



Council of the
European Union

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Brussels, 8 April 2019
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API 37

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 10/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 16 February 2019 and registered on 18 February 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 1 April 2019 (Annex 2);
- confirmatory application dated 4 April 2019 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 16 February 2019 - 22:00]

From: **DELETED**

Sent: Saturday, February 16, 2019 22:00

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

Subject: Request to access documents under Reg. (EC) 1049/2001

Dear Ms./Mr.,

please find attached my request to access documents.

Kind regards,

DELETED

Trento, 16th February 2019

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

Transparency [via [via e-mail at

access@consilium.europa.eu]

Subject: request to access documents under Regulation (EC) No 1049/2001.

Dear Ms./Mr.,

under the provisions of Regulation (EC) No 1049/2001, I'm respectfully requesting the Council to grant me full access to the following documents:

A. European Public Prosecutor's Office ("EPPO"):

1. Austria's notification, by letter of 9th June 2017, of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office;
2. Italy's notification, by letter of 22nd June 2017, of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office;
3. document **6960/18** listed on the Council's register as "*Setting up the European Public Prosecutor's Office (EPPO) - state of play*";
4. document **12171/18** listed on the Council's register as "*European Public Prosecutor's Office (EPPO) - State of play - Information on the Communication from the Commission on an initiative to extend the competences of the European Public Prosecutors Office to cross-border terrorist crimes*";

5. document **6281/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*";
6. document **6281/1/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*";
7. document **6419/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*".

Amendments to the Rules of Procedure of the Court of Justice:

8. document **5190/19** listed on the Council's register as "*Amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union - Confirmation of the final compromise text with a view to agreement*";
9. document **5700/19** listed on the Council's register as "*Draft amendments to the Rules of Procedure of the Court of Justice*";
10. document **6451/19** listed on the Council's register as "*Revised draft amendments to the Rules of Procedure of the Court of Justice*".

B. EUNAVFORMED Op SOPHIA:

1. documents **5220/19**, **5220/19 ADD 1** and **5220/19 ADD 2** listed on the Council's register as "*EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 JUN 2018 - 30 NOV 2018*";
2. document **14915/18** listed on the Council's register as "*EUNAVFORMED Op SOPHIA - VII Military Strategic Campaign Assessment*".

The preferred linguistic version is English.

If this letter is ever to be made public, I urge the Council to delete my name and my e-mail address.

Kind regards,

DELETED



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, 1 April 2019

DELETED

Email: **DELETED**

Ref. 19/0498-vl/nb

Request made on: 16.02.2019

Registered on: 18.02.2019

Deadline extension: 11.03.2019

Dear **DELETED**,

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

Please find attached documents **6960/18**, **12171/18**, **5190/19**, **5700/19** and **6451/19** you requested.

I regret to inform you that access to documents **14915/18**, **5220/19** + **ADD1** + **ADD2**, **6281/19**, **6281/19 COR1** and **6419/19** cannot be given for the reasons set out below.

Documents **14915/18** and **5220/19** + **ADD 1** + **ADD 2**, drawn up by the European External Action Service for the **Political and Security Committee (PSC)** and the **European Union Military Committee (EUMC)**, concern respectively the EUNAVFORMED Operation SOPHIA VII Military Strategic Campaign Assessment and the Six-Monthly Report 1 June 2018 - 30 November 2018.

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).

These documents bear the classification "RESTREINT UE". This means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.²

Document **14915/18** contain core data related to the abovementioned Operation, as it focuses on strategic lines of engagement, infrastructures effectiveness, synergies with international partners, monitoring of the illegal activities, and analyses its overall implementation in progress. Release of such information would reveal to third parties sensitive details of the Operation EUNAVFOR MED Sophia. This would affect the efficiency of the European Union's action and question the feasibility of the operation as a whole.

This document is closely related with the operational procedures of a partner nation military and police forces engaged in a very hostile environment in cooperation with the EU military forces.

Having regard to its sensitive content, its disclosure of document **14915/18** would undermine the protection of public interest as regards defence and military matters, as well as the lives of the military personnel engaged on the ground, both from the partner nation and from the EU, and of the persons they have the responsibility to protect. It would also undermine the international relations of the EU, seriously discrediting its foreign policy.

Document **5220/19 + ADD 1 + ADD 2** contains a variety of highly sensitive data on military assets engaged, identify intelligence sources and intelligence collection methods and targets, operational procedures, shortfalls, logistic facilities and flows, communications and information systems and command and operational infrastructures.

Its disclosure could expose to serious danger all the personnel engaged in the field (risks of death, impairment, abduction or torture for EU citizens, host nation citizens, partner nation citizens and allied nations citizens). It could also cause serious prejudice to the military forces on the ground and lead to a military defeat of the host nation forces, of the partner nations forces and of the allied nations forces, which is the main objective of the hostile entities. Furthermore, the defeat of EU military forces in the regions concerned would have devastating consequences for Europe security.

² Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1.

In the light of the above, if released to the public, these documents would undermine the protection of the public interest as regards public security, defence and military matters and EU's international relations. As a consequence, the General Secretariat has to refuse access to them.³

We have also looked into the possibility of releasing parts of these documents.⁴ However, as the information contained therein forms an inseparable whole, the General Secretariat is unable to give partial access.

Document **6281/19**, its corrigendum **COR1** and document **6419/19** are Notes of 12, 13 and 14 February 2019 from the Presidency to Delegations on the Appointment of the European Chief Prosecutor.

As indicated in the title, these documents contain information on the procedure for appointing the European Chief Prosecutor in particular as regards the internal process of the Council.

The disclosure of this information at a moment when the contacts on this appointment with the European Parliament are ongoing, may put delegations under additional pressure of stakeholders.

It would also reduce the flexibility for delegations to formulate and reconsider their positions in the light of the arguments exchanged in these contacts. This would seriously affect the chances of finding an agreement with the European Parliament.

The General Secretariat therefore considers that, at this stage, disclosure of these documents would be premature in that it would impede the proper conduct of discussions and compromise the conclusion of an agreement.

Disclosure of documents **6281/19**, **6281/19 COR1** and **6419/19** would therefore seriously undermine the decision-making process of the Council. As a consequence, the General Secretariat has to refuse access to these documents at this stage.⁵

³ Article 4(1)(a), first, second and third indent, of Regulation (EC) No 1049/2001.

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

⁵ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

After having examined the context in which the documents were 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 their disclosure.

We have also looked into the possibility of releasing parts of these documents.⁶ However, as the exception to the right of access applies to their 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).⁷

Yours sincerely,

Paulo VIDAL

Enclosures

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

⁷ 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: Thursday 4 April 2019 16:10

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

Subject: Re: Confirmatory application (ref. your letter 19-0498-ld-vl/nb)

Dear Ms./Mr.,

please find attached my confirmatory application with reference to your letter of 01.04.2019
(ref. 19-0498-ld-vl/nb).

Kind regards,

DELETED

Trento, 4th April 2019

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

[via e-mail at access@consilium.europa.eu]

Subject: confirmatory application with reference to your letter of 1st April 2019
(ref. 19-0498-ld-vl/nb)

Dear Ms./Mr.,

I thank the Council for letting me access documents 6960/18, 12171/18, 5190/19, 5700/19 and 6451/19 I requested in my letter of 16th February 2019.

As for the other documents, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 (hereinafter “Regulation”), I respectfully ask the Council to review its decision of 01.04.2019 for the following reasons.

EPPO

As for Austria’s notification, by letter of 9th June 2017¹, of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office and Italy’s notification, by letter of 22nd June 2017², of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office, the Council didn’t state anything, so I hereby simply reiterate my request to have access to them or, at least, to be informed of the grounds for refusal.

As for documents 6281/19, 6281/19 COR 1 and 6419/19 I ask the Council to reconsider its position also taking into account the time elapsed since my initial application and the fact that consultations will probably be over by the time that I will receive the reply to this confirmatory application.

¹ OJ L 283, 31.10.2017, p. 2, 8th indent

² OJ L 283, 31.10.2017, p. 2, 8th indent

Whereas the purpose of the Regulation is “*to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission [...] documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents*”³ and whereas it states that “*the right of access also applies to documents relating to the common foreign and security policy*”⁴, I have *prima facie* the right to be granted the widest possible access also to documents involving EUNAVFORMED Op SOPHIA, a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean Sea.

This mission core mandate is to undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, in order to contribute to wider EU efforts to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea.

One of the most preeminent debate topic in the upcoming European election is illegal immigration. It is a deeply dividing issue, which will play a central role on how European citizens will cast their vote. It is absolutely vital for us to be able to make our choices having all possible relevant information. EUNAVFORMED Op SOPHIA has been arguably one of the most important steps taken at the EU level to fight this crisis, and these documents are an important piece of the puzzle. Citizen must be allowed to look into the actions taken in this regard and to know what’s happening in the Southern Central Mediterranean.

The importance of the issue of illegal immigration is so striking that the Italian interior Minister was indicted (even though the Italian Senate refused the authorization to proceed with the trial) in a case pertaining to immigrants rescued at sea, the same Southern Central Mediterranean Sea in which this operation is taking place. There is an overriding public interest to be informed of the current situation.

³ OJ L 145, 31.5.2001, p. 44

⁴ OJ L 145, 31.5.2001, p. 43

As I stated above, the existence of an overriding public interest to the publication of these documents it's not up for debate. In order for a democracy to work properly, it is vital for citizen to be properly informed to be able to held accountable their representatives. The EU has often been under scrutiny for its supposed lack of openness and transparency, and the decision that I'm asking to reconsider sadly goes exactly in that direction.

Of course there is public information available on EUNAVFORMED Op SOPHIA (e.g. press releases and news conferences) but it's not enough, it is only through detailed internal documents that is possible to really assess what the institutions are doing, and that's arguably one of the reasons underlining Regulation No (EC) 1049/2001. It's easy to craft public information in such a way as to ease or underplay possible controversial topics, while internal documents are far more objective and hence more adequate to assess the real situation.

The Council, since it stated that the documents are classified, believes that the public interest is better served by withholding them. It is important to notice that the EUCI in question are classified at the lowest level so that they aren't considered sensitive according to Article 9(1). RESTRAINT UE/EU RESTRICTED information, if disclosed, might be "disadvantageous" to the interests of the EU or one or more of the member states, hence it is important to consider whether the possible negative outcomes outweigh the importance of public overseeing.

This decision, at least in my view, has been taken in a situation of blatant conflict of interest since the Council (*rectius* EEAS, PSC and EUMC) created the document and subsequently denied access to the public who wishes to fulfil it's democratic duty to held its representatives accountable.

It is not up for debate, as it is clearly also the ECJ's position, that the Council enjoys a wide discretion as for the application of the exemptions provided by Article 4(1)(a), but the Council is bound to exercise it *bona fide* and according to the EU law general principles, including transparency (see Article 42 Charter of Fundamental Rights of the European Union⁵). My request to access these classified documents, for the reasons stated above, has to be considered looking at the bigger picture, namely the public interest of Europeans to be able to express their vote in the upcoming elections being properly informed of previous EU actions regarding a very important issue.

⁵ OJ C 364, 18.12.2000, p. 19

As for document **14915/18**, in light of the above, I ask the Council to reconsider its position.

In particular, as for document **5220/19 + ADD 1 + ADD 2**, the Council stated that *“its disclosure could expose to serious danger all the personnel engaged in the field (risks of death, impairment, abduction or torture for EU citizens, host nation citizens, partner nation citizens and allied nations citizens). It could also cause serious prejudice to the military forces on the ground and lead to a military defeat of the host nation forces, of the partner nations forces and of the allied nations forces, which is the main objective of the hostile entities. Furthermore, the defeat of EU military forces in the regions concerned would have devastating consequences for Europe security”*.

In its letter of 1st April 2019, the Council also stated that this document is classified RESTRAINT UE/EU RESTRICTED, so it contains EUCI that, if improperly disclosed, could be *“disadvantageous to the interests of the European Union or of one or more of its Member States”*⁶.

The assessment that the Council did in order to refuse even a partial access, is not consistent with the description of the classification level assigned to the document. There are two possible explanations: the classification level wasn't properly assessed in accordance with Decision No 2013/448/UE or, and, in my opinion, it seems far more likely, the Council over-exaggerated the possible repercussions of an unauthorized disclosure in order to refuse even a partial access. My opinion is corroborated by the fact that EUNAVFORMED Op SOPHIA's Six-Monthly Reports are usually classified RESTRAINT UE/EU RESTRICTED and it is very unlikely that the security assessment for classification has been consistently wrong since the beginning.

The unauthorized disclosure of a document cannot be, at the same time, *“disadvantageous”* and capable to provoke a military defeat with *“devastating consequences for Europe security”*. Such a statement is absolutely incompatible with Article 2(2) of the above-mentioned Decision.

Conclusions

For the reasons set out above, I respectfully request the Council to reconsider its position, in particular by reassessing the possibility to grant me at least partial access to the following documents:

⁶ Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1

A. EPPO

1. Austria's notification, by letter of 9th June 2017, of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office;
2. Italy's notification, by letter of 22nd June 2017, of its intention to join the enhanced cooperation on the establishment of the European Public Prosecutor's Office;
3. document **6281/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*";
4. document **6281/1/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*";
5. document **6419/19** listed on the Council's register as "*Appointment of the European Chief Prosecutor*".

B. EUNAVFORMED Op SOPHIA:

1. documents **5220/19**, **5220/19 ADD 1** and **5220/19 ADD 2** listed on the Council's register as "*EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 JUN 2018 - 30 NOV 2018*";
2. document **14915/18** listed on the Council's register as "*EUNAVFORMED Op SOPHIA - VII Military Strategic Campaign Assessment*".

I ask the Council to remove my name and my e-mail address when this confirmatory application will be published.

Kind regards,

DELETED
