



Council of the
European Union

Brussels, 17 May 2021
(OR. en)

8811/21

INF 144
API 83

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 21/c/03/21

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);
- replies from the General Secretariat of the Council dated 14 and 26 April 2021 (Annex 2);
- confirmatory application dated 13 May 2021 and registered on 17 May 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 26 February 2021 - 15:25 using the electronic form available in the Register application]

From: **DELETED**

Sent: Friday, February 26, 2021 3:25 PM

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

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

DELETED

Family name **DELETED**

First name **DELETED**

E-mail **DELETED**

Occupation **DELETED**

On behalf of **DELETED**

Full postal address **DELETED**

Requested document(s):

ST 11375 2017 INIT

ST 8715 2012 DCL 1

ST 8715 2012 REV 1 DCL 1

ST 8715 2012 REV 1 – NOTE

ST 8715 2012 INIT - NOTE



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. 21/0520-rh/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.¹

I regret to inform you that access to documents **8715/12 DCL 1 + REV 1 DCL 1** cannot be given for the reasons set out below.

Please note that documents **8715/12 DCL 1 + REV 1 DCL 1** of 4 May 2018 are declassified versions of documents **8715/12 INIT + REV 1 RESTREINT UE/EU RESTRICTED** of 18 + 20 April 2012. Their texts are identical to classified versions.

The documents are related to political and practical arrangements as regard return, readmission and border management between the EU and a third country. The positions contained in the documents aim to implement the commitments from both sides to develop cooperation in the area of return, readmission and border management, by jointly developing the procedures and best practices 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 EU negotiating partners the strategic approach in the implementation of EU policies and priorities, thus weakening its negotiation position, complicating further developments of the ongoing readmission mechanisms and even compromising further similar negotiations. 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

The General Secretariat is still conducting consultations necessary to the examination of document 11375/17 and you will be notified of a decision as soon as possible. We apologise for the delay in replying to this part of your request.

Yours sincerely,

Fernando FLORINDO

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.



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. 21/0520-rh/nb-ADD

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.¹

Further of our letter of 14 April 2020, I regret to inform you that access to document **11375/17** cannot be given for the reasons set out below.

Document **11375/17** of 20 July 2017 - *Link between return/readmission and visa policies - Outcome of the JHA Counsellors (Expulsion and Visa) meeting on 19 July 2017* 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.²

The document is related to sensitive political and practical arrangements as regard return, readmission and visa policy between the European Union and a third country. The guarantee of

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.

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

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

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.

[E-mail message sent to access@consilium.europa.eu on 13 May 2021 - 11:09]

From: **DELETED**

Sent: Thursday, May 13, 2021 11:09 AM

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

Subject: Re: Ref. 21/0520-rh/nb-ADD - 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, 13 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 26 February 2021 (Ref. 21/0520-rh/nb-ADD)

1. Subject of dispute

On 26 February 2021, I requested access to Council document 11375/17.

In its letter of 26 April 2021, the General Secretariat refused access to the document entitled “Link between return/readmission and visa policies - Outcome of the JHA Counsellors (Expulsion and Visa) meeting on 19 July 2017”.

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 the ‘[t]he document is related to sensitive political and practical arrangements as regard return, readmission and visa policy between the European Union and a third country. 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 document would therefore undermine the protection of the public interest as regards international relations. As a consequence, the General Secretariat has to refuse access to it.’ Finally, the General Secretariat explained that it had looked into the possibility of releasing parts of the document but, ‘as the information contained in the document forms an inseparable whole, the General Secretariat is unable to give partial access to it’.

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. 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 11375/17 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 11375/17 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.

3. 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.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

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

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 document, the General Secretariat has not explained how disclosure could specifically and actually undermine the interest protected by the exception laid down in third intent of Article 4(1)(a) of Regulation (EC) No 1049/2001. 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 are ongoing negotiations with a third country, but without specifying which country and in what context, 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 ongoing negotiations with any third countries.

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’.⁵ The requested document has an impact on the application of existing EU legislation, most importantly the Return Directive.⁶ 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’.⁷

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 law⁸ 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 document should be granted.

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 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.

⁶ 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.

⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706

⁸ *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.

4. 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 information contained in the document 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.⁹

The General Secretariat argued that partial access cannot be granted because ‘[t]he information contained in the document 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 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.

5. 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

⁹ Case C-353/99 P *Council v Hautala* EU:C:2001:661, paras 27 and 28.