



Council of the  
European Union

049132/EU XXVII. GP  
Eingelangt am 03/02/21

Brussels, 3 February 2021  
(OR. en)

5798/21

INF 18  
API 13

#### NOTE

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 04/c/01/20

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 4 January 2020 and registered on 5 January 2021 (Annex 1);
- reply from the General Secretariat of the Council dated 25 January 2021 (Annex 2);
- confirmatory application dated 29 January 2021 (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 4 January 2021 - 19:27 using the electronic form available in the Register application]

This e-mail has been sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) using the electronic form available in the Register application.

This electronic form has been submitted in ENGLISH.

**Family name**

Magalhaes

**First name**

José

**E-mail**

jose.Magalhaes@ps.parlamento.pt

**Occupation**

Other

**On behalf of**

MP office

**Full postal address**

DELETED

**Telephone**

DELETED

**Mobile telephone**

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**Fax**

**Requested document(s)**

ST 12515 2020 REV 1 DCL 1 - DECLASSIFICATION 20/11/2020

EPPO: Process for the appointment of the European Prosecutors - request, submitted by

Ms. Ana Carla MENDES DE ALMEIDA, dated 20 October 2020

**1st option**

EN

**2nd option**

PT

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, 25 January 2021

Mr José Magalhaes  
Email: jose.Magalhaes@ps.parlamento.pt

Ref. 21/0029-rh/vk

Request made on: 04.01.2021  
Registered on: 05.01.2021

Dear Mr Magalhaes,,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

I regret to inform you that access to document **ST 12515/20 REV 1 DCL 1** cannot be given for the reasons set out below.

Document **ST 12515/20 REV 1 DCL 1** is a declassified version of document **12515/20 REV 1 RESTREINT UE/EU RESTRICTED** which is a note from the General Secretariat of the Council to delegations on *EPPO: Process for the appointment of the European Prosecutors - request, submitted by Ms. Ana Carla MENDES DE ALMEIDA, dated 20 October 2020*.

By the present, I regret to inform you that the General Secretariat of the Council is unable to make the requested document public, in the sense of a disclosure with an *erga omnes* effect, allowing any person to have access to the document in question.

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<sup>1</sup> 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).

First, the requested document, which comprise *inter alia* an assessment of the candidate's legal expertise, professional experience and ability to perform the duties of European Prosecutor, contain personal data of the candidates for the appointment of the European Prosecutors. Therefore they fall within the scope of the exception relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). The notion of personal data is interpreted broadly in the case-law of the Court. It manifestly covers both the factual elements concerning the candidates' professional experience and qualifications and the selection panel's individual as well as comparative assessment of the candidate's merits.

According to established case law, where a request seeks to obtain access to a document including personal data, the legal framework on the protection of individuals with regard to the processing of personal data by the European institutions and bodies becomes applicable in its entirety.

More specifically, according to Article 9 of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, "*personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if:*

*(a) the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient; or*

*(b) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.*

*(...) Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law".*

In your request you have not established the necessity of the transfer of the personal data contained in the requested document.

Second, the Council considers that disclosure of the requested document is likely to cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.

In particular, the disclosure of the information contained in the document sought for public release, such as the assessment of the candidates' merits or the comparative assessment of merits of various candidates, could be relevant for any other position both in the public or the private sector for which the candidate could be considered in the future since it shows the capabilities of the candidate as legal professional.

As such, it could have a significant negative impact on the candidates' career prospects and in particular their chances to succeed in other competitions.

Inevitably, this risk is even higher where disclosure relates to an opinion on the appointment of a candidate that is unfavourable or could be interpreted as such.

It follows that the disclosure of the requested document is likely to undermine the protection of the candidates' commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001), in the event that they carry out or intend to carry out paid work after the selection procedure is over or after their term as European Prosecutor has finished.

Under these circumstances, the GSC is unable to grant public access to the parts of the requested document revealing background data for assessing the suitability of the candidates to perform the duties as European Prosecutor.

Third, the GSC considers that full disclosure of the requested document, and especially of information concerning the candidates' suitability to perform the duties of European Prosecutor, would seriously undermine the aims and quality of the selection and appointment procedures provided for in Articles 14 to 16 of the EPPO Regulation. It follows that your request to access this document has to be refused on the basis of Article 4(3) of Regulation (EC) No 1049/2001.

The selection procedures for the post of European Prosecutor are very specific in nature. They include several distinct stages, starting with a selection procedure organised by the authorities of each of the interested Member States (Article 16(1) of the EPPO Regulation), an assessment by an independent panel set up in accordance with Article 14(3) of the EPPO Regulation and a final assessment on the basis of the documents brought to the attention of the Council by the interested Member States and the selection panel itself, leading to the adoption of a Council decision on the appointment (Article 16(3) of the EPPO Regulation).

In the light of that particular nature of those procedures, the publication of the selection panels' opinions, rankings and other documents in relation to the deliberations in the Council and its preparatory bodies would directly affect the confidential nature of the deliberations of the selection panel, as expressly foreseen in Rule IV of the operating rules of the selection panel<sup>2</sup>. It would also undermine the secrecy of deliberations of the Council and its various preparatory bodies involved in the assessment of the candidatures, provided for in Article 6(1) of the Council Rules of Procedure. Moreover, public access to documents produced on different stages of that process by different stakeholders would undermine the proper conduct of those procedures.

On the one hand, disclosure of the requested document would inevitably affect working methods of the Member States and of the selection panel in any future selection procedures. Inevitably, it would make the Member States and the Panel be more restrained and guarded when giving the reasons for their assessment. That, over a time could lead to the situation that the Council would not be able to obtain complete, relevant and useful explanation of the rationale for those assessments, whether favourable or unfavourable.

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<sup>2</sup> Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (*OJ L 282, 12.11.2018, p. 8–12*).

On the other hand, the disclosure of this document is also likely to have a negative impact on the potential candidates interested to apply in the future for the post of European Prosecutor. Such disclosure might also dissuade certain even highly qualified individuals from applying in the future because, even if the assessment of their merits were favourable, the documents produced in the course of the procedure contain detailed comments on the abilities of the candidates, some of whom might fear a negative impact on their reputation.

It follows that the disclosure of the document sought could have broader systemic implications for the correct functioning of selection procedures for European Prosecutors.

Fourth, having examined the context in which the requested document was drafted, on balance the General Secretariat of the Council could not identify any evidence suggesting the existence of an overriding public interest in its disclosure.

Finally, the General Secretariat of the Council has also examined the possibility of releasing parts of the document.<sup>3</sup> However, since it has been established that the abovementioned exceptions to the right of access apply to its entire content, the General Secretariat of the Council is obliged to refuse even a partial access.

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.<sup>4</sup>

Yours sincerely,

Fernando FLORINDO

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

<sup>4</sup> 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](mailto:access@consilium.europa.eu) on 29 January 2021 - 13:43]

Dear Sirs,

I am sending my request to a review of the decision taken on my request above identified.

Yours truly,

José Magalhães, MP

Dear Sirs,

I acknowledge the receipt of your letter on the request I presented according to applicable regulations in order to have access to Document ST 12515/20 REV 1 DCL 1, a declassified version of document 12515/20 REV 1 RESTREINT UE/EU RESTRICTED which is a note from the General Secretariat of the Council to delegations on *EPPO: Process for the appointment of the European Prosecutors - request, submitted by Ms. Ana Carla MENDES DE ALMEIDA, dated 20 October 2020*.

The request has been denied. I am therefore in due time asking for a review of the decision, in the following terms.

1. EU legislation allows transmission of *personal data* to recipients established in the Union other than Union institutions and bodies if:

(a) “the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient; or  
(b) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest (...)”.

(...) Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law”.

2. The signatory is a member of the portuguese Parliament

[<https://www.parlamento.pt/DeputadoGP/Paginas/Biografia.aspx?BID=189>] and Vice-President of the Civil Liberties Committee. In that capacity I participated in several debates on the appointment of the European Prosecutors.

The selection procedure in Portuguese institutions has been largely made public, according to national law. Not so the proceedings of the EU selection panel and the grounds for the choices made and transmitted to the Council.

European citizens do not know if the Panel made a quantitative evaluation or a qualitative one and the reasons that led to the final ranking of the candidates, both of them excellent members of the Public Prosecutor's Office.

- a) Keeping those data under secrecy is having negative consequences on the ongoing democratic debate in Portugal but also at the EU level.

The content of the proceeding has been leaked. A certain version of the facts became a tool currently used in political debates to criticize both the Council and the Portuguese Government, causing reputational damages to the candidate ultimately selected by the Council.

The Secretariat of the Council considers that "disclosure of the requested document is likely to cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests".

- b) There is no reason to establish that the disclosure of the information contained in the document sought for public release, namely the assessment of the candidates' merits or the comparative assessment of merits of various candidates, could have negative impact in eventual efforts to have access to any future position both in the public or the private sector.

Very much on the contrary, the Selection Panel made public its generic opinion favoring the candidate Ana Carla Almeida. The public does not know why and how that opinion was made.

The decision of the Council on the appointment of a candidate, unfavourable to procurer Ana Almeida was not requested, as it is well known.



c) The disclosure will not “undermine the protection of the candidates' commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001), in the event that they carry out or intend to carry out paid work after the selection procedure is over or after their term as a European Prosecutor has finished”. The norm invoked does not apply as both procurers are life-long members of the Public Prosecutor’s Office, and by definition have no commercial interests. Secrecy may damage their legitimate interests.

3. The request to access the mentioned document should not be refused on the basis of Article 4(3) of Regulation (EC) No 1049/2001.

The documents requested are only the ones related to the assessment by an independent panel set up in accordance with Article 14(3) of the EPPO Regulation and the documents brought to the attention of the Council by the interested Member States and the selection panel itself, leading to the adoption of a Council decision on the appointment (Article 16(3) of the EPPO Regulation). The documents resulting from opinions of national institutions are not requested.

4. Existing rules of procedure should not be interpreted as forbidding the disclosure of the document requested. As stated, it has been leaked out. A version of the content well disseminated inverts the probable meaning of what the opinion says.

That “alternative reality” invades political debate, and makes the case for the decisive role of transparency. The requested disclosure might also help avoiding the negative impact of the present disgusting case. Highly qualified individuals should be able to keep applying in the future without fearing that the favourable assessment of their merits will be under secrecy, thus making impossible to deny lies.

5. The General Secretariat of the Council could not identify any evidence suggesting the existence of an overriding public interest in the disclosure of the requested documents.

The facts mentioned in the present text can in its entirety be proved by consulting parliamentary debates and the main newspapers, available at [news.google.pt](https://news.google.pt) (query “procurador europeu”).

6. The General Secretariat of the Council has also examined the possibility of releasing parts of the document, but considered that partial access would be a breach of the conclusion that the entire content of the document should be kept secret.

The conclusion does not stand if facts (not “alternative facts”) above mentioned are taken into consideration. On the contrary, it is of utmost importance to combat fake news on a decision of the Council, which can only be achieved through transparency.

Yours Truly,  
José Magalhães, MP

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