



Council of the
European Union

Brussels, 30 October 2019
(OR. en)

13553/19

INF 292
API 151

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 34/c/02/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 24 September 2019 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 15 October 2019 (Annex 2);
- confirmatory application dated 25 October and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 24 September 2019 - 11:28]

From: **DELETED**

Sent: Tuesday, September 24, 2019 11:28

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

Subject: Document request under Regulation (EC) No 1049/2001

To Whom It May Concern:

I hereby request access to the following document:

ST 5013 2019 ADD 12

In accordance with the reasons outlined in my confirmatory application dated 16 September 2019 to the Council regarding my request (Reference Number 19/1757), I would like to direct the General Secretariat's attention to the fact that the document in question informed, in my opinion, the decision-making process referred to in paragraph 5 of Document ST 9674 2019 REV 1 and ST 7222/19, both of which are already in public domain, therefore a rejection of this application under the terms of Article 4(3) Subparagraph 1 of Regulation (EC) No 1049/2001 would seem to me as inappropriate.

Moreover, I would like to point out that I do not believe that the Union's international relations would be in any way compromised by the release of the document in question and hence that a rejection of this application under Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001 would be inappropriate as well, for the reasons outlined in my confirmatory application on page 2.

Lastly, I would like to kindly propose to the General Secretariat to group the processing of the present application with the Council proceedings on my other request (Reference No. 19/1757) if possible.

Thank you very much in advance!

Yours faithfully,
Mr Patrick Domke



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, 15 October 2019

Mr Patrick Domke
Email: **DELETED**

Ref. 19/2038-em/nb

Request made on: 24.09.2019

Dear Mr Domke,

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 document **ST 5013/19 ADD12** cannot be given for the reasons set out below.

Document **ST 5013/19 ADD12** is a note dated 7 January 2019 addressed by the Chair of the Code of Conduct Group to the **Code of Conduct Group (Business Taxation) (COCG)** containing an annex to the report on interactions with Cayman Islands on the procedural /political aspects of the monitoring process. It encloses a letter from the Cayman Islands government to the COCG Chair providing an update on the ongoing commitment of the jurisdiction to address the concerns expressed by the COCG.

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).

Document ST 2013/19 ADD12 is a classified document, bearing the classification "EU-RESTRICTED". This means that the unauthorised disclosure of its contents could be disadvantageous to the interests of the European Union or of one or more of its Member States .

Regarding the letter of Cayman Islands government, the General Secretariat of the Council has to refuse access to it. Disclosure of an official diplomatic letter could undermine the willingness of a third party for an open exchange of views with an official body of the Council of the European Union and thus the international relations of the Union. As a consequence, the General Secretariat of the Council has to refuse access to this letter.²

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).³

Yours sincerely,

Fernando FLORINDO

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

³ Article 7(2) of Regulation (EC) No 1049/2001.

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: Friday, October 25, 2019 16:24

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

Subject: AW: Ref. 19/2038-em/nb

Dear Sir or Madam,

Please find attached my confirmatory application to the Council of the European Union. I should like to kindly draw your attention to the fact that the reasons for my application can be found in Annex A. Where there is mention of “review by the Ombudsman” (or similar) in Annex A, however, this should now be interpreted as “review by the Council” for the purposes of this confirmatory application.

Thank you very much in advance!

Yours faithfully,

Patrick Domke

DELETED

Patrick Domke **DELETED**

General Secretariat of the Council of the EU
DG F - Transparency
Wetstraat 175
1048 Brussel BELGIUM

25 October 2019

Confirmatory Application under Article 7(2) of Regulation (EC) No 1049/2001

Dear Sir Madam

Thank you for your Email dated 15 October 2019 regarding my application to the General Secretariat of the Council of the European Union under Regulation (EC) No 1049/2001, which you have registered under the reference number 19/2038.

In this Email, you notified me that you had to reject my application under the provisions of Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

On advice of the European Ombudsman, I hereby ask the Council of the European Union (hereinafter "the Council") to reconsider its position in accordance with Article 7(2) of Regulation (EC) No 1049/2001.

Please find enclosed to this letter my correspondence with the European Ombudsman . The grounds of the present confirmatory application are outlined in Annex A.

I explicitly consent to the publication of my name when the Council puts the documents relating to my confirmatory application into public domain .

Lastly , I would like to request that all further correspondence with regards to my enquiry be conducted by hard copy mail (my postal address is listed above).

Thank you very much in advance!

Yours faithfully,
Patrick Ome

15 October 2019

Patrick Domke • DELETED

MÉDIATEUR EUROPÉEN
1 AVENUE DU PRÉSIDENT ROBERT SCHUMAN
CS 30403
67001 STRASBOURG CEDEX
RÉPUBLIQUE FRANÇAISE

Re: Complaint regarding the access to documents under the Ombudsman "fast-track" procedure

Dear Sir or Madam,

Pursuant to the provisions of Article 228 of the Treaty on the Functioning of the European Union (TFEU) as well as those of the European Ombudsman's "fast-track" procedure, I am hereby writing to you in order to file a complaint about the handling of a request to disclose documents in accordance with Regulation (EC) No 1049/2001. More specifically, I would like to kindly ask you to inquire into the whys and wherefores of the General Secretariat of the European Council's refusal to grant access to the document ST 5013/19 ADD12, dated 15 October 2019 and registered under the reference 19/2038-em/nb [REDACTED].

I should like to point out that I requested access to the document in question in light of an earlier application for the disclosure of document ST 10791/19 (reference of the initial application: 19/1757-em/ns; reference of the confirmatory application under Article 7(2) of Regulation (EC) No 1049/2001: 28/c/01/19), to which the Council did eventually grant access on 10 October 2019. In the official reply, I was notified that

"[...] the Council has carefully scrutinized the content of the requested document [ST 10791/19], having due regard to the updated state of play of the monitoring process regarding the jurisdiction concerned. In that context, the Council took into account that the decision-making process to which the document relates has progressed and the Commission, as the author of the report contained in document ST 10791/19, has declassified this document." (cf. para 5 of the reply adopted by the Council on 10 October 2019 [REDACTED])

Since document ST 10791/19 is dated 28 June 2019 and ST 5013/19 ADD12 is dated 07 January 2019, I would, with regards to the "updated state of play", expect that the disclosure of the latter would *a fortiori* not impair the EU's relations with the Cayman Islands. In this context, I should moreover like to refer to the arguments I set out in my aforementioned confirmatory application, only adding that where there is reference to Article 4(3) Subparagraph 1 of Regulation (EC) No 1049/2001, in light of the Council's positive reply, I am now convinced that the same applies with regards to Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001:

"I assume that the ongoing decision-making process regarding the assessment of the progress made by the Cayman Islands with regards to the COCG's concerns mentioned in your Email is the one addressed in paragraph 5 of Document ST 9674 2019 REV 1.

[...]

I furthermore understand that the findings in ST 7222/19 were the primary reason why the Council took the decision outlined in paragraph 5 of Document ST 9674 2019 REV 1. If that were the case, then it would be incomprehensible in my opinion why the Council has notwithstanding Article 4(3) Subparagraph 1 of Regulation (EC) No 1049/2001 decided to put ST 7222/19 into public domain unredactedly but refuses to do so in the case of other assessments produced by the COCG with regards to the Cayman Islands citing the provisions of Article 4(3) Subparagraph 1 of Regulation (EC) No 1049/2001, even though [...] ST 7222/19 informs the same continuous and ongoing decision-making process in the Council."

(cf. ST 12408/19 INIT, pp. 5f.)

Furthermore, no assessment about whether the document can be released with redactions in accordance with Article 4(6) of Regulation (EC) No 1049/2001 appears to have been conducted by the General Secretariat of the Council with regards to the present application, even though they set out clearly in their reply that most issues lie only with the document's annex.

Quoad ultra put forward by the General Secretariat is rejected and should be subject to the Ombudsman's review.

Lastly, I wish to point out that the auditability of the Council's decisions with regards to the list of non-cooperative jurisdictions for tax purposes by the general public should be in the European Union's interest as well, for the general principles of transparency and good governance are core values of the Union, set out for example in Article 15 TFEU. Where possible, detailed progress reports on the jurisdiction's compliance with the concerns raised by the COCG and not only summaries as part of Council decisions should be in the public domain in order to allow for a better understanding of the overall decision-making progress.

I would like to kindly ask you to briefly acknowledge receipt of this letter via Email (as mentioned above), whereas I request that all other correspondence regarding this complaint be conducted by postal mail.

I would be most grateful for advice as to whether I should write to the Council for a review of their initial answer under the provisions of Article 7(2) of Regulation (EC) No 1049/2001 as well, too. Given that this has to be applied for within fifteen working days, I would like to ask you to reply until 1 November 2019 with regards to that matter.

Thank you very much in advance!

Yours faithfully,

PATRICK DOMKE



Unit 4 - Inquiries

Mr Patrick Domke

DELETED

Strasbourg, 25/10/2019

Complaint 1938/2019/MIG

Dear Mr Domke,

On 15 October 2019, you submitted a complaint to the European Ombudsman against the Council of the EU. Your complaint concerns the Council's refusal to grant public access to document ST 5013/19 ADD12 regarding the monitoring of business taxation on the Cayman Islands. The Ombudsman has asked me to deal with your complaint and reply to you on her behalf. I am sorry to have to tell you that, for the reasons set out below, the Ombudsman is unable to deal with your complaint at this stage.

The Ombudsman must follow certain rules for dealing with complaints¹. One of these rules² is that the complainant must first have contacted the EU body concerned with a view to resolving the problem, before complaining to the Ombudsman. In this way, the EU body in question will have an opportunity to deal with the problem at an early stage and without the need to involve the Ombudsman.

Regarding requests for public access to documents, the procedure that has to be followed before a complaint can be made to the Ombudsman is to make a so-called 'confirmatory application' under the EU rules on access to documents (Regulation 1049/2001) and to await the response. If there is no response within the appropriate time period, this may be treated as an implicit refusal of the request. The Ombudsman can then consider any issues related to the handling of the access request.³

It appears from the documentation you have sent us that you have not yet made a confirmatory application to the Council. The fact that, in your initial request, you referred to a confirmatory application, which you have made in another case, is not sufficient, even though the document you requested in that

¹ These are set out in the Treaty on the Functioning of the European Union and in the Statute of the European Ombudsman.

² Set out in Article 2(4) of the Statute of the European Ombudsman.

³ Article 8 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1>.



case may be related to the one to which you are now seeking access. Unfortunately, this means that the Ombudsman cannot deal with your complaint at this stage.⁴

If you wish to pursue the matter further, I suggest that you make a confirmatory decision with the prescribed deadline of 15 working days. In the event that the Council does not respond within the relevant deadline⁵, or that you are unsatisfied with its response, you may make a new complaint to the Ombudsman.

We note that you wish to be contacted by postal mail. However, in the light of the imminent deadline for making a confirmatory application, this decision is sent to you also by e-mail.

Thank you for having contacted the European Ombudsman.

Yours sincerely,

DELETED
Head of Inquiries - Unit 4

⁴ Full information on the procedure and rights pertaining to complaints can be found at <https://www.ombudsman.europa.eu/en/document/70707>.

⁵ Article 8 of Regulation 1049/2019.