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**'I/A' ITEM NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	13718/18
Subject:	Public access to documents - Confirmatory application No 28/c/01/18

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Delegations will find enclosed a draft reply from the Council to confirmatory application No 28/c/02/18, unanimously approved by the Working Party by written consultation which ended on 15 November 2018.

Delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item
- decide to publish the result of the vote.

The annex is available in English only.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx  
TO CONFIRMATORY APPLICATION 28/c/02/18,  
made by email on 29 October 2018,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to document 12300/02 and its revisions**

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) (hereafter referred to as "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 18 September 2018, the applicant requested access to document " 12300/02 and its revisions" claiming that " *the documents can be released in full without redaction. Nothing suggests that the 16 year old information contained in these reports could pose any risk that would allow a denial of release. If this document is considered classified at this point, I believe that such classification is done in error and the classification should be removed in full*".
2. In its reply of 29 October 2018, the General Secretariat of the Council transmitted to the applicant partially accessible versions of documents 12300/02 DW01, 12300/1/02 DW01 and 12300/2/02 DW01. Indeed, some parts of those documents could not be disclosed, as it was deemed that they contained information that if released to the public would undermine the protection of the public interest as regards public security<sup>1</sup> as well as that the full release of their content would undermine the public interest as regards international relations with certain third countries<sup>2</sup>.

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

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

3. In a confirmatory application received on 29 October 2018, the applicant states that the "...heavy redactions were done without sufficient legal basis and the documents could have been released in full for the following reasons:

*The requested documents are from September and October of 2002, more than 16 years ago. Any information contained in this document appears to be information available to the general audience already in 2002. It is inconceivable that there is information contained in these documents that deserves any protection, both in absolute terms as well as in relation to the public interest.*

*As it appears, the document does not contain any hints about sources and methods and only plainly states the otherwise not sensitive information that matches the publicly known information of that time, only maybe in a slight condensed form.*

*The redaction process seems to be inconsistent and erring on the side of over-classification. In chapter II, report snippets from various countries seem to be redacted following input from member states on subjective rather than objective criteria. No information contained in these documents indeed could be disadvantageous to the interests of the EU or its Member States, including the security interests. Or could have in 2002 or any time in between these 16 years"*

4. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the request and carried out renewed consultations, it has re-assessed the request for access in full consideration of the principles underlying Regulation No 1049/2001, with the aim of ensuring the widest possible public access to documents.
5. Document **12300/02**, is a Note of 25 September 2002 from the Presidency to the Working Party on Terrorism presenting a summary of the terrorist threat in Europe. Documents **12300/1/02** and **12300/2/02**, which essentially reflect the content of document **12300/02**, comprise respectively a Note of 14 October 2002 from the Working Party on Terrorism to the Article 36 Committee/COREPER/Council and a Note of 28 October 2002 from the Article 36 Committee to COREPER and Council.

6. The Council recalls that these documents were bearing the classification "'EU CONFIDENTIAL" which applies to information and material the unauthorised disclosure of which could harm the essential interests of the European Union or of one or more of its Member States.<sup>3</sup> On 11 September 2018, these documents have been downgraded and are henceforth bearing the classification "EU RESTRICTED" which means that the unauthorised disclosure of their contents could be disadvantageous to the interests of the European Union or of one or more of its Member States. The Council fully recognizes that a security classification does not automatically mean that access to such document should be refused.
7. The Council notes, however, that based on their content the documents concerned by the request come within the remit of the exceptions of protection of public interest as regards public security (Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001) and international relations (Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001).
8. At the outset, the Council recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
9. On the one hand, "the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 could undermine the public interest"<sup>4</sup>.
10. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest, it has no choice but to refuse access, because "it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"<sup>5</sup>.

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<sup>3</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.

<sup>4</sup> ECJ case C-266/05, Sison, para. 35.

<sup>5</sup> ECJ case C-266/05, Sison, para. 46.

11. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of a document on the protection of the public interest as regards public security and as regards international relations, but is barred from taking into account other legitimate interests, such as the ones raised by the applicant, in order to override the conclusion that giving access to a document would harm the protected interest and grant access nonetheless.
12. The Council considers that the terrorist threat in Europe is still concrete and present. Although there has been some positive changes, the sensitivities in this area, also from the past, remain in place.
13. Parts of documents 12300/02 DW01, 12300/1/02 DW01 and 12300/2/02 DW01 bearing the classification "EU RESTRICTED" go into issues which are very sensitive and which touch upon Member states' and the EU's public security. If released to the public, they could be exploited for reviving old threats and/or inciting new ones. The disclosure of such documents could give orientations regarding the strategic aspects of the fight against terrorism and would reveal information held by the public authorities on entities that have been/are still involved in terrorist acts.
14. This would undermine the protection of the public interest as regards public security. Article 4(1)(a) 1st indent of Regulation 1049/2001 thus prevents the Council from releasing those parts of the documents.
15. Moreover, the Council has also taken into consideration that some parts of the documents concern entities involved in activities of terrorism which originate from third countries and/or are active in the international level. The release of such information could have a negative impact on the relations of the EU or of its Member States with third countries. What is more, the disclosure of such information could compromise the position of the European Union in the fight against terrorism which falls within the scope of international action.

16. The release of the relevant parts of the documents concerned by the request would therefore undermine the public interest as regards international relations with certain third countries. Article 4(1)(a) 3rd indent of Regulation 1049/2001 thus also prevents the Council from releasing those parts of the documents.
17. As for the argument of the applicant according to which the protection is not justified as a significant period of 16 years has elapsed from the adoption of the documents concerned by the request, it shall be noted that the exceptions laid down in Regulation No 1041/2001 apply for the period during which protection is justified on the basis of the content of the requested document and that the time limit of this protection is set at 30 years.

### **Conclusions**

18. For the above-mentioned reasons, the Council concludes that:

The downgrading of the requested documents 12300/02 , 12300/1/02 and 12300/2/02 from "EU CONFIDENTIAL" to "EU RESTRICTED" is fully in line with the provisions of the Council Decision of 23 September 2013 on the security rules for protecting EU classified information.

Whereas some parts of these documents have been declassified and access has be granted, pursuant to Article 4(1)(a),1st and 3rd indent and Article 4(6) of Regulation 1049/2001, the classification of other parts should be maintained and access to those parts refused.

The partial access as granted at the initial stage is therefore confirmed and no full or wider partial access to the requested documents can be granted.