



Council of the  
European Union

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**NOTE**

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	6433/20
Subject:	Public access to documents - Confirmatory application No 07/c/01/20

Delegations will find attached a draft reply to confirmatory application No 07/c/01/20  
(see 6433/20).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx**  
**TO CONFIRMATORY APPLICATION 07/c/01/20,**  
**made by email on 28 February 2020,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to document 8570/18**

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 of 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, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 31 January 2020, the applicant submitted a request for access to document **8570/18** of 4 May 2018 which is a 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part2)/Council on Good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorization to stay.
2. In its reply dated 21 February 2020, the General Secretariat of the Council refused access to document 8570/18 pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, since its disclosure would undermine the protection of the public interest as regards international relations.
3. In the confirmatory application dated 28 February 2020 and registered on the same day, the applicant asks the Council to reconsider this position.

4. The applicant contends, in essence, that refusal of the General Secretariat of the Council to grant access to the requested document "*cannot supersede the right provided under Article 15 of the Treaty on the Functioning of the European Union*" and that "*a right for a citizen to access Union's documents is fundamental to the operation of the Union, in part it enable keep the Union accountable in line with the spirit of transparency*".
5. The Council has carefully considered the confirmatory application. Having thoroughly examined the requested document and carried out renewed consultations, it has re-assessed the request in full consideration of the principles underlying Regulation (EC) No 1049/2001, with the aim of ensuring the widest possible public access to documents.

## **I. CONTEXT OF THE DOCUMENT**

6. Document **8570/18** is a 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part2)/Council on Good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorization to stay. It focuses on a cooperation in the area of return and readmission by jointly defining good practices as part of the recent reinforcement of the relations between the EU and Gambia in the area of migration and migration-related issues.
7. Following endorsement by COREPER and Council in October 2017, the EU submitted the first draft of the good practices to the Gambian authorities to start negotiations. In February 2018, the Commission submitted the draft good practices as the result following the conclusions of the negotiations with the Gambian authorities; these draft good practices were considered by the Working Party on Integration, Migration and Expulsion and agreed by delegations.

The good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorization to stay were approved by the General Affairs Council on 14 May 2018.

## **II. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) NO 1049/2001**

8. The Council has carefully scrutinised the content of the document which is the subject of the request.
9. As a preliminary remark, it is recalled that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. As also confirmed by established case law, the principle of widest access is particularly pressing and, therefore, the requirements for transparency are greater, where the institutions act in the framework of legislative procedures. Those considerations bear a lesser weight as regards the requested document which was not drawn up in the context of legislative activities.

### ***The invoked exception of Regulation (EC) No 1049/2001***

10. Based on its content, the requested document falls within the scope of the exception provided for on the grounds of protection of the public interest as regards international relations (third indent of Article 4(1)(a), of Regulation (EC) No 1049/2001).
11. The Council wishes to state from the outset 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 (EC) No 1049/2001 are subject to a different regime than the other exceptions included in Article 4.
12. 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 (EC) No 1049/2001 could undermine the public interest"*.<sup>1</sup>

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<sup>1</sup> Court of Justice, Sison v. Council, C-266/05 P para. 34; General Court, Besselink v. Council, T-331/11; General Court, Jurašinović v. Council, T-63/10.

13. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because *"it is clear from the wording of Article 4(1)(a) of Regulation (EC) 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>2</sup>
14. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations but is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless. It also follows from the above that the Council has no choice but to refuse access to a document that falls within the scope of the exception concerning international relations and whose publication would undermine the public interest protected by it.
15. The EU considerations and concrete measures concerning the cooperation with The Gambia for the efficient operation of the identification and return procedures of persons without authorisation to stay proposed in the requested document are part of the broader sensitive EU negotiation process in an international context, which is still ongoing. The EU is currently negotiating similar readmission arrangements with a certain number of other countries. Disclosure of considerations and proposed concrete measures on possible EU policies towards The Gambia would make it possible for other negotiating countries to have foreknowledge of the European Union's future approach or new actions in similar circumstances. It would therefore weaken the position of the European Union in the context of the relevant negotiations.

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<sup>2</sup> Court of Justice, *Sison v. Council*, C-266/05 P, para. 46; *Besselink v. Council*, T-331/11, para. 44.

16. This is particularly so in a moment when the ability of the Union to engage with third countries is key to address the current migration crisis and where political and diplomatic efforts are being devoted to mitigate its effects. Disclosure under such circumstances would therefore involve a concrete risk of undermining international relations.
17. In view of the above, the Council considers, in exercise of its wide margin of discretion, that disclosure of document **8570/18** would undermine the protection of the public interest as regards international relations pursuant to the third indent of Article 4(1)(a), of Regulation (EC) No 1049/2001.
18. As regards the arguments justifying disclosure put forward in the confirmatory application, the Council notes that the applicant confines itself to considerations of purely general nature on the need for openness, transparency and accountability as regards the operation of the EU. In any event, as abovementioned, Article 4(1) of Regulation (EC) No 1049/2001 does not provide for a test of balancing the harm to the protected interest against the public's interest in disclosure. On the contrary, once the Council has come to the conclusion that release would indeed undermine the public interests protected pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, this conclusion is not mitigated by any obligation – or even possibility – to take into account "an overriding public interest in disclosure" as is the case for other exceptions under Article 4 of the Regulation.

***Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001***

19. The Council has also examined the possibility of granting partial access to the document and has come to the conclusion that the information contained therein forms an insuperable whole which cannot be severed into individual parts which are not covered by this exception.

**III. CONCLUSION**

20. In the light of the above considerations, the Council confirms that access to document **8570/18** should be refused pursuant to the third indent of Article 4(1)(a) (protection of the public interest as regards international relations).