



Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 25/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 18 July and registered on 19 July 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 29 August 2019 (Annex 2);
- confirmatory application dated 29 August 2019 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 18 July 2019 - 20:54 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address:

Telephone:

Mobile:

Fax:

Requested document(s): 10147/19, 10027/19, 9593/19, 9184/19, 8513/19, 8234/19, 6075/19, 6037/19

1st preferred linguistic version: EN - English

2nd preferred linguistic version: ES - Spanish



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, 29 August 2019

DELETED

Email: **DELETED**

Ref. 19/1686-ld/jg

Request made on: 18.07.2019

Registered on: 19.07.2019

Deadline extension: 09.08.2019

Dear **DELETED**,

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

Please find attached documents **10027/19** and **9596/19** you requested.

Please find also attached partially accessible versions of documents **6075/19** and **6037/19**.²

However, I regret to inform you that full access to these documents cannot be given for the reasons set out below.

Document **6075/19**, contains a contribution of the Council Legal Service dated 5 February 2019 which analyses the question as to when, in decisions regarding international agreements, in conformity with the case-law of the European Court of Justice, CFSP legal bases could be considered to be ‘ancillary’ to other legal bases.

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).

² Article 4(6) of Regulation (EC) No 1049/2001.

The legal advice provided in the requested contribution is relevant to all current and future decision-making procedures concerning the conclusion of an international agreement with a CFSP component. Discussions in that connection are sensitive and complex, and the question analysed in the advice constitutes a significant part of the basis for such discussions. Under those circumstances, disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council and would risk compromising the capacity of the institutions to reach an agreement, thereby undermining the decision-making process within the meaning of Article 4(3) of 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.

Moreover, the legal advice is particularly broad in scope insofar as it covers the use of CFSP legal bases in general in Council decisions concerning international agreements. The legal issues dealt with in this document are still unresolved and remain particularly contentious. Consequently, the legal advice is of a sensitive nature.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service intended for members of the Council. The possibility that the legal advice in question might be disclosed to the public could lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the ability of the Legal Service to express its views free from external influences.

With regard to the existence of an overriding public interest in disclosure, the Secretariat takes the view that, in this case, the principle of transparency does not take precedence over the aforementioned interests.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to document 6075/19. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, public access is granted to paragraphs 1 to 3 and 8 to 9 thereof.

Document **6037/19** is a Note of 8 February 2019 from the General Secretariat of the Council to the Permanent Representatives Committee and the Council on Two non-disputing party interventions lodged, or to be lodged, by the Commission on behalf of the European Union in investor-to-State dispute settlement proceedings under BITs covered by Regulation (EU) No **1219/2012** - Consultation of the Council.

As indicated in the title, this note concerns dispute settlement proceedings under BITS which are still ongoing. The release of certain parts of this note could undermine the protection of court proceedings and legal advice.

The General Secretariat of the Council is therefore unable to grant full access to the document³.

You may however have access to those parts of the document which are not protected by this exception.

Having examined the context in which the document was drafted, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in its disclosure.

I also regret to inform you that access to documents **8234/19** and **8513/19** cannot be given for the reasons set out below.

Document **8234/19** is a "I" Item Note from the General Secretariat of the Council to the Permanent Representatives Committee containing a draft reply to the European Parliament regarding the absence of Council position on the proposal for a recast of the dual-use Regulation.

This file is still under scrutiny and is strictly related to inter-institutional relations on sensitive matters (including, among others, the modernisation of the current EU regime for the control of exports and cyber-technology implications), on which negotiations with the European Parliament still have to start.

³ Article 4.2 second indent of Regulation (EC) No **1049/2001**

Document **8513/19** is a "I" Item Note of 16 April 2019 from the **Working Party on General Affairs** to the Permanent Representatives Committee (Part 2) containing a position with a view to reopening negotiations with the European Parliament on the Draft Arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy and on the Draft Interinstitutional Agreement between the European Parliament and the Council repealing the Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy

This document relates to sensitive negotiations in the preparatory bodies of the Council and with the European Parliament which are not yet concluded.

Given the content and the preliminary state of play of these two files, disclosure of these documents at this stage would seriously undermine the decision making-process of the Council. As a consequence, the General Secretariat has to refuse access to them at this stage.⁴

We have also looked into the possibility of releasing parts of documents **8234/19** and **8513/19**.⁵ However, as the information therein contained forms an inseparable whole, the General Secretariat is unable to give partial access at this stage.

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 disclosure.

Please also note that we have not been able to identify document **10147/19** in our registration system.

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

⁵ Article 4(6) of Regulation (EC) No **1049/2001**.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁶

Yours sincerely,

Paulo VIDAL

Enclosures: 4

⁶ 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, August 29, 2019 4:29 PM

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

Subject: Re: Ref. 19/1686-ld/jg

Thanks for the reply.

I want to file a confirmatory application.

Regarding document 6075, I would like to note that there has been extensive litigation and caselaw over legal basis.

While the Council may have some remaining margin of discretion in deciding over legal basis, it will always be the Court which decides if their use was constitutional.

It is not clear from the reply why the Legal Service's opinion would be sensitive in the sense that it could prejudice the outcome of any Council decision because the Council would either (1) be already bound by caselaw or (2) be in the exercise of its legitimate remaining margin of discretion.

In the case of the exercise of that discretion it is important for the public to understand why the Council in signing, concluding or approving positions, the Commission in negotiating and proposing measures and the Parliament in validating any legal basis think that that legal basis is consistent with caselaw.

Maybe the Legal Service opinion explains that this is not the case and that there is still significant ambiguity in caselaw. But in this case and in the alternative case of the Legal Service opinion merely explaining its understanding of existing caselaw then there is significant public interest in understanding the position of the Legal Service given how it is usually followed by the Council.

If the Legal Service were not to be followed by the Council in the case of this particular legal opinion then the remaining argument is that not following these opinions undermines the Council.

Caselaw consistently holds that not following Legal Service advice doesn't undermine the Council's position.

The only way this "undermining" takes place is by telling the public that the Council didn't follow advice. But the public's confidence is more undermined by not understanding what are the positions of the parties than by not knowing what the parties' positions are.

While this is nominally a CFSP area, the fact is international agreements are legally binding and can often be as important and of as much public interest as legislation. The discussion of the relationship between CFSP legal basis and internal/legislative legal basis is very much of public interest.

The issue of unanimity and the role of Parliament in any processes are constitutional questions of the highest public interest.
