



Council of the  
European Union

Brussels, 27 May 2019  
(OR. en)

8436/19

LIMITE

INF 108  
API 48

**'I/A' ITEM NOTE**

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From: General Secretariat of the Council

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To: Permanent Representatives Committee/Council

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No. prev. doc.: 8434/19;8435/1/19 REV 1

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Subject: Public access to documents  
- Confirmatory application No 13/c/01/19

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Delegations will find enclosed a draft reply from the Council to confirmatory application No 13/c/01/19, unanimously approved by the Working Party on Information by written consultation which ended on 24 May 2019.

The following statement was made:

***DK:** " Denmark believes it is of great importance to be open about its position, and agrees consequently with giving access to its reply to the questionnaire reflected in document 10098/17"*

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 xxx  
TO CONFIRMATORY APPLICATION 13/c/01/19,  
made by email on 8 April 2019,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to certain documents related to the Council Working party on Information  
Exchange and Data Protection**

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 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 2019 (registered on 18 February 2019), the applicant submitted a request for access to:
  - a) ...*"information about the activities, collaborators, contributions, contact data, work schedules, meeting agendas, work results and working papers, remit or mandate as well as any further documents relating to the Working Party on Information exchange and data Protection" (hereafter: DAPIX);*
  - b) ...*"any answers to the questionnaire sent to EJCEN Eurojust" referred to on page 3 of document 10098/17 of 6 November 2017 which is a Note to Delegations containing a EUROJUST report on Data retention regimes in Europe in light of the CJEU ruling of 21 December 2016 in Joined Cases C-203/15 and C-698/15;*
  - c) ...*information about meeting agendas, participants, results, resolutions, financing, work papers, remits of mandates of the Conference organised by Europol on 20 March 2018, 14 May 2018 and 22/23 November 2018 as well as any other documents relating to the aforementioned conferences,*

d) ...the two documents referred to on page 4 of document 14319/18 which is a Note of 23 November 2018 of the Presidency to the Committee of Permanent Representatives/council on the State of Play of data retention,

e) ...the positions taken by all Member States referred to on page 5 of the same document.

2. The General Secretariat of the Council replied on 27 March 2019.

a) As regards the first part of the applicant's request on information on DAPIX, the GSC invited the applicant to consult first the Council's Register and the case being to come back with a more precise request. It was explained where and how to execute the relevant search.

b) As regards the replies to the questionnaire of EUROJUST and after having consulted Eurojust<sup>1</sup>, access to these replies was refused since their disclosure would undermine the protection of public security<sup>2</sup> and for some the protection of Court proceedings and investigations<sup>3</sup>.

c) On the Europol Conference, the General Secretariat of the Council identified two documents i.e. WK 4507/18 and WK 5900/18 which are Working Papers of 17 April 2018 and 18 May 2018 containing Power point presentation from Europol comprising the Outcome of two "Data Matrix exercises" and to which, after consultation of Europol<sup>4</sup>, partial access was given since the release of certain parts could undermine the protection of commercial interests of natural or legal persons including intellectual property<sup>5</sup>.

d) These documents are also the requested documents referred to on page 4 of document 14319/18.

e) Finally, the General Secretariat of the Council identified document WK 3974/18 of 12 April 2018 which is a Working Paper of the Presidency on Renewable retention warrants and referred to on page 5 of document 14319/18 to which access was granted.

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<sup>1</sup> Article 4(4) of Regulation (EC) No 1049/2001.

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

<sup>3</sup> Article 4(2), second and third indent of Regulation (EC) No 1049/2001

<sup>4</sup> Article 4(4) of Regulation (EC) No 1049/2001.

<sup>5</sup> Article 4(2), first indent of Regulation (EC) No 1049/2001

3. In the confirmatory application dated 8 April 2019 and registered the same day, the applicant asks the Council to reconsider this position and to grant (full) access to all requested documents.
4. The applicant claims the following:
- a) *.You referred to the Council of the European Union’s document register. DELETED’s request, although broad, did in fact relate to specific documents. We would ask you to verify again which of the requested documents are in your institution’s possession and to grant us access to them (...). If our request was not sufficiently specific, we would ask that you help us further define it (...).*
- b) *... You refused to publish the requested documents on the basis that it would pose a risk to the relationship of trust between Eurojust and the Member States, which you claim would create a threat to public security. In addition, you noted that their publication would jeopardise ongoing legal proceedings and investigations.*
- We would request that you explain in detail how the publication of these documents would in fact pose a threat to public security.*
  - We would request that you explain in detail how the publication of these documents would in fact jeopardise ongoing investigations and legal proceedings.*
  - Furthermore, we would request that you explain in detail how and why the grounds for exception outweigh the public interest in the publication of the documents.*

*Data retention is an aspect of law enforcement which always involves substantial infringements of fundamental rights. Groundless data collection in particular constitutes a renunciation of traditional investigative techniques. The Court of Justice ruled in its TELE2 judgment that groundless data retention constitutes a disproportionate interference in fundamental rights. [1] The public interest in participating in the democratic process of assessing the judgment and possibly rethinking data retention should therefore be recognised as correspondingly significant. Data retention has previously been widely debated in society on many occasions. A **DELETED** petition against data retention in Germany received around 35 000 signatures. [2]*

- *We would also request that Germany's reply be published. As a **DELETED**, we are particularly dismayed by the current rules on data retention in Germany. We are therefore bringing an action before the Federal Constitutional Court to contest the legislation currently in force. Our founding directors **DELETED** are among the complainants.*
- c) *... Some of the information we requested is missing. In particular, we were not given access to documents on participants or funding, or to working papers. No information at all was provided to us on the workshop held on 22 and 23 November 2018. We would ask you to verify again which documents concerning these matters are in your institution's possession and to grant us access to them.*
- *Should you refuse our request, we would ask that you provide a detailed justification of your decision. In particular, we would ask that you explain how the grounds for exception outweigh the public interest in publication.*
- d) *... You published only parts of working papers WK 4507/2018 and WK 5900/2018. You justified this on the grounds of a potential breach of copyright which could pose a threat to the intellectual property of legal or natural persons.*
- *We would ask that you reconsider this decision.*

*In our view, the public interest in having full access to the documents mentioned outweighs the commercial interests of third parties. As already mentioned in our remarks under point 2, using data retention as a law enforcement tool involves substantial infringements of fundamental rights.*

*In our view, if publicly funded state institutions are discussing such a politically contentious issue, the public has the right to be given full access to the related documents. We therefore ask that you give the public the opportunity to exercise its right of access to documents as laid down in Article 42 of the EU Charter of Fundamental Rights.*

- *Should you refuse our request, we would ask that you provide a detailed justification of your decision. In particular, we would ask that you explain how the grounds for exception outweigh the public interest in publication.*

5. 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, the aim of ensuring the widest possible public access to documents.
6. In so doing the Council has carefully scrutinized the content of the documents, having due regard to the current state of play related to the issues.

**As regards the request of documents and information on the activities of the Working Party on Information Exchange and Data Protection ("DAPIX")**

7. As regards documents and information on the functioning and activities of DAPIX, the applicant recognised in the confirmatory application that the request is broad, and asked for assistance in order to further define the application in case it "was not sufficiently specific".
8. By letter of 30 May 2019, the General Secretariat of the Council asked the applicant to clarify and narrow down the request pursuant to article 6 (2) and (3) of Regulation No 1049/2001. As it was the case already at the initial stage, guidance was provided in order to help the applicant better define the request and conduct relevant search to this end in the Council's register.
9. In that direction, a list of more than 230 documents, that could be of interest for the applicant and the contents of which are available in the public register, has been also provided.
10. Therefore, the Council considers that, as regards documents that are publicly available in the Council's Register, the General Secretariat has fulfilled its obligation of granting access to documents in line with Article 10(2) of Regulation 1049/2001, by informing the applicant on where and how the requested information can be obtained.

11. The examination of any other further (non-public) documents that could eventually be of interest for the request will be pursued following the clarifications expected from the applicant.
12. The examination of the Council that follows therefore focuses on the remaining parts of the application.

**As regards the answers of Member States to the questionnaire reflected in document 10098/17**

*Preliminary remarks*

13. As provided for in Article 4(4) of Regulation 1049/2001 the Council has re-consulted Eurojust on possible disclosure of the requested contributions. Eurojust has informed the General Secretariat of the Council that according to its internal rules, when proceeding on the examination of an access to document request, it must consult the Member State from which the information originates and, in the absence of an answer by the Member State, refuse access to that information.
14. After having finalized the consultation of the 23 Members of the European Judicial Cybercrime Network that contributed to the Eurojust questionnaire, 7 Members of the European Judicial Cybercrime Network (Germany, Hungary, Finland Netherlands, Slovenia, Sweden and the UK) have agreed to disclose their replies..
15. It shall also be stressed that Regulation No 1049/2001 places the Member States in a position that is different from that of other third parties, by providing in its article 4(5) that a Member State may request that document originating from it is not disclosed without its prior agreement.



16. Case law<sup>6</sup> has further precised that this requirement would risk becoming a dead letter if, despite a Member State's objection, the institution were free to disclose the document in question. Nevertheless, such an objection from a Member State has to be justified by reasons related to the exceptions provided by article 4 of Regulation 1049/2001. It follows that, before refusing access to a document originating from a Member State, the institution concerned must examine whether that State has based its objection on the exceptions under Regulation 1049/2001 and has given proper reasons for its position. In addition, the institution to which the request is made does not have to carry out exhaustive assessment of the Member State's decision. In particular, it shall not conduct a review going beyond the verification of the existence of reasons referring to the aforementioned exceptions. As it is responsible of the decision, the institution must, however, check that the grounds relied upon as justification for the Member State's objection do appear to it, *prima facie*, unfounded.
17. Following the consultation of Member States, Eurojust has confirmed that granting full access to the requested contributions would undermine the public interest as regards public security as well as the protection of court proceedings and investigations.

*Prejudice to protection of the public interest as regards public security*

18. 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 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.

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<sup>6</sup> See notably ECJ case C-64/05, *Sweden v Commission* and case C-135/11 P, *IFAW Internationaler Tierschutz- Fonds v Commission* and General Court case T-250/08, *Batchelor v Commission*, case T-59/09, *Germany v Commission*, case T-669/112 *Darius Nicolai Spirlea v Commission* and case T-74/16, *Pagpyrios organismos ageladotrofon v Commission*.

19. 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>7</sup>.
20. 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 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>8</sup>.
21. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of documents on public security 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.
22. It is recalled that Eurojust was set up with a view to reinforcing the fight against serious crime as a body of the Union with legal personality<sup>9</sup> which established partnerships with other EU bodies as well as with third states and international organisations .
23. Its mandate covers support and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

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<sup>7</sup> ECJ case C-266/05, Sison, para. 34.

<sup>8</sup> ECJ case C-266/05, Sison, para. 46.

<sup>9</sup> Council Decision 2002/187/JHA of 28 February 2002 subsequently amended in 2003 (Council Decision 2003/659/JHA of 18 June 2003, amending Decision 2002/187/JHA) and 2008 (Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA) consolidated version in doc. 5347/3/09.

24. The unauthorised disclosure to the public of information provided by national authorities or partners would prejudice the mutual trust between Eurojust and Member States and would be detrimental to their willingness to provide new information to Eurojust. The confidential treatment of such information is therefore crucial for Eurojust's operational capacity.
25. The Council therefore confirms that the release of the replies of the Members of the European Judicial Cybercrime Network that refuse to give access to the Eurojust questionnaire as contained in document 10098/17, would affect the operational capacity of Eurojust and thus undermine the protection of public interest as regards public security.

*Prejudice to the protection of investigations and court proceedings*

26. The release of some of these replies would jeopardise investigations and court proceeding because the information and positions contained in the documents could be used by individuals or organisations that are or will be subject to investigations or court proceedings in the area of data protection, against the public authorities that conduct the investigations and or engage in Court proceedings.
27. The Council therefore confirms that also for these reasons, the replies to the Eurojust questionnaire of Members of the European Judicial Cybercrime Network that refuse to give access, would undermine the protection of court proceedings and investigations.

**As regards documents related to the Europol Conferences referred to in the confirmatory application as well as documents WK 4507/2018 and WK 5900/2018**

*Preliminary remarks*

28. The Council notes that as stated by the applicant in its request, the conferences referred to under point 1 c) were organized by Europol. Except the two Working Documents containing presentations by Europol to DAPIX i.e. WK 4507/2018 and WK 5900/2018, to which partial access was granted, no further documents related to these conferences are hold by the Secretariat General of the Council.

29. It shall be recalled that according to established case-law of the Court of justice, the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 applies only to existing documents in the possession of the institution concerned<sup>10</sup>. Regulation (EC) No 1049/2001 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist<sup>11</sup>.
30. As regards WK 4507/2018 and WK 5900/2018 pursuant to Article 4(4) of Regulation 1049/2001 the Council has re-consulted Europol.

*Prejudice to protection of commercial interests of a natural or legal person, including intellectual property*

31. Having conducted a renewed consultation with Europol as regards documents WK 4507/2018 and WK 5900/2018 , the latter has confirmed its original assessment. Its recommendation was reached after a careful consideration of the written submissions and an ad-hoc reassessment of the consequences of the disclosure of the redacted parts against the interests protected under the relevant public access legislation, in particular the protection of the commercial interests of a natural or legal person, including intellectual property. The parts of the documents to which no access was granted, pertain to images, sourced from online media providers, containing depictions of law enforcement officers, movie actors, etc., meant to exclusively illustrate and visualise certain elements made in the presentations.
32. The Council considers that the release of these images would not contribute to a better understanding nor contains any other substantial element related to the issue presented.

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<sup>10</sup> ECJ, case C-127/13 P, *Strack v Commission*, para. 38.

<sup>11</sup> ECJ, case C-127/13 P *Strack v Commission*, para. 46.

**The overriding public interest in disclosing the requested documents (documents 10098/17, WK 4507/2018 and WK 5900/2018)**

1. The Council notes that "overriding public interest" is an assessment criterion which does not apply to the exception under Article 4.1.a. first indent (protection of public security). It only applies in the current case to the exception under Article 4.2 first, second and third subparagraph of Regulation 1049/2001.
2. The Council notes that the arguments of the applicant to support the overriding public interest are general, non-detailed considerations which substantially amount at alleging that the topic is somehow being discussed by the general public. The Council considers that these considerations fail to show that the need for the public to have access to the requested documents is particularly pressing in the present case and that it should override the interest that advocate against disclosure, as developed above. This is all the more so in relation to the fact that the requested documents are not part of the legislative decision-making process of the Council but pertain to a broader policy making reflection as mentioned above. Therefore the principle of wider access in cases where the institutions are acting in their legislative capacity, which is also referred to in recital 6 of Regulation (EC) No 1049/2001, is not directly relevant in the present circumstances.
3. The Council therefore concludes that no overriding public interest in the disclosure of the requested documents has been demonstrated.

## Conclusion

4. For the above-mentioned reasons, the Council concludes that:
- a. as regards documents on the activities of the DAPIX that are publicly available in the Council's Register, the General Secretariat has fulfilled its obligation of granting access to documents in line with Article 10(2) of Regulation 1049/2001, by informing the applicant on where and how the requested information can be obtained. The examination of any other (non-public) documents that could eventually be of interest for the request will be pursued following the provision of further clarifications by the applicant.
  - b. after having consulted Eurojust and the Members of the European Judicial Cybercrime Network who contributed to the Eurojust questionnaire:
    - wider partial access can be granted to document 10098/17 i.e. to the replies of those Members who agreed to disclose their contributions (Germany, Hungary, Finland, Netherlands, Slovenia, Sweden and the UK)
    - full release to this document cannot be granted since the disclosure of the other replies would undermine the protection of the public interest as regards public security<sup>12</sup>, the protection of Court proceedings<sup>13</sup>, and the protection of investigations<sup>14</sup>;
  - c. no full or wider partial access can be granted to documents WK 4507/2018 and WK 5900/2018 since their full release would undermine the protection of commercial interests of a natural or legal person, including intellectual property;
  - d. the applicant is invited to address Europol to obtain the requested additional information on the Europol Conferences which is not held by the General Secretariat of the Council.

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<sup>12</sup> Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

<sup>13</sup> Article 4(2), second indent of Regulation (EC) No 1049/2001.

<sup>14</sup> Article 4(2), third indent of Regulation (EC) No 1049/2001.