



Council of the  
European Union

Brussels, 5 May 2021  
(OR. en)

8453/21

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**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 19/c/02/21

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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);
- the reply from the General Secretariat of the Council dated 14 April 2021 and 23 April 2021 (Annex 2);
- the confirmatory application dated 4 May 2021 (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 26 February 2021 - 15:26 using the electronic form available in the Register application]

**From:** DELETED

**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

**Requested document(s)**

ST 9233 2020 INIT - 'I/A' ITEM NOTE  
CM 1559 2021 INIT - WRITTEN PROCEDURE  
CM 1456 2021 INIT - WRITTEN PROCEDURE  
ST 5287 2021 INIT - 'I' ITEM NOTE  
ST 5223 2021 ADD 1 – NOTE  
ST 5223 2021 INIT - NOTE  
CM 4736 2020 INIT  
CM 4735 2020 COR 1 - WRITTEN PROCEDURE  
CM 4735 2020 INIT - WRITTEN PROCEDURE  
ST 12896 2020 COR 1 - 'I' ITEM NOTE  
ST 12896 2020 INIT - 'I' ITEM NOTE  
ST 10652 2020 INIT - 'I/A' ITEM NOTE  
CM 2337 2020 INIT - WRITTEN PROCEDURE  
CM 2335 2020 COR 1 - WRITTEN PROCEDURE  
CM 2335 2020 INIT - WRITTEN PROCEDURE  
ST 8179 2020 INIT - 'I' ITEM NOTE  
ST 12191 2016 INIT - 'I/A' ITEM NOTE  
ST 6738 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, 14 April 2021

**DELETED**

Email: **DELETED**

Ref. 21/0521-rh-vl/ns

Request made on: 26.02.2021

Deadline extension: 19.03.2021

Dear **DELETED**,

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

Please find attached the following documents:

CM 1456/21

CM 1559/21

CM 2335/20 INIT + COR 1

CM 2337/20

CM 4735/20 INIT + COR 1

CM 4736/20

I regret to inform you that access to documents **ST 5223/21 INIT + ADD 1**, **ST 5287/21**, **ST 9233/20** and **ST 12191/16** cannot be given for the reasons set out below.

Document **5223/21 INIT** of 13 January 2021 is a note from the Commission to delegations on the *Commission's request for endorsement of the Joint Declaration on Migration Cooperation between Afghanistan and the EU*.

<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).

Document **5223/21 ADD 1** of 13 January 2021 is a note from the Commission to delegations on the *Joint Declaration on Migration Cooperation between Afghanistan and the EU*.

Document **5287/21** of 22 January 2021 is an 'I' item note from the general Secretariat of the Council to the Permanent Representatives Committee (Part 2) on the *Joint Declaration on Migration Cooperation between Afghanistan and the EU - authorization of signing/approval - Decision to use the written procedure*.

Document **9233/20** of 3 July 2020 is a 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee/Council on *Extension of the Joint Way Forward on Migration Issues between Afghanistan and the EU*.

Document **12191/16** of 22 September 2016 is a 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part 2)/Council on *Draft Joint Way Forward on migration issues between Afghanistan and the EU - Adoption*.

The release of the information contained in the documents would have a negative impact on the relations between the European Union and the third country concerned and the EU's position in negotiations with third countries as it would reveal principles and positions of the EU in the course of negotiations with the Afghan government.

Therefore, having also consulted originating source of documents when necessary, the General Secretariat is of the opinion that the disclosure of the documents would undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access.<sup>1</sup>

We have also looked into the possibility of releasing parts of the documents.<sup>2</sup> However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give 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>3</sup>

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<sup>1</sup> Article 4(1)(a), third indent, of Regulation (EC) No **1049/2001**.

<sup>2</sup> Article 4(6) of Regulation (EC) No **1049/2001**.

<sup>3</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.

We will send you a complement to this letter concerning the remaining documents as soon as possible (probably by the end of this week).

Yours sincerely,

Fernando FLORINDO

Enclosures



**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, 23 April 2021

**DELETED**

Email: **DELETED**

Ref. 21/0521-rh/nb ADD2

Request made on: 26.02.2021

Deadline extension: 19.03.2021

Dear **DELETED**,

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

Further to our letter of 14 April 2021, I regret to inform you that access to document **6738/16** cannot be given for the reasons set out below.

Document **6738/16** of 3 March 2016 is a *Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan*. It is a classified document bearing the classification "RESTREINT UE". This means that the unauthorised disclosure of its content could be disadvantageous to the interests of the European Union or of one or more of its Member States.<sup>2</sup>

The release of the information contained in the document would have a negative impact on the relations between the European Union and the third country concerned and the EU's position in negotiations with third countries as it would reveal principles and positions of the EU in the course of negotiations with the Afghan government.

<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).

<sup>2</sup> 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.

Therefore, having consulted originating sources of the document, the General Secretariat is of the opinion that the disclosure of the document would undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access.<sup>1</sup>

We have also looked into the possibility of releasing parts of the document.<sup>2</sup> However, as the exception to the right of access applies to its entire content, the General Secretariat is unable to give 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>3</sup>

Yours sincerely,

Fernando FLORINDO

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

<sup>2</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>3</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 4 May 2021 - 16:23]

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

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

Best regards,

**DELETED**

*Subject:* Request for access to documents made on 26 February 2021 (Ref. 21/0521-rh-vl/ns)

## **1. Subject of dispute**

On 26 February 2021, I requested access to Council documents CM 1456/21, CM 1559/21, CM 2335/20 INIT + COR 1, CM 2337/20, CM 4735/20 INIT + COR 1, CM 4736/20, ST 5223/21 INIT + ADD 1, ST 5287/21, ST 9233/20 and ST 12191/16. The documents are related to practical arrangements as regard return and readmission between the EU and Afghanistan.

In its letter of 14 April 2021, the General Secretariat granted access to documents CM 1456/21, CM 1559/21, CM 2335/20 INIT + COR 1, CM 2337/20, CM 4735/20 INIT + COR 1, CM 4736/20 and refused access to documents ST 5223/21 INIT + ADD 1, ST 5287/21, ST 9233/20 and ST 12191/16.

The General Secretariat justified its refusal to grant access relying on the following reasons. First, regarding documents ST 5223/21 INIT + ADD 1, ST 5287/21, ST 9233/20 and ST 12191/16, the General Secretariat argued that ‘The release of the information contained in the documents would have a negative impact on the relations between the European Union and the third country concerned and the EU's position in negotiations with third countries as it would reveal principles and positions of the EU in the course of negotiations with the Afghan government. Therefore, having also consulted originating source of documents when necessary, the General Secretariat is of the opinion that the disclosure of the documents would undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access.’ Second, the General Secretariat explained that although it had considered the possibility to release parts of the documents, ‘as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access’.

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



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

Regarding documents ST 5223/21 INIT + ADD 1, ST 5287/21, ST 9233/20 and ST 12191/16, 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.<sup>10</sup> 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.<sup>11</sup> The risk of undermining the relevant interest must also be 'reasonably foreseeable and not purely hypothetical'.<sup>12</sup>

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. In particular, the impact of disclosure of the documents on future negotiations is questionable and hypothetical. For instance, document 12191/16, the draft of the Joint Way Forward, has been superseded by the official agreement and by a successive agreement with Afghanistan, which makes it hard to argue that disclosing it would have an impact on future negotiations. 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.<sup>13</sup> The argument that there might be future negotiations with Afghanistan and other third countries, but without specifying what and when, remains too hypothetical and unsubstantiated to fulfil the criterion set in this jurisprudence. The documents to which the General Secretariat granted access are technical and procedural in nature – for example, a communication<sup>14</sup> concerning the approval of the Joint Declaration on Migration Cooperation between Afghanistan and the EU, which the General Secretariat did not disclose – and do not provide information about the content of the arrangements made with Afghanistan. Accepting the General Secretariat's position would therefore imply that the Council and the Commission are virtually exonerated from ever disclosing any substantive documents concerning any types of negotiations with any third countries.

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<sup>10</sup> Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 36.

<sup>11</sup> 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.

<sup>12</sup> *Sweden v MyTravel Group plc and European Commission*, para 76; *Sweden and Turco v Council*, para 43.

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

<sup>14</sup> CM 1456/21.

Moreover, several of the requested documents have been disclosed by a third party and are already available in the public domain.<sup>15</sup> 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.<sup>16</sup> 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. On the contrary, refusing to formally disclose at that stage risks undermining the credibility of the institution. In the recent case of *Pech v Council*, the General Court held that while the fact that the content of a document was publicly known due to press leaks does not prevent the Council from relying on the exception provided in Regulation (EC) No 1049/2001 - in *Pech*, the exception concerning the protection of legal advice - the Council still has to explain 'how disclosure of the entire document could compromise its defence and its freedom to adapt its line of defence in judicial proceedings, on the ground that its position had already been revealed on certain issues'.<sup>17</sup> Furthermore, 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.<sup>18</sup>

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'.<sup>19</sup> The requested documents have an impact on the application of existing EU

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<sup>15</sup> Available documents online include: ST 5223/21 INIT, available at <https://www.statewatch.org/media/1693/eu-council-com-call-approval-afghanistan-deportation-agreement-5223-21.pdf>; ST 5223/21 ADD 1, available at <https://www.statewatch.org/media/1801/eu-council-joint-declaration-afghanistan-5223-21-add1.pdf>; ST 9233/20, available at <https://www.statewatch.org/media/1384/eu-council-joint-way-forward-afghanistan-renewal-9233-20.pdf>; ST 12191/16, available at <https://www.statewatch.org/media/documents/news/2016/sep/eu-council-afghanistan-12191-16.pdf>. As a matter of fact, all documents listed whose access was denied can be easily found online with the only exception of document ST 5287/21.

<sup>16</sup> See eg Case C-350/12 P *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 60.

<sup>17</sup> Case T- 252/19 *Pech v Council* EU:T:2021:203, para 91.

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

<sup>19</sup> 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.

legislation, most importantly the Return Directive.<sup>20</sup> 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’.<sup>21</sup> Furthermore, the requested documents may impact EU-Afghanistan relations as regulated by the EU-Afghanistan cooperation agreement on partnership and development, which has the status of formal international agreement and includes provisions on migration and readmission.<sup>22</sup>

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 law<sup>23</sup> 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. 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.

### 3. Partial access

The General Secretariat explained that although it had considered the possibility to release parts of the requested documents ST 5223/21 INIT + ADD 1, ST 5287/21, ST 9233/20 and ST 12191/16, it cannot grant partial access ‘as the exception to the right of access applies to their entire content’.

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.<sup>24</sup>

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<sup>20</sup> 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.

<sup>21</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)

<sup>22</sup> Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, *OJ L 67/3*, art. 28.

<sup>23</sup> *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.

<sup>24</sup> 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 exception to the right of access applies to their entire content’. 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.

#### **4. 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**

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 4 May 2021 - 16:31]

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**

*Subject:* Request for access to documents made on 26 February 2021 (Ref. 21/0521-rh/nb ADD2)

## 5. Subject of dispute

On 26 February 2021, I requested access to Council document 6738/16.

In its letter of 23 April 2021, the General Secretariat refused access to the document, which is a Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan.

First, the General Secretariat argued that the document ‘is a classified document bearing the classification "RESTREINT UE". This means that the unauthorised disclosure of its content could be disadvantageous to the interests of the European Union or of one or more of its Member States.’ Second, the General Secretariat argued that ‘[t]he release of the information contained in the document would have a negative impact on the relations between the European Union and the third country concerned and the EU's position in negotiations with third countries as it would reveal principles and positions of the EU in the course of negotiations with the Afghan government. Therefore, having consulted originating sources of the document, the General Secretariat is of the opinion that the disclosure of the document would undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access.’ Finally, the General Secretariat argued that it had looked into the possibility of releasing parts of document 6738/16 but is unable to grant partial access to the document ‘as the exception to the right of access applies to its entire content’.

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

## 6. 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. The General Secretariat argued that the document 6738/16 is classified as ‘RESTREINT UE’, which ‘means that the unauthorised disclosure of its content 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 an 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’. Document 6738/16 is 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.



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

The General Secretariat argued that the disclosure of the document 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.<sup>25</sup> 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.<sup>26</sup> The risk of undermining the relevant interest must also be 'reasonably foreseeable and not purely hypothetical'.<sup>27</sup>

Concerning the requested document, 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. 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.<sup>28</sup> The argument that there might be negotiations with other third countries, but without specifying when this would be the case and with which countries, remains too hypothetical and unsubstantiated to fulfil the criterion set in this jurisprudence. Accepting this position would therefore imply that the Council and the Commission are virtually exonerated from ever disclosing any substantive documents concerning any types of negotiations with any third countries.

Moreover, the requested document has been disclosed by a third party and is already available in the public domain.<sup>29</sup> 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 it online already.<sup>30</sup> 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

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<sup>25</sup> Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 36.

<sup>26</sup> 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.

<sup>27</sup> *Sweden v MyTravel Group plc and European Commission*, para 76; *Sweden and Turco v Council*, para 43.

<sup>28</sup> Case T-395/13 *Miettinen v Council* EU:T:2015:648, paras 63-65.

<sup>29</sup> <https://www.statewatch.org/media/documents/news/2016/sep/eu-council-afghanistan-readmission-6738-16.pdf>

<sup>30</sup> See eg Case C-350/12 P *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 60.

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. On the contrary, refusing to formally disclose at that stage risks undermining the credibility of the institution. In the recent case of *Pech v Council*, the General Court held that while the fact that the content of a document was publicly known due to press leaks does not prevent the Council from relying on the exception provided in Regulation (EC) No 1049/2001 – in *Pech*, the exception concerning the protection of legal advice – the Council still has to explain ‘how disclosure of the entire document could compromise its defence and its freedom to adapt its line of defence in judicial proceedings, on the ground that its position had already been revealed on certain issues’.<sup>31</sup> Furthermore, the fact that the requested document has already been disclosed by a third party does not mean that the Council would be relieved of its obligation to grant access. 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.<sup>32</sup>

Furthermore, while the requested document falls under international relations, it has 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’.<sup>33</sup> The requested document has an impact on the application of existing EU legislation, most importantly the Return Directive.<sup>34</sup> It potentially also has 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’.<sup>35</sup> Furthermore, the requested document may impact EU-Afghanistan relations as regulated by the EU-Afghanistan cooperation agreement on partnership and development, which has the status of formal international agreement and includes provisions on migration and readmission.<sup>36</sup>

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 law<sup>37</sup> 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. 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

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<sup>31</sup> Case T- 252/19 *Pech v Council* EU:T:2021:203, para 91.

<sup>32</sup> Case C-761/18 P *Leino-Sandberg v Parliament* EU:C:2021:52, paras 47–49.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)

<sup>36</sup> Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, *OJ L 67/3*, art. 28.

<sup>37</sup> *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.



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 document should be granted.

## 8. Partial access

The General Secretariat explained that although it had considered the possibility to release parts of the requested document, it cannot grant partial access 'as the exception to the right of access applies to its entire content'.

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.<sup>38</sup>

The General Secretariat argued that partial access cannot be granted because 'the exception to the right of access applies to its entire content'. Furthermore, the reasoning of the General Secretariat does not demonstrate which factors were considered 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 the requested document 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 document 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.

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<sup>38</sup> Case C- 353/99 P *Council v Hautala* EU:C:2001:661, paras 27 and 28.

## 9. Requested action

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

Yours sincerely,

**DELETED**

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