to grant access:

1. Both of the arguments of the Decision lack any specific and clearly stated manner through which the disclosure of the letter would give rise to a real, and not just purely hypothetical, risk of harm to ongoing international relations or ongoing negotiations. Merely noting the existence of a risk or merely stating the relevance of the letter to an interest protected by one of the Regulations exceptions¹³ do not satisfy the requirement whereby the Council must “*explain how disclosure of a document could specifically and actually*” would undermine the EU’s interest in the field of international relations, making both the arguments of the Decision insufficient in law¹⁴.
2. The Council’s statement that there is a “*general interest that progress be made in an area that is still the subject of negotiations*” is highly speculative, arbitrary and ultimately contentious; the assumption that the general interest is for or against progress in this area is an ultimately a political and subjective decision and, therefore, should not affect the decision to disclose (or not) the letter.

⁹ <http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>

¹⁰ <http://www.consilium.europa.eu/media/35863/st10555-en18.pdf>

¹¹ <http://www.consilium.europa.eu/en/press/press-releases/2018/06/28/remarks-by-president-donald-tusk-before-his-meeting-with-prime-minister-zoran-zaev/>

¹² C-350/12, par. 110, in which the ECJ determined that disclosure was possible, even when taking into account the existence of ongoing negotiations.

¹³ C-350/12, par. 51 and the case law cited.

¹⁴ C-350/12, par. 52 and the case law cited, par. 64 through 66.

3. It is clear that there is an overriding public interest in releasing the letter. Contrary to what is claimed by Greece and (apparently) accepted by the Council, the letter does not constitute "*political opinions*," since it is sent by the Greek Minister of Foreign Affairs in his official capacity as representative of the Greek government and therefore represents the official position of Greece on beginning EU accession negotiations with FYROM. Considering the official nature of the letter and the importance of this process for EU citizens (note for example, the polls in Greece¹⁵, the French, Danish and Dutch objections raised over the accession negotiations¹⁶, etc.), the disclosure of the letter would truly serve the purpose of a better informed EU public without harming internal or external Council relations and processes (as would, for example, a hypothetical position paper of France or Greece on the overall accession of FYROM). Hence the Decision did not have clear regard "*to the advantages of increased openness*" (Recital 2 of the Regulation)¹⁷
4. Suggesting that documents related to accession negotiations are, at large, considered as falling under the exceptions of the Regulation simply because of their nature (documents relating to accession), would mean that EU citizens would be deprived of any knowledge relevant to the highly important issue of EU enlargement for a period of years, and would allow the Council to indiscriminately withhold all relevant access to information, ultimately depriving the Regulation of any actual force.
5. Finally, the Decision suggests that the exceptions to access of information apply to the "*entire content*" of the letter. However, considering A.1 above, part of the content of the letter has already been made public, whether by the author or other officials. Therefore, the argument that partial disclosure is rejected cannot be valid retrospectively, at the very least for the parts already published¹⁸.

Taking all the above under consideration, I wish to submit this confirmatory application and request that the Decision be reviewed by the Council.

Thank you in advance

Sincerely



¹⁵ <http://www.ekathimerini.com/229746/article/ekathimerini/news/seven-in-10-greeks-opposed-to-north-macedonia-poll-shows>

¹⁶ <https://www.ft.com/content/cf67a85c-7965-11e8-bc55-50daf11b720d>

¹⁷ C-350/12, par. 53 and the case law cited.

¹⁸ Combination of par. 60 and 67 of C-350/12.