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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	7330/20; 7331/20; 7808/20
Subject:	Public access to documents - Confirmatory application No 13/c/01/20

Delegations will find in Annex the Council's draft reply on the above-mentioned confirmatory application, as agreed by the Working Party on Information, following the written consultation launched on 14 May 2020 which ended on 20 May 2020.

DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION 13/c/01/20,
made by email on 10 April 2020,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents WK 1747/2020 and COREU 0006/20

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 "Regulation 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 6 March 2020 the applicant introduced an initial application for access to all documents underlying the decision to include his client's name in the list annexed to Council Decision (CFSP) No 2020/212 of 17 February 2020 implementing Decision 2013/255/CFSP (OJ L 43 I/6 of 17.2.2020) on restrictive measures against Syria (that list being one of the updates performed on a regular basis during the evolution of the EU's legislation adopted in this regard¹).
2. On 7 April 2020, the General Secretariat replied to the applicant, fully releasing five documents and refusing two documents - **WK 1747/2020** and **COREU 0006/20** - in their entirety on the ground of Article 4(1)(a), first and third indent and Article 4(1)(b) of Regulation (EC) No 1049/2001, since their disclosure would undermine the protection of public interest with regard to public security and international relations as well as privacy and the integrity of the individuals whose names are referred to in those documents.

¹

- a. Council Decision 2011/782/CFSP of 1st December 2011 concerning restrictive measures against Syria.
- b. Council Regulation (EU) No 36/2012 of 18th January 2012 concerning restrictive measures in view of the situation in Syria.
- c. Council Decision 2012/739/CFSP of 29th November 2012 concerning restrictive measures against Syria and repealing Decision 2011/782/CFSP.
- d. Council Decision 2013/255/CFSP of 31st May 2013 concerning restrictive measures against Syria, which replaced Decision 2012/739/CFSP and extended the restrictive measures until 1st June 2014 (deadline extended, lastly until 1st June 2020 by Council Decision (CFSP) 2019/806 of 17th May 2019).

3. On 10 April 2020 (application registered on 14th April 2020), the applicant introduced a confirmatory application against the General Secretariat's refusal to release the two abovementioned documents.
4. The applicant, who has meanwhile submitted another request to the Council for privileged access to the same documents, argues that:
- the data protection exception is not applicable to the documents concerned, since the personal data therein contained belongs to her client, and in any case this exception does not justify full refusal. In this context, the applicant in particular:
 - i) rejects the GSC's allegation that the applicant has not justified a prevailing interest in the public release of such data as required by the existing rules in this field². In her view, the GSC, by indicating to have weighed up the interests in disclosure, has implicitly admitted that some public interest exists;
 - ii) contends that, having inspected the full text of one of the two documents concerned (**WK 1747/2020**) meanwhile released in response to her request for privileged access, it appears evident that the personal data protection exception cannot be invoked;
 - the divulgation of **WK 1747/2020** could in no way undermine the interests of the EU or of its Member States;
 - by analogy, the above arguments pleading for full disclosure should also apply to the content of the other requested document (**COREU 0006/20**), whose refusal is not sufficiently motivated. In this context, the applicant criticises the GSC's reference to the sensitive character of the content, since its "RESTREINT UE/EU RESTRICTED" mark is not sufficient to qualify it as a "sensitive document" like the categories of classified documents referred to in Article 9 of Regulation (EC) No 1049/2001;
 - the public release of both documents is justified by the applicant's right to have full knowledge of charges against her client before undergoing legal procedures.

² 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 (OJ L 295 21.11.2018, p. 39).

5. The Council has carefully scrutinized the content of documents **WK 1747/2020** and **COREU 00006/20** and re-assessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comments, whether public access can be provided to the two documents fully withheld in the General Secretariat's reply, and has come to the conclusions set out below.
6. In bringing forward her arguments to contest the General Secretariat's decision to refuse public access to the requested documents³, the applicant provides incorrect references, confusing details related to her request introduced under Article 7 of Regulation (EC) No 1049/2001 with those related to her application for privileged access:
- the partial access granted on 7th April 2020 concerns her privileged access
 - likewise, the extension of the deadline to reply to the applicant's initial request cannot be put in relation with the abovementioned partial access, which was granted only as a privileged access
 - the General Secretariat has correctly informed the applicant on 27 March 2020 that, since the consultations with the competent services were still ongoing, the deadline to reply to the applicant was postponed of three working weeks until 22 April 2020. Hence, the applicant's reference to 23 March 2020 is not related to the abovementioned extension letter, but concerns the privileged access file
 - the full access to document **WK 1747/2020** was provided by the Council to the applicant on 6 April 2020 as a privileged access. Therefore it cannot be used to contest the decision of the General Secretariat following the examination of the applicant's request introduced under Regulation (EC) No 1049/2001⁴.
7. In the Council's views, the exceptions of Regulation (EC) No 1049/2001 concerning the protection of the public interest as regards international relations and the personal data invoked by the GSC in its initial reply to the applicant are fully applicable.

³ See document 7330/20.

⁴ Any document exchanged by the Council with the applicant in a specific privileged access framework is not available to the general public and the applicant may be given access to it only for the purpose of defending his client's interests. As such, any document is not disclosed to the general public on the basis of Regulation (EC) No 1049/2001 and the represented client must not make it public.

**1. THE PROTECTION OF PUBLIC INTERESTS UNDER ARTICLE 4(1)(A) OF
REGULATION (EC) NO 1049/2001**

The nature of the exceptions in general

8. At the outset, the General Secretariat recalls that, in accordance 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 particular regime as 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 (EC) No 1049/2001 could undermine the public interest"*.⁵
10. 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"*.⁶
11. 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 in order to override the conclusion that giving access to a document would harm the protected interest and grant access nonetheless.
12. It also results from the above that the Council has no choice but to refuse access to a document that falls within the scope of the abovementioned exception, the public disclosure of which would undermine the public interest protected by it.

⁵ Judgement in *Sison v Council* (C-266/05, ECLI:EU:C:2007:75, paragraph 34).

⁶ Judgement in *Sison v Council* (C-266/05, ECLI:EU:C:2007:75, paragraph 46).

Assessment of the harm to the protected interests that would ensue from the disclosure of the requested documents

13. Document **WK 1747/2020** is a working document examined by the Council Working Parties on Mashreq/Maghreb and Foreign Relations Counsellors containing sensitive information collected to provide evidence and facilitate discussion on the inclusion, among other persons, of the applicant client's name to the list of individuals subject to restrictive measures in accordance with the Council's acts referred in footnote 1 above.
14. Document **COREU 0006/20** provides introductory background information shared with Member States' delegations with a view to the examination of the abovementioned file by the two working parties. This document contains preliminary data of confidential nature concerning several subjects as well as references to individual Member States. As indicated by the GSC in its initial reply to the applicant, this document bears the classification code "RESTREINT UE/EU RESTRICTED".
15. According to the security rules for protecting EU Classified Information (EUCI) (Council Decision of 23 September 2013, OJ L 274, 15.10.2013, p. 1) , this classification mark is applied to information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or of one or more of its Member States.
16. These two documents contain detailed references resulting from monitoring activities, including, among others, information collected from online platforms focusing on activities and responsibilities deemed in conflict with the legal framework protected by the EU's restrictive measures in relation to the situation in Syria referred to in footnote 1.
17. The background elements contained in **COREU 0006/20** were exchanged on a confidential basis in order to help evaluate the delicate scenario under which the monitoring and investigation on possible activities which are subject to restrictive measures pursuant to the EU law referred to in footnote 1 were put in place, taking also due account of the impact of such activities in a particularly unstable geo-political environment and development.

18. To be deemed of sensitive nature, such information does not need to be necessarily confined in documents bearing a classification mark "CONFIDENTIEL" or higher as described in Article 9 of Regulation No 1049/2001, this Article aiming essentially to underline that those documents should be carefully handled by authorized officials and to indicate the relationship between the classification mark and the author's prerogative to decide which references to the document should be provided in the public register of Council documents. Therefore the Council considers that the classification code "RESTREINT UE/EU RESTRICTED" assigned to document **COREU 0006/20** is justified.
19. The Council maintains its view that, releasing these two documents would reveal the institution's strategic approach and its *modus operandi* in this field, enabling hostile entities and individuals perpetrating violations in this field to circumvent the legislation in force. This would weaken/neutralize the impact of the sanctions' list concerned and create a breach in the climate of confidence among the Member States exchanging relevant information in this sensitive field.
20. In the light of the above, and having due regard to the outcome of new consultations with the competent services within the GSC, unlike the reasoning given by the applicant, the Council has no choice but to refuse access to the requested documents, that fall within the scope of the abovementioned exceptions and the publication of which would undermine the public interest protected by it.
21. As a consequence, disclosure of **WK 1747/20** and **COREU 0006/20** would undermine the protection of the public interest as regards international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001).

2. THE PROTECTION OF THE PRIVACY AND THE INTEGRITY OF THE INDIVIDUALS CONCERNED

22. The Council considers that the requested documents **WK 1747/20** and **COREU 0006/20** contain personal data and therefore fall within the remit of the exception provided for by Article 4(1)(b) of Regulation (EC) No 1049/2001.
23. According to Article 3(1) of Regulation 2018/1725, personal data is in broad terms "*any information relating to an identified or identifiable natural person*". Moreover, the Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. In particular, it has stressed that professional data or information provided as part of a professional activity may well be characterised as personal data;⁷ it has pointed out that objection or agreement to disclosure is not a constituent part of the concept;⁸ it has further stressed that the fact that certain information has already been made public does not exclude its characterisation as personal data.⁹
24. According to established case law, where an application is made seeking access to personal data within the meaning of Article 2(1) of Regulation 2018/1725, the provisions of that Regulation become applicable in their entirety.¹⁰ More specifically, according to Article 9(1)(a) of Regulation 2018/1725 personal data may be transferred to recipients established in the Union only if two cumulative conditions are met: (1) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and (2) the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

⁷ Judgment in *Commission v Bavarian Lager* (C-28/08, ECLI:EU:C:2010:378, paragraphs 66 to 70).

⁸ Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 33).

⁹ Judgment in *Satakunnan and SATAMEDIA* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

¹⁰ Ibidem, paragraph 63 regarding the predecessor Regulation (EC) No 45/2001.

The necessity and proportionality of the transfer

25. It is up to the applicant to show whether the transfer of the requested personal data is necessary, that is to say, whether it is the most appropriate measure to achieve the objective pursued by the applicant and if it is proportional to that objective.¹¹
26. In this regard the applicant invokes the interest of right of defence, equality of arms, the respect of contradictory proceedings and the ability to have effective judicial protection.
27. The Council does not consider that the applicant's arguments are sufficient to establish the necessity of the transfer of the requested personal data.
28. To start with, it should be stressed that Regulation 1049/2001 only provides a right of public access to the extent that none of the exceptions provided by said Regulation applies. The automatic prevalence of the principle of transparency over data protection has been expressly ruled out by the Court.
29. In addition, the disclosure of the personal data pursuant to Regulation 1049/2001 would make known to the general public with effect *erga omnes* personal data contained in these two documents. In this context it must be emphasized that this personal data not only refers to the applicant's client, but also to other individuals fulfilling different roles, whose names are occurring several times in both documents under examination. Hence, the applicant's allegation that the two documents only refer to her client is incorrect.
30. Moreover, the scope of the data transfer requested by the applicant is not proportionate in relation to the objective pursued. On the one hand, the applicant has not shown why the transfer of sensitive personal data pursuant to Regulation 1049/2001 would be the only appropriate measure to achieve the objective pursued. On the other hand, if the objective is to safeguard the rights of defence of the applicant's client, this is accomplished by way of privileged access through which the General Secretariat granted access on 6 April 2020 to document **WK 1747/20** and is currently further examining to grant access to the relevant information to the applicant's client contained in **COREU 0006/20**. Therefore, the Council does not consider that it is necessary to make available to the general public with *erga omnes* effect the documents under consideration.

¹¹ Judgment in *Dennekamp v European Parliament* (T-115/13, ECLI:EU:T:2015:497, paragraphs 59, 77 and ff.).

The prejudice to a legitimate interest of the persons concerned

31. The Council considers that disclosure of the requested personal data would prejudice the legitimate interests of the persons mentioned in the documents under considerations, including harm to the reputation of those persons who are not subject to restrictive measures.
32. Releasing the personal data contained in the documents under consideration would make known to the general public detailed background information on the economic activity of various individuals in Syria, which are subject or mentioned in relation to the restrictive measures referred to in footnote 1. Disclosing this sensitive personal data especially for those individuals who are not subject of restrictive measures would invariably cause prejudice to their legitimate interests. Moreover, disclosure of personal data related to those individuals who are subject of restrictive measures but have not given consent that their personal data is divulged to the general public would also cause prejudice to their legitimate interests as detailed information on their economic activity beyond the statement of reasons in the Council's restrictive measures would be made accessible to the general public. For these reasons it does not suffice that the applicant consents in the release of her client's personal data.
33. In light of these considerations, the Council deems that the disclosure of the requested personal data would cause prejudice to legitimate interests of various persons and that, on balance, those interests prevail on the objectives pursued by the applicant. Disclosure of the requested document should therefore be refused.

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

34. The Council has thoroughly re-examined the possibility of releasing parts of these two documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001, but has concluded that the protection of the public interest as regards international relations (Article 4(1)(a), third indent of Regulation (EC) No 1049/2001) covers their whole content including those elements containing only the personal data of the applicant's client. Therefore, no partial access is possible.

CONCLUSION

35. The Council therefore considers that public access to documents **WK 1747/2020** and **COREU 0006/20** must be refused in their entirety.
36. The Council's reply to this confirmatory application does not prejudice the treatment of the request for privileged access to documents related to this file submitted by the applicant to the competent services of the GSC on 8th March 2020, whose outcome will be communicated to the applicant exclusively, without *erga omnes* effect.
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