



Council of the
European Union

Brussels, 13 April 2021
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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 10/c/01/21

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 26 February 2021 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 19 March 2021 (Annex 2);
- confirmatory application dated 12 April 2021 and registered on 13 April 2021 (Annex 3).

[Email message sent to the General Secretariat of the Council on 26 February 2021 at 15:18 using the electronic form available in the Register application]

From: **DELETED**

Sent: Friday, February 26, 2021 3:18 PM

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

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

Family name **DELETED**

First name **DELETED**

E-mail **DELETED**

Occupation Academia

On behalf of Myself (research purposes)

Full postal address **DELETED**

Requested document(s)

ST 12822 2017 INIT - 'I/A' ITEM NOTE

ST 11907 2017 INIT

ST 11907 2017 REV 1 NOTE

ST 8570 2018 INIT - 'I/A' ITEM NOTE

ST 11428 2017 INIT - 'I/A' ITEM NOTE

ST 10600 2018 INIT - 'I/A' ITEM NOTE

ST 8894 2016 ADD 1

ST 8894 2016 INIT



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, 19 March 2021

Ms **DELETED**
Email: **DELETED**

Ref. 21/0517-rh/mf

Request made on: 26.02.2021

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 **8894/16 INIT + ADD1**, **11428/17**, **11907/17 INIT + REV1**, **12822/17**, **8570/18** and **10600/18** cannot be given for the reasons set out below.

Documents **8894/16 INIT + ADD1** of 12 May 2016 contain recommendation for a Council Decision authorising the opening of negotiations on an agreement between the EU and the Federal Republic of Nigeria on readmission. They are classified document bearing the classification "RESTREINT UE". This means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.²

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 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.

Document **11428/17** of 24 July 2017 is a note from the General Secretariat of the Council to the Permanent Representatives Committee/Council on *EU- Guinea good practices for the efficient operation of the return procedure*.

Documents **11907/17 INIT + REV1** of 5 September and 3 October 2017 are notes from Commission services to delegations, document **12822/17** of 10 October 2017 is a 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part 2)/Council on *Draft EU-Gambia good practices for the efficient operation of the return procedure*.

Document **8570/18** of 4 May 2018 is an "I/A Item" Note to the Permanent Representatives Committee (COREPER) and to the Council on *Good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorisation to stay*.

Document **10600/18 INIT** of 2 July 2018 is an 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part 2)/Council on *Joint document of the Government of the Ivory Coast and the European Union on the procedures for identification and readmission of migrants presumed to be Ivorian nationals staying irregularly in the European Union - Endorsement*.

All these documents are related to practical arrangements as regard return and readmission between the EU and third countries. The positions contained in the documents aim to implement the commitments from both sides to develop cooperation in the area of return and readmission, by jointly defining the procedures, best practices and detailed operational provisions for the efficient operation of the readmission process.

Having regard to the abovementioned sensitive issues, disclosure would reveal to other negotiating partners the strategic approach in the implementation of the EU's mandate, thus weakening its negotiation position, complicating further developments of the ongoing readmission mechanisms and even compromising further similar agreements. Other negotiating partners could use the already reached agreements as leverage in negotiations if they had access to such documents.

The guarantee of confidentiality is key for the success of this complex exercise, which aims to secure both the interests and values of the EU.

Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access to them.³

We have also looked into the possibility of releasing parts of these documents.⁴ However, as the information contained in the documents forms an inseparable whole, the General Secretariat is also unable to give partial access to them.

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.⁵

Yours sincerely,

Fernando FLORINDO

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

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

⁵ 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.

[Email sent to access@consilium.europa.eu on 12 April 2021 - 17:41]

From: DELETED

Sent: Monday, April 12, 2021 5:41 PM

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

Subject: Re: Ref. 21/0517-rh/mf - Confirmatory application

Dear Mr. Florindo and staff of the General Secretariat of the Council,

Thank you for your response. Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, please find attached a letter asking the Council to review this decision.

Best regards,

DELETED

Amsterdam, 12 April 2021

Council of the European Union
General Secretariat

Directorate-General Communication and
Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Subject: Request for access to documents 8894/16 INIT + ADD1, 11428/17, 11907/17 INIT + REV1, 12822/17, 8570/18 and 10600/18 made on 26 February 2021, Ref. 21/0517-rh/mf

1. Subject of dispute

On 26 February 2021, I requested access to Council documents 8894/16 INIT + ADD1, 11428/17, 11907/17 INIT + REV1, 12822/17, 8570/18 and 10600/18. The documents are related to practical arrangements as regard return and readmission between the EU and third countries. In its letter of 19 March 2021, the General Secretariat refused access to the requested documents.

The General Secretariat justified its refusal to grant access relying on the following reasons. First, regarding documents 8894/16 INIT + ADD1 of 12 May 2016 that contain recommendation for a Council Decision authorising the opening of negotiations on an agreement between the EU and the Federal Republic of Nigeria on readmission, the General Secretariat argued that ‘They are classified document bearing the classification “RESTREINT UE”. This means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.’ The General Secretariat referred to Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU).⁶

⁶ OJ L 274, 15.10.2013, p. 1.

Secondly, regarding the other documents requested, the General Secretariat argued that ‘All these documents are related to practical arrangements as regard return and readmission between the EU and third countries. The positions contained in the documents aim to implement the commitments from both sides to develop cooperation in the area of return and readmission, by jointly defining the procedures, best practices and detailed operational provisions for the efficient operation of the readmission process. Having regard to the abovementioned sensitive issues, disclosure would reveal to other negotiating partners the strategic approach in the implementation of the EU’s mandate, thus weakening its negotiation position, complicating further developments of the ongoing readmission mechanisms and even compromising further similar agreements. Other negotiating partners could use the already reached agreements as leverage in negotiations if they had access to such documents. The guarantee of confidentiality is key for the success of this complex exercise, which aims to secure both the interests and values of the EU. Disclosure of the documents would therefore undermine the protection of the public interest as regards international relations.’

Finally, the General Secretariat explained that although it had considered the possibility to release parts of the documents, ‘as the information contained in the documents forms an inseparable whole, the General Secretariat is also unable to give partial access to them’.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, I hereby ask the Council to review this decision for the following reasons.

2. Irrelevance of ‘RESTREINT UE’ classification for public disclosure

The General Secretariat seems to suggest in its reply that the classification of certain documents as ‘RESTREINT UE’ has automatic consequences for their public disclosure. Regarding documents 8894/16 INIT + ADD1, the General Secretariat argued that the documents are classified as ‘RESTREINT UE’, which ‘means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.’

The General Secretariat referred to Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU).

According to Article 2(1) of the Council Decision of 23 September 2013, ‘EU classified information’ (EUCI) means any information or material designated by a EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or of one or more of the Member States.’ Furthermore, according to Article 2(2)(d), the classification ‘RESTREINT UE/EU RESTRICTED’ refers to ‘information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or of one or more of the Member States.’

Article 9 of Regulation (EC) 1049/2001 concerns ‘Treatment of sensitive documents’. It lays down the rules for registering such documents and handling applications for access to sensitive documents. Under paragraph 4, ‘An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4’. This means that a classification is not decisive in establishing whether one of the exception grounds in Article 4 can be applied.

Moreover, documents classified as ‘RESTREINT UE’ do not fall within the definition of Article 9(1) of Regulation (EC) No 1049/2001 concerning the definition of ‘sensitive documents’. Article 9(1) defines ‘sensitive documents’ as ‘documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters’. Documents 8894/16 INIT + ADD1 are classified as ‘RESTREINT UE’, which is a classification that does not belong to the list of sensitive documents as defined in Article 9(1). Only documents classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned may constitute ‘sensitive documents’. Consequently, classifying a document as ‘RESTREINT UE’ does not justify its non-disclosure.

For this reason, I request that the Council reviews its decision. Contrary to what the Council Secretariat argues, Article 9 cannot be used as a ground for refusing disclosure under Regulation (EC) No 1049/2001.

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

Regarding documents 11428/17, 11907/17 INIT + REV1, 12822/17, 8570/18 and 10600/18, the General Secretariat argued that their disclosure would undermine the protection of the public interest as regards international relations.

According to Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations. However, Regulation 1049/2001 is built on the presumption of access to documents, which is why exceptions provided by Article 4 depart from the principle of the widest possible access and have to be interpreted strictly.⁷ Even if Article 4(1)(a) allows to refuse access where disclosure would undermine the protection of the public interest as regards international relations, it is important to underline that international relations, as a policy field, are not a categorical exception. Each exception must be substantiated case by case: the institution must explain how disclosure of the requested document could specifically and effectively undermine the interest protected by the exception.⁸ The risk of undermining the relevant interest must also be ‘reasonably foreseeable and not purely hypothetical’.⁹

⁷ Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 36.

⁸ Case C-506/08 P *Sweden v MyTravel Group plc and European Commission* EU:C:2011:496, para 76; Case C-350/12 P *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 52.

⁹ *Sweden v MyTravel Group plc and European Commission*, para 76; *Sweden and Turco v Council*, para 43.

Concerning the requested documents, the General Secretariat has not explained how disclosure could specifically and actually undermine the interest protected by the exception laid down in third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001. Rather, the General Secretariat has provided the same general explanation for all the requested documents (except for documents 8894/16 INIT + ADD1, which were refused access based on their classification). In particular, the impact of disclosure of the documents on future negotiations is questionable and hypothetical. The Court has required the institution to demonstrate that there is a tangible element of the decision-making process being undermined. The institution must demonstrate that there is a risk of serious prejudice to the decision-making process which is not merely hypothetical.¹⁰ The argument that there might be future negotiations, but without specifying what, when and with whom, remains too hypothetical and unsubstantiated to fulfil the criterion set in this jurisprudence.

Moreover, some of the requested documents have been disclosed by a third party and are already available in the public domain.¹¹ Consequently, the General Secretariat's argument that disclosure would be detrimental to the negotiations is not credible, as current and future negotiating partners can easily access them online already.¹² While previous unauthorised disclosure by a third party is not directly relevant for the application of Regulation (EC) No 1049/2001, the fact that a document is already in the public domain where it can be easily consulted by anyone interested makes it particularly difficult for the institution to establish that formal disclosure at a subsequent date would be harmful to the protected interest. To the extent that there is harm from disclosure, this is already created by the unauthorised publication. The formal disclosure by the institution at a later date would no longer seem to add to this harm, presuming that the published document corresponds to its position. In that case, it is the practice of leaking that might be harmful to the Union interest, not the subsequent disclosure decision of the Union institution.

¹⁰ Case T-395/13 *Miettinen v Council* EU:T:2015:648, paras 63-65.

¹¹ Document 11428/17: <https://lifos.migrationsverket.se/dokument?documentAttachmentId=46630>; document 10600/18 INIT: <https://lifos.migrationsverket.se/dokument?documentAttachmentId=46616>.

¹² See eg Case C-350/12 P *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 60.

On the contrary, refusing to formally disclose at that stage risks undermining the credibility of the institution. According to recent case law, the fact that some of the documents have already been disclosed by third parties does not mean that the Council would be relieved of its obligation to grant access to the requested documents. In circumstances in which a document has been disclosed by a third party, the person requesting the document retains a genuine interest in obtaining access to an authenticated version of the requested document, guaranteeing that the institution is the author and that the document expresses its official position.¹³

Furthermore, while the requested documents fall under international relations, they have an impact on EU legislation. The General Court has held that the importance of transparency could not ‘be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union’s legislative activity’.¹⁴ The requested documents have an impact on the application of existing EU legislation, most importantly the Return Directive.¹⁵ They potentially also have an impact on the ongoing reform of the internal dimension of EU migration control, the new Pact on Migration and Asylum, one of the aims of which being ‘to boost a common EU system for returns’.¹⁶

Even if the matter was considered non-legislative, non-legislative activity of the institutions does not fall outside the scope of Regulation (EC) No 1049/2001. This is confirmed by case law¹⁷ as well as in Article 2(3) of the Regulation, according to which it applies ‘to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union’, as well as in case law.

¹³ Case C-761/18 P *Leino-Sandberg v Parliament* EU:C:2021:52, paras 47–49.

¹⁴ Case T-529/09 *Sophie in 't Veld v the Council supported by the Commission*, para 89; see also *Council of the European Union v Sophie in 't Veld*, paras 106-107.

¹⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348*, 24.12.2008, p. 98–107.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706

¹⁷ *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 107; *Sweden v MyTravel and Commission*, paras 87-88, 109.

Even if the international relations exception is formulated as a categorical exception, there is nothing in Regulation (EC) No 1049/2001 that prevents the institution from proactive disclosure policies. Under Article 1 TEU, decisions in the EU ‘are taken as openly as possible and as closely as possible to the citizen’. This sets the EU institution under a general obligation to always strive for the maximum level of openness. It is absurd to read Regulation (EC) 1049/2001 as preventing this objective. Practical arrangements concerning return and readmission potentially have severe implications for the fundamental rights of individuals affected, which is why the need for public disclosure for such arrangements is particularly high and relevant for upholding the legitimacy of the Union.

For these reasons, Article 4(1) has been misapplied and full access to the requested documents should be granted.

4. Partial access

The General Secretariat explained that although it had considered the possibility to release parts of the requested documents, ‘as the information contained in the documents forms an inseparable whole, the General Secretariat is also unable to give partial access to them’.

According to Article 4(6) of the Regulation (EC) No 1049/2001, ‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released’. In other words, partial access must be granted if the whole document cannot be disclosed, and the examination of partial access must be carried out in the light of the principle of proportionality.¹⁸

¹⁸ Case C-353/99 P *Council v Hautala* EU:C:2001:661, paras 27 and 28.

The General Secretariat argued that partial access cannot be granted because ‘the information contained in the documents forms an inseparable whole’. Furthermore, the reasoning of the General Secretariat does not demonstrate which factors were taken into account in assessing the proportionality of granting partial access. As the Court confirmed already in 2001 in [Case C-353/99 P](#),

a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions. [...] the aim pursued by the Council in refusing access to the contested report could be achieved even if the Council did no more than remove, after examination, the passages in the report which might harm international relations.

The Court pointed out how the interpretation put forward by the Council at that time

would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4(1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced.

It is striking that the Council continues to present the same excuse twenty years later. I expect the Council to apply this jurisprudence also in 2021. It is not credible that every sentence in all the requested documents would be covered by the exception of Article 4(1) of the Regulation, or that the Council has engaged in a serious examination of the requested documents for the purposes of applying Article 4(6) of Regulation (EC) [1049/2001](#). For this reason, I request the Council to review the possibility of partial access.

5. Requested action

For the above reasons, I request that the General Secretariat reconsider its earlier decision and disclose the full documents at its earliest possible convenience.

Yours sincerely,

DELETED
