



Council of the
European Union

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Eingelangt am 11/03/19

Brussels, 11 March 2019
(OR. en)

7392/19

INF 56
API 25

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 08/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 29 January 2019 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 26 February 2019 (Annex 2);
- confirmatory application dated 11 March 2019 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 29 January 2019 - 08:58 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): 17773/12 (negotiating mandate for IIA with Parliament concerning access to EUCI CFSP).

1st preferred linguistic version: EN - English

2nd preferred linguistic version:



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, 26 February 2019

DELETED

Email: **DELETED**

Ref. 19/0288-ip/nb

Request made on: 29.01.2019

Deadline extension: 19.02.2019

Dear **DELETED**,

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

I regret to inform you that access to document **ST 17773/12 INIT** cannot be given for the reasons set out below.

Document **ST 17773/12 INIT** sets out a draft position of the Council with a view to opening negotiations with the European parliament on two interinstitutional agreements on the transmission of classified information to the European Parliament in the areas of Justice and Home Affairs and of the Common Foreign and Security Policy (CFSP), respectively.

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).

The content of this document is still current, as the CFSP arrangement has not been agreed yet with the European Parliament. Exchanges on the reopening of negotiations are undergoing and a new negotiating mandate is under preparation on the basis of Document ST 17773/12 INIT.

This document gives details of the state of play and sets out, for internal use as part of deliberations and preliminary consultations within the Council, the draft texts of the Arrangement and the Interinstitutional Agreement. It would be premature to disclose it to the public, in that it would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this sensitive subject.

Full release of this information would harm current and future decision-making on such issues, in particular the still ongoing discussions on the proposed interinstitutional agreement in the CFSP area.

Therefore, disclosure of the document would seriously undermine the decision-making process of the Council.

Having examined the context in which the documents were drafted, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their (full) disclosure.

As a consequence, the General Secretariat has to refuse access to this document.²

You can ask the Council to review this decision within 15 working days of receiving this reply.³

Yours sincerely,

Paulo VIDAL

² Article 4(3) of Regulation (EC) No 1049/2001.

³ 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 (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

From: **DELETED**

Sent: Monday, March 11, 2019 10:57 AM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Re: Ref. 19/0288-ip/nb

Dear Mr Vidal,

Many thanks for your letter of 26 February with reply to my request for access to Council document 17773/12/INIT (your reference numbers 19/0288-ip/nb).

With this email I would like to bring a confirmatory application against the Council's decision to refuse access to the document.

First, the Council failed, against its duty, to consider the possibility of offering partial access to the document (Regulation 1049/01, art. 4(6)).

Second, to the extent that the document discusses privileged access to CFSP documents, an overriding public interest exists in having access to the document pursuant to Reg. 1049/01, article 4(3), first indent. As the Council confirmed in its response, the requested document "sets out a draft position of the Council with a view to opening negotiations with the European parliament on two interinstitutional agreements on the transmission of classified information to the European Parliament in the areas of Justice and Home Affairs and of the Common Foreign and Security Policy (CFSP), respectively", the latter being still ongoing.

The negotiations between the Council and the Parliament concerning classified CFSP information pertain to an area in which the Council acts in its non-legislative capacity, and where the Parliament exercises a duty of oversight such as is incumbent on the legislative branch. In a democratic decision-making system such as the European Union, debates on the appropriate manner of legislative oversight over governing bodies exercising executive and/or administrative functions is a matter of public concern.

After all, although members of the public are generally (necessarily) denied access to EU classified documents under the public right of access to documents, they have a strong interest in ascertaining that their chosen parliamentary representatives are in a position to exercise the role of oversight on their behalf, as they have a strong interest in knowing the process in which this right of oversight comes about. Without having sufficient knowledge of this process and the documents that belong to it, European citizens would have insufficient information to hold their representatives both in the Parliament and the Council to account over the positions that they take throughout the negotiations, and ultimately, to adjust their voting decision in elections.

Third, to the extent that the document discusses privileged access to JHA documents, as the Council states, the negotiations have already been concluded. It must here be underlined that the Council did not specify which part of article 4(3) is applied (the first indent or the second indent) in its decision to refuse access, leaving the applicant in uncertainty over the argument that it wants to rely on to justify access refusal. Seeing however that this part of the negotiations is already concluded, refusal under the first indent of article 4(3) cannot any longer apply. Meanwhile, under the second indent, the Council would have to explain how disclosure of information contained in a document after conclusion of the negotiation "would seriously undermine the decision-making process". In its response, the Council did not meet this standard of justification. It merely explained how disclosure would undermine the *ongoing* negotiations concerning parliamentary access to CFSP documents, without explaining specifically and actually (or in fact at all) how disclosure "would harm (...) future decision-making on such negotiations". Particularly given the Council's obligation under Reg. 1049/01 to consider the possibility of offering partial access to a requested document (art. 4(6)) and to weigh the decision of an access refusal against the public's overriding interest in disclosure, refusal of this part of the document does not meet the current standard of the right of public access as guaranteed by Reg. 1049/01.

For the above-mentioned reasons, I request the Council to reconsider its refusal of access to the requested document.

Yours sincerely,

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