



Council of the
European Union

180288/EU XXVII. GP
Eingelangt am 15/04/24

Brussels, 15 April 2024
(OR. en)

8906/24

INF 108
API 72

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 16/c/01/24

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 27 February 2024 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 12 April 2024 (Annex 2);
- the confirmatory application dated 12 April 2024 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Tuesday, 27 February 2024 at 15:46 using the electronic form available in the Register application]

From: document-request@consilium.europa.eu <document-request@consilium.europa.eu>

Sent: Tuesday, February 27, 2024 3:46 PM

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

Subject: Consilium - Electronic Request for Access to documents [ENGLISH]

Form of address

DELETED

Family name

DELETED

First name

DELETED

E-mail

DELETED

Occupation

DELETED

I submit this request on my own behalf.

Name of the organisation

Full postal address

DELETED

Telephone

DELETED

Requested document(s)

ST 5295 2024 REV 1 - NOTE

ST 5295 2024 INIT - NOTE

1st option

NL

2nd option

EN

This is an automatic reply from the General Secretariat of the Council of the European Union concerning your request for access to Council documents.

This notification was sent from an unattended mailbox. Please do not reply.



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, 12 April 2024

DELETED

Email: **DELETED**

Ref. 24/0707

Request made on: 27.02.2024

Deadline extension: 19.03.2024

Dear **DELETED**,

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

I regret to inform you that access to documents **ST 5295/24** and **ST 5295/1/24 REV 1** cannot be given for the reasons set out below.

Documents **ST 5295/24** and **ST 5294/1/24 REV 1** are two consecutive versions of a Note from the General Secretariat of the Council to the Permanent Representatives Committee dated 12 and 22 January 2024 respectively. They contain a set of suggested principles aimed at enabling the Presidency to participate effectively in the ongoing interinstitutional discussions for an Agreement on an interinstitutional ethics body.

For the Council to reach a common position for the above-mentioned interinstitutional negotiations, its Member States hold initial consultations and exploratory talks. To reveal the contents of such talks before a common position has been reached would seriously jeopardise the chances for reaching an agreement within the Council and hence an agreement amongst the EU Institutions.

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).

Disclosure of documents ST 5295/24 and ST 5294/1/24 REV 1 at this stage would therefore actually, specifically and seriously undermine the Council's decision-making process.

As a consequence, the General Secretariat has to refuse access to these documents.²

Having examined the context in which documents ST 5295/24 and ST 5294/1/24 REV 1 were drafted and the current state of play in negotiations on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in the disclosure of the documents in question.

We have also looked into the possibility of releasing parts of these documents.³ However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access at this stage.

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.

Yours sincerely,

Fernando FLORINDO

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

³ Article 4(6) of Regulation (EC) No 1049/2001.

[E-mail message sent to access@consilium.europa.eu on Friday, 12 April 2024, 15:40]

From: **DELETED**

Sent: Friday, April 12, 2024 2:25 PM

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

Subject: Re: Ref. 24/0707

Dear Council,

I would like to make a confirmatory application to my initial application Ref. 24/0707.

Access to the two documents covered by my request has been refused based on Article 4(3), first subparagraph, the exception for ongoing decision-making. I would like to challenge this refusal.

I contend that the documents in question, which are part of the ongoing effort to establish an inter-institutional ethics body, refer to a case where the Council is acting in its legislative capacity. Therefore, in line with Recital (6) of Regulation 1049/2001, widest-possible access should be given.

Further, I contend that the Council has not sufficiently demonstrated that disclosure of the document would "seriously undermine" the institution's decision-making process, as is required under this exception. In the *De Capitani v Parliament* ruling, the Court accepted that a risk of external pressure could constitute a legitimate ground for restricting access to documents related to the decision-making process, but "the reality of such external pressure must ... be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure". [para. 99] In *De Capitani v Council*, the court has said that "since Member States express, in the context of Council working groups, their respective positions on a given legislative proposal, and accept that their position could evolve, the fact that those elements are then disclosed, on request, is not in itself capable of undermining the sincere cooperation which the Member States and the institutions are required to exercise among themselves pursuant to Article 4(3) TEU".

As regards the overriding public interest in disclosure, I contend that insufficient understanding of reasoning within the Council on the Ethics Body risks giving rise to the public impression that the member states are not interested in transparency and due public scrutiny of their work in the Council. Failure to release these documents will therefore cause tangible harm to the public perception of transparency and willingness to ethical scrutiny of the Council.

Kind regards,

DELETED
