



Council of the
European Union

168315/EU XXVII. GP
Eingelangt am 08/01/24

Brussels, 8 January 2024
(OR. en)

17081/23

INF 278
API 189

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 39/c/01/23

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 26 October 2023 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 11 December 2023 (Annex 2);
- the confirmatory application dated 20 December 2023 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Thursday 26 October 2023, 12:14]

From: **DELETED**

Sent: Thursday 26 October 2023 12:14

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

Subject: Communication regarding restrictions on personal liberty in the context of border procedures/CEAS reform [#291049]

Application pursuant to EU Regulations 1049/2001 and 1367/2006

Dear Sir/Madam,

On the basis of Regulations 1049/2001 and 1367/2006, I would be grateful if you could send me documents containing the following information:

- all communications (internal and external letters, emails, telephone call notes, memos, minutes, etc.) from 2023 (to 26.10.23) concerning the planned restrictions on personal liberty for a limited period during the implementation of border procedures within the framework of the CEAS reform.

I would stress that I would like to receive a reply by email to this address and not via a web portal. Please confirm receipt of this message. Thank you for your efforts.

(Complimentary close)

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, 11 December 2023

DELETED

E-mail: **DELETED**

Ref. 23/3107-rh/vk

Request made on: 26.10.2023

Deadline extension: 20.11.2023

Dear **DELETED**

Thank you for your request for access to documents of the Council of the European Union¹.

Please find attached the documents you requested:

ST 7895/23

ST 8464/23

ST 9242/23

ST 9384/23

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).

ST 9710/23

ST 9710/23 REV 1

ST 9712/23

ST 10065/23

ST 10065/23 REV 1

ST 10083/23

ST 10444/23

WK 6617/23

WK 9278/23

WK 10235/23

WK 11093/23

I regret to inform you that access to the following requested documents containing comments from the Member States of the European Union cannot be given for the reasons set out below:

ST 7625/23

ST 7674/23

ST 7674/23 REV 1

ST 9439/23

WK 5153/23

These legislative files are the subject of intensive inter-institutional negotiations and are intrinsically linked to other files on which intensive inter-institutional negotiations are ongoing. The requested documents explore possible solutions for difficulties that still need to be addressed. Releasing preliminary positions of EU Member States on issues that will later be subject of negotiations with the European Parliament, into the public domain at this stage would seriously undermine the negotiation strategy (to be) taken by the Presidency (including future Presidencies) and might affect the negotiations on other files.

Therefore, the General Secretariat of the Council is of the opinion that the release of these documents to the public domain would seriously undermine the decision-making process of the Council. As a consequence, the General Secretariat has to refuse access to these documents².

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Please note that the German translation of the present reply has been requested and will be sent to you as soon as it is ready.

Yours sincerely,

Fernando FLORINDO

Enclosures: 15

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

[E-mail message sent to access@consilium.europa.eu on Wednesday, 20 December 2023, 11:35]

From: **DELETED**

Sent: Wednesday 20 December 2023 11:35

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

Subject: Re: Ref. 23/3107-rh/nb // confirmatory application [#291049]

Dear Sir/Madam,

Please forward this to the person in charge of examining confirmatory applications.

In its letter of 13 December 2023 the Council of the European Union refused access to some of the documents I had requested:

‘These legislative files are the subject of intensive inter-institutional negotiations and are intrinsically linked to other files on which intensive inter-institutional negotiations are ongoing. The requested documents explore possible solutions for difficulties that still need to be addressed. Releasing preliminary positions of EU Member States on issues that will later be subject of negotiations with the European Parliament, into the public domain at this stage would seriously undermine the negotiation strategy (to be) taken by the Presidency (including future Presidencies) and might affect the negotiations on other files.

Therefore, the General Secretariat of the Council is of the opinion that the release of these documents to the public domain would seriously undermine the decision-making process of the Council. As a consequence, the General Secretariat has to refuse access to these documents.’

Today, various media outlets reported that the EU institutions have reached an agreement on the CEAS reform. Please see: https://www.spiegel.de/ausland/eu-verkuendet-durchbruch-bei-verhandlungen-zu-asylreform-a-3596e3c1-d592-4b39-99d6-77493fe1520a?sara_ref=re-so-app-sh

In this respect, your grounds for the partial refusal of the request for documents would appear no longer to be admissible. As the negotiations have now been concluded, please send me the remaining documents:

ST 7625/23

ST 7674/23

ST 7674/23 REV 1

ST 9439/23

WK 5153/23

I should also like to point out that the refusal to grant even partial access to the documents requested is not covered by the following provisions: Article 4(1)(a), second and third indents, of Regulation (EC) No 1049/2001.

In accordance with the case-law on Article 4(1)(a) of Regulation No 1049/2001, the Council must be allowed broad discretion in determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. Reviewing the legality of such a decision is therefore limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, paragraph 34).

In the light of that case-law, the Council has failed to comply in the present case with the duty to state reasons. There is also a manifest error of assessment since several relevant factors have not been taken into account.

The case-law states, in relation to the duty to state reasons, that the institution which has refused access to a document is required to provide reasons indicating, firstly, whether the document requested does in fact fall within the scope of the exception relied on, and, secondly, whether the need for protection relating to that exception is genuine.

As regards the manifest error of assessment, the Council has not taken into account the fact that the requested working papers are part of a legislative procedure and have, therefore, already been widely disseminated. Unlike in *Sison v Council*, which recognised the broad discretion, the documents in the present application are not classified as ‘CONFIDENTIEL’. Instead, they were widely distributed to all Member States and the European Parliament and thereby to a large and unpredictable number of people. They were not part of a military strategy meeting or anything similar.

It is therefore not logical that the documents would contain confidential information on sensitive matters that could be used by opponents of the EU to undermine decision-making processes, above all since (as mentioned above) the decision-making process has now been concluded.

(Complimentary close)

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