



Council of the
European Union

073568/EU XXVI. GP
Eingelangt am 29/08/19

Brussels, 29 August 2019
(OR. en)

11787/19

INF 233
API 103

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	11113/19; 11114/19; 11116/19
Subject:	Public access to documents - Confirmatory application No 20/c/01/19

The draft reply to confirmatory application No 20/c/01/19 for public access to documents was endorsed by the Council of the European Union on 28 August 2019 with Austria and the United Kingdom abstaining.

The majority of the Member States agreed to publish the result of the vote.

The annex is available in English only.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION No 20/c/01/19,
made by email on 9 July 2019,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document ST 9894/1/19 REV 1**

The 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, 31.5.2001, p. 43) (hereafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 13 June 2019, the applicant requested access to document **9894/1/19 REV1** which is a note from the Spanish delegation to the Working Party for Schengen Matters (Evaluations) / Mixed Committee (EU-Iceland/Norway/Switzerland/Liechtenstein) of 11 June 2019 on the Schengen evaluation of Spain - Updated Action Plan to remedy any deficiencies identified in the 2017 evaluation of Spain on the application of the Schengen Acquis in the field of data protection.
2. In its letter of 28 June 2019, the General Secretariat of the Council replied that access to that document could not be granted since its disclosure would seriously undermine the Council's decision making process¹ and furthermore would undermine the protection of the public interest as regards public security.²
3. That letter further referred to the request of Spain as the originator of the requested document not to disclose it without its prior agreement.³
4. In a confirmatory application received on 9 July 2019, the applicant requests a review of this decision without any further explanation or arguments.

¹ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

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

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

5. The Council has carefully considered the confirmatory application. Having thoroughly examined the document concerned by the request and carried out renewed consultations, it has re-assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001, with the aim of ensuring the widest possible public access to documents.

Context of the document

6. On 7 October 2013 the Council adopted Regulation (EU) No 1053/2013⁴, establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. In line with the Regulation, the Commission has established a multiannual evaluation programme 2014 - 2019⁵ and an annual evaluation programme for 2017⁶ with detailed plans for on-site visits to the Member States to be evaluated, areas to be evaluated and sites to be visited.
7. The areas to be evaluated cover all aspects of the Schengen *acquis*; management of the external borders, visa policy, the Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters, as well as the absence of border control at internal borders. In addition, fundamental rights issues and the functioning of authorities that apply the relevant parts of the Schengen *acquis* are taken into account in all evaluations.
8. Based on the multiannual and annual programmes, a team of Member States and Commission experts carried out an evaluation of Spain's application of data protection between 1 and 6 October 2017. Their evaluation report sets out their findings and assessments, including best practices and any deficiencies identified during the evaluation.
9. Alongside the report the team made recommendations for remedial action aimed at addressing the deficiencies.

⁴ OJ L 295, 6.11.2013, p. 27.

⁵ Commission Implementing Decision C(2014)3683 of 18 June 2014 establishing the multi-annual evaluation programme 2014 - 2019 in accordance with Article 5 of the Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*.

⁶ Commission Implementing Decision C(2016) 7387 of 21 November 2016 establishing the first section of the annual evaluation programme for 2017 in accordance with Article 6 of Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*.

10. These recommendations were formalised by Council Implementing Decision of 7 March 2019 setting out a "Recommendation on addressing the deficiencies identified in the 2017 evaluation of Spain on the application of the Schengen acquis in the field of data protection"(public document 7278/19). That Recommendation recommends, in particular, that Spain should establish an action plan listing all recommendations to remedy any deficiencies identified in the evaluation report and provide that action plan to the Commission and the Council.
11. On 7 June 2019, Spain forwarded to the Council that action plan, which seeks to follow up on that Recommendation to ensure that Spain applies all Schengen rules related to data protection correctly and effectively. It was circulated on 7 June 2019 in doc. 9894/19.
12. On 11 June 2019, Spain forwarded to the Council an update of that action plan containing additional information. That updated action plan was circulated by the Council in doc. 9894/19 REV 1 on the same day.
13. That updated action plan was submitted for comments pending an adequacy assessment by the Commission provided for in Article 16(2) of Regulation (EU) No 1053/2013, which reads:
"After consulting the on-site team or the questionnaire team, as appropriate, the Commission shall present its assessment of the adequacy of the action plan to the Council within one month of receiving the action plan from the evaluated Member State. The other Member States shall be invited to comment on the action plan."

Prejudice to the interest protected by the first indent of point (a) of Article 4(1) of Regulation (EC) No 1049/2001

14. At the outset, the Council recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in point (a) of Article 4(1) of Regulation (EC) No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.

15. On the one hand, "the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions *relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest*".⁷
16. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*.⁸
17. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of a document on the protection of the public interest as regards public security and as regards international relations, but is barred from taking into account other legitimate interests, such as the ones raised by the applicant, in order to override the conclusion that giving access to a document would harm the protected interest and grant access nonetheless.
18. The Schengen acquis is a set of rules and legislation integrated into European Union law which regulate the abolishment of border controls at the internal borders within the Schengen Area as well as the strengthening of border controls at the external borders.
19. The Council notes that, based on its content, i.e. remedying the deficiencies identified in the 2017 evaluation of Spain on the application of the Schengen acquis in the field of data protection, the document concerned by the request comes within the remit of the exceptions of protection of public interest as regards public security (Article 4(1)(a), first indent).

⁷ Judgment of 1 February 2007, *Sison*, C-266/05 P, EU:C:2007:75, paragraph 34.

⁸ Judgment of 1 February 2007, *Sison*, C-266/05 P, EU:C:2007:75, paragraph 46.

20. In some of its parts, document **9894/1/19 REV1** contains details on concrete operational actions, and identifies responsible law enforcement and other authorities as well as the timeframe in which the deficiencies on the application of the Schengen acquis in the field of data protection should be addressed.
21. The release of those sensitive elements would enable persons or organisations to make use of the identified deficiencies to circumvent certain provisions of the Schengen acquis.
22. Full release of the document would therefore jeopardise public security since it would put in danger the effective implementation of the Schengen acquis.

Prejudice to the interest protected by the first subparagraph of of Article 4(3) of Regulation (EC) No 1049/2001

23. For the sake of completeness, the Council wishes to underline the fact that the decision-making process relating to the requested document is still ongoing in the Council preparatory bodies. In this regard, it must be recalled that if the public interest in transparency is particularly strong when institutions act in their legislative capacity, it does not bear the same relevance as regards their decision-making in non-legislative areas. In such areas, the interest of the public in the openness and transparency carries a lesser weight than in case of law making.

Prejudice to the application of Article 4(4) and(5) of Regulation (EC) No 1049/2001

24. Since document **9894/1/19 REV1** originates from the Spanish Delegation, it needs to be considered as a third-party document within the meaning of Article 4(4) of Regulation (EC) No **1049/2001**.

25. According to Article 4(5) of Regulation (EC) No 1049/2001, the Member State concerned may request the institution not to disclose a document originating from that Member State without its prior agreement.
26. After renewed consultation, Spain requested the Council not to fully disclose their document.

Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001

27. The Council has also carefully reviewed the possibility of granting partial access to the requested document pursuant to Article 4(6) of the Regulation.
28. Taking into account the abovementioned provisions, i.e. the first indent of point (a) of Article 4(1) and the first subparagraph of Article 4(3) (), the Council is of the opinion that the full document does not require protection under these provisions and that access to a substantial part of its content may be granted.

Conclusions

29. For the abovementioned reasons, the Council confirms that no full public access can be granted to document 9894/1/19 REV1.
30. However, partial access can be granted to:
- pages 1 to 4
 - page 5 as regards recommendations 7-8
 - pages 6-7
 - page 8
 - page 9 as regards the continuation of recommendation 18
 - page 12 as regards recommendation 26
 - page 13 as regards recommendation 31
 - page 14 as regards recommendation 33
 - page 15 as regards recommendations 36-37.