



Council of the
European Union

Brussels, 17 May 2021
(OR. en)

8817/21

INF 147
API 86

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 23/c/02/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 19 April 2021 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 26 April 2021 (Annex 2);
- the confirmatory application dated 14 May 2021 and registered on 17 May 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 19 April 2021 - 14:50 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 11945 2017 INIT
ST 12031 2017 ADD 1 COR 1 - COVER NOTE
ST 12031 2017 ADD 1 - COVER NOTE
ST 9118 2016 INIT - 'I/A' ITEM NOTE
ST 11951 2017 INIT - 'I/A' ITEM NOTE
ST 12237 2017 INIT
ST 11906 2017 REV 1
ST 11906 2017 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, 26 April 2021

DELETED

Email: **DELETED**

Ref. 21/0868-rh/nb

Request made on: 19.04.2021

Dear **DELETED**,

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

Please find attached document **12031/17 ADD 1 COR 1**.

I regret to inform you that access to documents **11945/17**, **12031/17 ADD 1**, **9118/16**, **11951/17**, **12237/17** and **11906/17 INIT + REV 1** cannot be given for the reasons set out below.

All these documents are related to practical arrangements as regard return and readmission between the EU and Bangladesh. 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.

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).

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.²

We have also looked into the possibility of releasing parts of these documents.³ 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.⁴

Yours sincerely,

Fernando FLORINDO

Enclosure: 1

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

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

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 14 May 2021 - 13:07]

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

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

Best regards,

DELETED

Helsinki, 14 May 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 made on 19 April 2021 (Ref. 21/0868-rh/nb)

1. Subject of dispute

On 19 April 2021, I requested access to Council documents 12131/17 ADD 1 COR 1, 11945/17, 12031/17 ADD 1, 9118/16, 11951/17, 12237/17 and 11906/17 INIT + REV 1.

In its letter of 26 April 2021, the General Secretariat granted access to document 12131/17 ADD 1 COR 1, which is a cover note that only contains the following sentence: 'Document ST 12031/17 ADD1 should bear the distribution marking "LIMITE"'. The General Secretariat refused access to documents 11945/17, 12031/17 ADD 1, 9118/16, 11951/17, 12237/17 and 11906/17 INIT + REV 1. As the Council specified in its decision, all the documents are related to practical arrangements as regard return and readmission between the EU and Bangladesh.

The General Secretariat justified its refusal to grant access relying on the following reasons. The General Secretariat argued that '[t]he 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.'

The General Secretariat also argued that although it had looked into the possibility of releasing 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 its decision for the following reasons.

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

The General Secretariat argued that the disclosure of the documents 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.¹ 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.² The risk of undermining the relevant interest must also be 'reasonably foreseeable and not purely hypothetical'.³

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. 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.⁴ The argument that there might be negotiations with 'other negotiating partners', 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. This is all the more relevant considering that similar readmission arrangements with other countries (Joint Way Forward with Afghanistan) have been publicly disclosed by the institutions.⁵ It is therefore unclear why disclosing the arrangements with Bangladesh 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', while publishing the one with Afghanistan would not. I thus expect the Council to substantiate how documents related to the negotiations with Bangladesh substantially differ and specifically pose a threat to future negotiations. In addition, one of the documents I requested appears to have already been publicly disclosed by the European Commission, so it is unclear why the Council and the Commission would hold distinct views and adopt diverging practices in deciding which documents shall be disclosed and which documents shall pose a threat to ongoing and future negotiations.⁶

¹ Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 36.

² 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.

³ *Sweden v MyTravel Group plc and European Commission*, para 76; *Sweden and Turco v Council*, para 43.

⁴ Case T-395/13 *Miettinen v Council* EU:T:2015:648, paras 63-65.

⁵ https://eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf

⁶ <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-6137-F1-EN-ANNEX-1-PART-1.PDF>

Moreover, some of the requested documents have been disclosed by a third party and are already available in the public domain.⁷ 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.⁸ 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'.⁹ Furthermore, the fact that a 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.¹⁰

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'.¹¹ The requested documents have an impact on the application of existing EU legislation, most importantly the Return Directive.¹² 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'.¹³

Even if the matters were 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 law¹⁴ 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'. Even if the international relations exception is formulated as a

⁷ See <https://ifos.migrationsverket.se/dokument?documentAttachmentId=46631>.

⁸ See eg Case C-350/12 P *Council of the European Union v Sophie in 't Veld* EU:C:2014:2039, para 60.

⁹ Case T-252/19 *Pech v Council* EU:T:2021:203, para 91.

¹⁰ Case C-761/18 P *Leino-Sandberg v Parliament* EU:C:2021:52, paras 47–49.

¹¹ 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.

¹² 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.

¹³ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706

¹⁴ *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.

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, it cannot grant partial access 'as the information contained in the documents forms an inseparable whole'.

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.¹⁵

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 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 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.

¹⁵ Case C-353/99 P *Council v Hautala* EU:C:2001:661, paras 27 and 28.

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,

Yours sincerely

DELETED
