



Council of the
European Union

Brussels, 1 July 2020
(OR. en)

9037/20

INF 127
API 86

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 17/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 9 June 2020 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 29 June 2020 (Annex 2);
- confirmatory application dated 29 June 2020 and registered on 30 June 2020 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 9 June 2020 - 8:200 using the electronic form available in the Register application]

From: **DELETED**
Sent: Tuesday, June 9, 2020 8:00 AM
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: Electronic Request for Access

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone: **DELETED**

Requested document(s): (1) The annual report on the status of PESCO implementation (including on the fulfilment, by each participating Member State, of its commitments, in accordance with its updated and reviewed national implementation plans) provided by the High Representative to the Council on 22 March 2019;

(2) The annual report on the status of PESCO implementation for the period 2019-2020.



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 June 2020

DELETED
Email: **DELETED**

Ref. 20/1100-vl/ns

Request made on: 09.06.2020

Dear **DELETED**,

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

In the light of our consultations with our data base, we have identified the following documents corresponding with your request:

- **7864/19**, annual report from the High Representative of the Union for Foreign Affairs and Security Policy to the Council on the status of the implementation of the Permanent Structured Cooperation (PESCO) (2018 report);

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).

- **7864/19 ADD 1**, Addendum to the abovementioned document, containing an assessment of the Member States' National Implementation Plans (NIPs). This document bears the classification mark "**RESTREINT EU/EU RESTRICTED**", which means that the unauthorised disclosure of its contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.²
- **7320/20**, annual report from the High Representative of the Union for Foreign Affairs and Security Policy on the status of PESCO Implementation (2019 report).

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

These reporting documents were elaborated in accordance with Article 6(3) of the Council Decision (CFSP) 2017/2315 establishing PESCO. They contain sensitive information provided by participating Member States, drawn from their own national implementation plans (NIPs) as baseline for continuous assessment and reviewing of, among others, objectives, investments, current and new projects, and the fulfilment by each participating Member State of the strategic and operational commitments in this framework in accordance with its NIP. They also table recommendations for optimizing the implementation mechanisms and the information exchanges.

Having due regard to the content of these documents and in the light of consultations with our policy directorate responsible for this matter and with the European External Action Service, the General Secretariat concluded that the disclosure of such documents would prejudice the European Union's action in this sensitive field as it would reveal confidential strategic data that could be used by hostile entities to cause disruption and prejudice to the EU's activities in this field, with a negative impact also on its international relations.

As a consequence, regretfully the General Secretariat has to refuse access.³

We have also looked into the possibility of releasing parts of documents **7864/19 + ADD 1** and **7320/20**. However, as the information therein contained forms an inseparable whole, the General Secretariat is unable to give partial access.

² Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1.

³ Article 4(1)(a), second and third indent of Regulation (EC) No 1049/2001.

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.⁴

Yours sincerely,

Fernando FLORINDO

⁴ 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.

[E-mail message sent to access@consilium.europa.eu on 29 June 2020 - 17:13]

From: **DELETED**

Sent: Monday, June 29, 2020 5:13 PM

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

Subject: RE: Ref. 20/1100-vl/mf

Hi there,

Please find attached our request for a review of the decision to refuse the above request.

All the best,

DELETED

Mr. Fernando Florindo,
Council of the European Union,
General Secretariat,
Directorate General Communication and Information,
Directorate Information and Outreach,
Information Services Unit/Transparency

29 June 2020

Dear Fernando,

Thank you for your letter of 9 June 2020 in regard to our request for documents (ref: 20/1100-vl/mf).

We would like to appeal the decision to refuse our request. Please find below an outline of the reasons for our appeal.

Refusal to release the documents requested

You write:

‘The General Secretariat concluded that the disclosure of such documents would prejudice the European Union’s action in this sensitive field as it would reveal confidential strategic data that could be used by hostile entities to cause disruption and prejudice to the EU’s activities in this field, with a negative impact also on its international relations.’

The exemptions provided for in Article 4(1) of Regulation (EC) No 1049/2001 turn on the effect that release of records would have on the public interest:

‘The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;’

The impact on the public interest as regards any of these matters is not elucidated in the letter rejecting our request - we are told instead that release could ‘cause disruption and prejudice to the EU’s activities in this field, with a negative impact also on its international relations’. It is not clear here to what ‘the EU’ refers - is it to the EU institutions? A specific EU institution? Is it to the Member States as a whole? To some Member States but not others? Here, the ‘public interest’ is assumed to be identical with an undefined EU actor (‘the EU’s activities’), but such identity cannot simply be assumed, it must be justified. As it has not been justified in this case, we query its use as grounds for refusing release of the documents concerned. Nor is it clear from the letter what ‘this field’ is - is it PESCO? The CSDP? - which makes it all the more difficult to understand if the test set out in Article 4(1) has in fact been met.

Refusal to release documents in redacted format

Article 4(6) of Regulation (EC) No 1049/2001 states:

‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

We fail to understand how ‘the information [in documents 7864/19, 7864 ADD 1 and 7320/20]... forms an inseparable whole,’ as posited in the refusal letter. Is the position that every single word and sentence in those documents contains sensitive information? We cannot believe that to be the case, so we do not accept that it is not possible to release these records with the sensitive aspects redacted.

We would note further that commitments under PESCO, and actions taken, involve expenditure, and commitments to expend, significant sums from public funds across the EU. That’s quite apart from the high level of public interest in the implementation of PESCO, given the effects of the agreement on a range of areas from the economic to the social as it is implemented. It is of some concern, therefore, if these documents are not made available for public scrutiny and debate.

Yours sincerely,

DELETED
