



Council of the  
European Union

007933/EU XXVII.GP  
Eingelangt am 08/01/20

**Brussels, 8 January 2020**  
**(OR. en)**

**5068/20**

**INF 1**  
**API 2**

**NOTE**

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

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 18 July 2019 and registered on 19 July 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 06 January 2020 (Annex 2);
- confirmatory application dated 06 January 2020 and registered on 07 January 2020 (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 29 October 2019 - 10:29 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address:

Telephone:

Mobile:

Fax:

Requested document(s): 5731/14, 10718/14, 13993/18, 15181/18, 7404/18, 7409/18, 8298/18, 10982/18, 9544/17

1st preferred linguistic version: EN - English

2nd preferred linguistic version: ES - Spanish

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**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, 6 January 2020

**DELETED**

Email: **DELETED**

Ref. 19/1688-vl/vk

Request made on: 18.07.2019

Registered on: 19.07.2019

Deadline extension: 09.08.2019

Dear **DELETED**,

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

We apologise for the delay in our reply, caused by the workload generated by the increased number of requests received in the second semester of last year and the need to carry out internal consultations with the services responsible for these files.

Public access is granted to documents **10718/14**, **7409/18**, **8298/18** and **15181/18**.

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<sup>1</sup> The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No **1049/2001** of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

The same goes for documents **7404/18** and **10982/18**, but in accordance with the applicable framework on personal data protection<sup>2</sup>, some personal data contained in these two documents have been erased. The personal data contained in these documents is necessary for the organisation of the work of the Council.

The abovementioned data protection rules at EU level provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data.

After carefully considering all the principles related to this request, on balance the General Secretariat has concluded that disclosure of the personal data contained in document **7404/18** and **10982/18** would undermine the protection of privacy and the integrity of the identified individuals.<sup>3</sup>

Document **9544/17**, dated 22 May 2017, is a contribution of the Legal Service analysing the legal instruments to be used for the determination of the location of seats of bodies and agencies of the European Union. It contains legal advice in its paragraphs 8 to 27.

The decision-making procedures to which the requested contribution was directly relevant (negotiations on the relocation of the European Medicines Agency and the European Banking Authority following the withdrawal of the UK from the Union) have been finalised.

Nevertheless, the legal advice covered by this contribution has a wide horizontal scope and goes beyond the context of the decision-making procedures in question. It touches upon legal issues which are complex and novel and which have not been settled in case law. What is more, those legal issues are contentious and currently relevant to pending court proceedings (Cases C-59/18, *Italian Republic v. Council of the European Union*, C-182/18, *Comune di Milano v. Council of the European Union*, and C-106/19, *Italian Republic v. Council of the European Union and European Parliament*). The legal advice is therefore sensitive.

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<sup>2</sup> Regulation (EU) **2018/1725** of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, repealing Regulation (EC) No **45/2001** and Decision No **1247/2002/EC** (OJ L 295 21.11.2018, p. 39).

<sup>3</sup> Article 4(1)(b) of Regulation (EC) No **1049/2001**.

In that regard, we would like to draw your attention to the fact that, in accordance with case law, there is a general presumption that documents having a relevant link with pending court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4 (2) of Regulation No 1049/2001. Indeed, it can be seen from that case-law that the principles of equality of arms and the sound administration of justice are at the heart of that exception<sup>4</sup>. The need to ensure the equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial<sup>5</sup>.

Disclosure of such a document would therefore undermine the protection of court proceedings and legal advice <sup>6</sup>. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service.

Moreover, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences. Finally, the disclosure of the requested document could undermine the serene conduct of currently pending judicial proceedings possibly altering the equality of arms and affecting the capacity of the Council Legal Service to effectively defend the Council in Court.

As regards the existence of an overriding public interest in disclosure of the document 9544/17 in relation to the interest in protecting court proceedings and legal advice under Regulation (EC) No. 1049/2001, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the documents.

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<sup>4</sup> See notably judgment of 21 September 2010, Sweden and Others v API and Commission, C 514/07 P, C 528/07 P and C 532/07 P, paragraph 84-94.

<sup>5</sup> Judgment of 15 September 2016, Philip Morris Ltd v European Commission, T-18/15, paragraph 64.

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

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested document.

However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have access to paragraphs 1 to 7 of the document.

You will also find enclosed a partially accessible version of documents 5731/14 and 13993/18.<sup>7</sup> However, I regret to inform you that full access to these two documents cannot be granted for the reasons set out below.

Documents 5731/14 and 13993/18 are two reports drawn up by the General Secretariat for the Antici Group respectively on 27 January 2014 and 13 November 2018 focused on Interpreting in the Council.

You may have access to the whole content of these two reports, with the exception of paragraph 11 of document 5731/14 and Annexes 1 and 2 of document 13993/18.<sup>8</sup> These undisclosed parts contain comparative data and internal assessments of budgetary figures that, in the General Secretariat's view, if released to the public, could generate misperceptions and seriously jeopardise the Council's decision-making process in the future EU budget exercises.

Having examined the context in which these documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in their full disclosure.

As a consequence, the General Secretariat cannot grant full access to them<sup>9</sup>.

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<sup>7</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>8</sup> Article 4(3) of Regulation (EC) No 1049/2001.

<sup>9</sup> Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

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 (confirmatory application). Should you see the need for such a review, you are invited to indicate the reasons thereof.<sup>10</sup>

Yours sincerely,

Fernando FLORINDO

Enclosures: 9

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<sup>10</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.

**From:** **DELETED**

**Sent:** Monday, January 06, 2019 21:26

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

**Subject:** Re: Ref. 19/1688-vl-/vk

I want to file a confirmatory application regarding the decisions over documents 5731/14 and 13993/18.

The argument that transparency "could generate misperceptions and seriously jeopardise the Council's decision-making process in the future EU budget exercises" is a self defeating one. Only by providing explanations on the use of funds can misperceptions be avoided.

I would understand if the reasoning for failing to provide certain information was for ongoing decision making processes but it is not clear if that is the case.

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