



European Council

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Brussels, 15 May 2019  
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## NOTE

|                 |                                                                        |
|-----------------|------------------------------------------------------------------------|
| From:           | President of the European Council                                      |
| To:             | European Council                                                       |
| No. prev. doc.: | 8007/19; 8008/19                                                       |
| Subject:        | Public access to documents<br>- Confirmatory application No 09/c/01/19 |

The draft reply to confirmatory application No 09/c/01/19 for public access to documents was unanimously endorsed by the European Council on 14 May 2019.

All members of the European Council having the right to vote agreed to publish the result of the vote.

The annex is available in English only.

**REPLY ADOPTED BY THE EUROPEAN COUNCIL ON 14 MAY 2019  
TO CONFIRMATORY APPLICATION 09/c/01/19,  
made by email on 28 March 2019,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to SMS of the President of the European Council,  
Donald Tusk and leaders during 2018**

The European Council has considered this confirmatory application under 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 (OJ L 145 of 31.5.2001, p. 43) and Article 10(2) of its Rules of Procedure (European Council Decision No 2009/882/EU, OJ L 315, 2.12.2009, p. 51) which makes Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) applicable *mutatis mutandis* and has come to the following conclusion:

1. On 26 January 2019, the applicant filed an initial application with the European Council for access to *"All text messages (i.e., SMS messages) and other mobile-phone-based text communications (e.g., WhatsApp, Telegram, iMessage, Facebook Chat, SnapChat, Slack, Facebook and Twitter "direct messages," Signal Messenger, Wire, etc.) sent by – or on behalf of – Council President Donald Tusk in exchange with EU and foreign heads of state or heads of government in 2018"*.

On 11 March 2019, the General Secretariat replied to this application on behalf of the European Council, informing the applicant that no such SMS messages or other mobile-phone-based text communications sent out in the professional context containing substantial and not short-lived information that would be considered as documents drawn up by the European Council within the meaning of Article 3(a) of Regulation (EC) No 1049/2001 are in its possession.

On 28 March 2019, the applicant filed a confirmatory application against this reply, challenging the assertion that the European Council does not hold any documents covered by the application.

2. In his confirmatory application, the applicant argues that text messages and other mobile-phone based text communications fall under the definition of "document" under Article 3 (a) of Regulation (EC) No 1049/2001, which *"does not limit certain types of content (such as substantial or non-substantial; short-lived or long-lived) that could define a document as such"* and that the exceptions provided by Article 4 of the said Regulation do not include *"non-substantial or short-lived as legitimate grounds for refusing access to an EU document"*. The applicant also contends that *"it is common practice by EU institutions to release documents that constitute futile or short-lived communications between EU-officials such as e-mails"*, that *"in the year 2019, there is little difference between email communication and text message communication"* and that *"ensuring the right of public access to documents should be consistent with technological development"*.
3. The European Council has carefully considered the confirmatory application in the light of the applicant's arguments and it has re-assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001.
4. First of all, the European Council wishes to draw the attention of the applicant on the following provisions of Regulation (EC) No 1049/2001 :

Article 3 (a) of Regulation (EC) No 1049/2001 defines as a document *"any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"*.

Article 2 (3) of the said Regulation defines its material scope as follows: *"This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union"*.

5. It results from the combined reading of those provisions that the medium is irrelevant and thus a content exchanged by phone or via social networks such as a text message or a mobile-phone-based text communication may under certain exceptional circumstances qualify as a document falling within the scope of Regulation (EC) No 1049/2001, as long as two additional conditions are met. On the one hand, such a content must concern a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. On the other hand, such a content must be "*held by the institution*", that is to say "*drawn up or received*" by it and remaining "*in its possession*". The European Council considers that in order to be drawn-up by it, a content requires a minimum degree of stability and formality. In other words, the European Council considers that a text message or other mobile-phone-based text communication is a document held by it only if it relates to the policies, activities and decisions falling within the European Council's sphere of responsibility, if it is not ephemeral or short-lived and if it contains substantial information, in which case the information contained therein needs to be exchanged, registered, saved and eventually archived in accordance with the applicable rules, including with regard to the security of such information.
6. The European Council has examined whether it holds any documents that would correspond to the request of the applicant in view of the above considerations.
7. Following its examination, the European Council confirms that it has not been possible to identify any document corresponding to the request introduced by the applicant. In that regard, the European Council also wishes to underline that it is not in the practice of the institution that information containing substantial content and which concerns matters falling within the institution's sphere or responsibility is exchanged by text messages of its President.

## CONCLUSION

8. In the light of the above, the European Council confirms the assessment of the General Secretariat that it does not hold documents that would correspond to the applicant's request.