



Council of the
European Union

Brussels, 13 March 2019
(OR. en)

6063/1/19
REV 1

LIMITE

INF 16
API 8

'A' ITEM NOTE

From:	General Secretariat of the Council
To:	Council
No. prev. doc.:	6063/19
Subject:	Public access to documents - Confirmatory application No 02/c/01/19

Delegations will find enclosed a draft reply from the Council to confirmatory application No 02/c/01/19, approved by the Working Party on Information which ended on 5 March 2019 and by Coreper 2 on 13 March 2019 with the UK abstaining.

Delegations agreed to publish the result of the vote.

It is therefore suggested 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 ...
TO CONFIRMATORY APPLICATION 02/c/01/19,
made by email on 4 February 2019,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 14302/11 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 (EC) 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 20 January 2019, the applicant requested access to document **14302/11** and its **REV1**, **REV2** and **REV3**.
2. In its letter of 29 January 2019, the General Secretariat of the Council replied that access to these documents could not be granted since their disclosure would seriously undermine the Council's decision making process¹.

¹ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

3. In a confirmatory application received on 4 February 2019, the applicant refers to the General Secretariat's reply of 29 January 2019 and states the following: *I would urge the Council to reconsider my request for access to document 14302/11 together with documents 14302/11 REV1, REV2 and REV3. In your decision of 29 January 2019 you write that 'the general interest that progress be made in an area that is still the subject of negotiations' outweighs my interest in being informed of progress in this area. I would point out, however, that in fact the opposite is true. Access to public documents is actually a reflection of the general interest manifested by citizens living in a democracy. This is not so much about my personal access to a specific document as about the access of the general public to documents which concern them. The public interest in being informed about the implications of a draft decision outweighs the Council's interest in keeping the documents secret. In a democracy, it goes without saying that voters and electoral candidates should have full access to public documents, including preparatory documents, provided such documents are not confidential in terms of security or personal data, etc. As far as I am aware, the documents in question are not considered confidential. Previous draft decisions concerning the incorporation of Bulgaria and Romania into the Schengen area have been published (e.g. document 14142/10). Such a draft decision - in particular, one drawn up eight years ago - can hardly be regarded as so sensitive that it cannot be disclosed to the general public.*
4. Document **14302/11**, is a Note of 16 September 2011 from the Presidency to Coreper / Council (Mixed Committee) on the Draft Council Decision on the framework for the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania. This note was drafted after discussions in the Committee of Permanent Representatives (Coreper) on 14 September 2011 and contains a revised version of the initial draft decision which was presented in public document 14142/10.

5. Documents **14302/1/11 REV1**, **14302/2/11 REV2** and **14302/3/11 REV3**, are further revised versions the Draft Council Decision of 21 September 2011, 17 November 2011 and 7 December 2011 respectively.
6. In conformity with the provisions of Article 4 (2) of the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, the Draft Council Decision, comprised in the requested documents, is aiming at establishing the framework and dates at which the provisions of the Schengen acquis which are not yet applicable in Bulgaria and Romania (checks at internal borders and visas)² would take effect.
7. 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.

Prejudice to the interest protected by Article 4.3 first subparagraph, of Regulation (EC) No 1049/2001

8. As it was the reason to refuse access to the requested documents at the initial stage, the Council examined in particular the need to protect its decision making process.

² After 2011, the Schengen acquis not applicable to Bulgaria and Romania has been reduced and it is currently limited to these two areas.

9. In its assessment, the Council has particularly considered the arguments developed by the applicant in the confirmatory application. As regards the arguments of the applicant on the "*public interest of being informed*" which belongs to "*citizens living in a democracy*", the Council acknowledges the importance that the Treaties attach to the participation of citizens to the democratic life of the Union and more specifically to the need to give them the opportunity to get access to documents especially in the framework of a legislative process. This access is an important source of information and can strengthen the legitimacy of the legislative decision-making.
10. However, the Council wishes to underline that the principle of wider public access which is generally associated in cases where the institutions are acting in their legislative capacity is not directly relevant in the present circumstances. This is all the more so in relation to the fact that the decision-making process at hand is not a legislative one. In the present case, the public interest in transparency does not bear the same weight than in case of law making and the effectiveness of the decision making of the institution deserves particular attention.
11. The Council further notes that the decision-making process is not necessarily representative nor immune from the pressure of organised interests. The public interest to be informed does not therefore automatically prevail when disclosure of a document would seriously undermine the effectiveness of the decision making.
12. In the present case, the Draft Council Decision to which the requested documents pertain has not been adopted to date which means that the decision making process has not been finalised. The Council notes, in particular, that to date, given the high complexity of discussions and the particular sensitivity of their subject matter, it has not been possible to agree on the framework and dates of the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania, that is to say on the lifting of controls at internal land, maritime and air borders.

13. Under these circumstances, disclosure of the different options as proposed in the consecutive versions of the Draft Council decision as contained in the requested documents, at a moment when the appropriate balance of the various interests involved has not yet been achieved within the Council, would expose its members to undue pressures by stakeholders affected by the issues under discussion. The ensuing pressure would make it even more difficult for Council members to agree on possible solutions or to pursue certain options and therefore would affect the possibility of reaching a final agreement on the file to which unanimity applies.
14. It would also reduce the flexibility for delegations to formulate and reconsider their positions in the light of the arguments exchanged in the debate and thwart their efforts to overcome the outstanding points. This would seriously affect the chances of finding a convergence in delegations' positions and find a compromise within the Council. As a consequence, the decision making process could be seriously derailed altogether.
15. Against that background, the Council considers that there is a reasonably foreseeable risk that full disclosure of the requested documents could have a substantial negative impact on the decision-making process.
16. In addition, and as was stated in the initial reply to the applicant, on balance, all possible factors which would, at the present stage, plead in favour of releasing documents **14302/11** and its revisions are still outweighed by the need to protect the Council's decision-making process, when taking into account the particular sensitivity and contentious character of the issues under scrutiny in a domain which is not legislative.

Non-classified nature of the documents

17. The applicant states in his confirmatory application that, given the non-classified nature of the requested documents, their content should not be regarded as so sensitive so as to justify the non-disclosure eight years after their issuing.

18. Whereas the requested documents indeed are not classified but have the indication "LIMITE" which is a distribution marking, and not a classification level, this has however no bearing on the sensitive nature of the information contained therein.
19. The marking LIMITE is a circulation marking that aims at protecting, with an obligation of professional secrecy, as set out in Article 339 TFUE and Article 6 of the Council's Rules of Procedure, the confidentiality of documents that, if disclosed, could undermine one of the interests protected by Regulation 1049/2001. In that regard, the sensitive character of the information contained in the document can well be one of the parameters to be taken into consideration when marking a document as LIMITE.
20. The Council further notes it is not the marking or classification of the documents which automatically leads to a refusal to grant access. It is rather the potential harmful consequences of disclosure of the documents which constitute the criteria for assessing access.
21. As in particular demonstrated under points 13 to 16 these harmful consequences of disclosure are still valid even eight years after issuing of the documents. It shall also be noted that the exceptions laid down in Regulation (EC) No 1049/2001 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.

Partial access pursuant to Article 4(6) of Regulation 1049/2001

22. The Council has also carefully reviewed, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the requested documents.
23. In light of its examination, the Council concludes that an important part of the requested documents are less sensitive in the context of the ongoing decision-making process.

24. Therefore, the Council has concluded that partial access can be now granted to those parts of the requested documents that do not specifically reveal the different options concerning the timeline of the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania.

Conclusions

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

- a) Full disclosure of documents **14302/11, 14302/1/11 REV1, 14302/2/11 REV2** and **14302/3/11 REV3** would seriously undermine the decision-making process under Article 4(3), first subparagraph, of Regulation 1049/2001. In addition, in the specific case at hand, the public interest invoked by the applicant does not outweigh the need to preserve the effectiveness of the Council's decision-making.
- b) Therefore, the Council is unable to grant full access to the requested documents.
- c) A partial access shall be granted to those parts of the requested documents identified under points 23 and 24.