



Council of the  
European Union

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#### "I/A" ITEM NOTE

From:	Working Party on Information
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	11688/15
Subject:	Public access to documents - Confirmatory application No 20/c/03/15

Delegations will find enclosed a draft reply from the Council to confirmatory application No 20/c/03/15, approved unanimously by the Working Party at its meeting on 24 September 2015.

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 .....**  
**TO CONFIRMATORY APPLICATION 20/c/3/15,**  
**made by email on 31 August 2015,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to documents 11000/15, 11000/15 ADD1 and 11000/15 ADD 1 COR 1**

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) 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. The applicant refers to documents 11000/15, 11000/15 ADD 1 and 11000/15 ADD 1 COR 1. Document 11000/15 (classified RESTREINT UE/EU RESTRICTED) is a report to the Political and Security Committee (PSC) relating to the development of the "Complete Operational procedures" to be defined pursuant to Article 5 of Council Decision 2014/496/CFSP for the European Global Navigation Satellite System (GNSS) Security Architecture. Document 11000/15 ADD 1 sets out two unclassified annexes to document 11000/15, and document 11000/15 ADD 1 COR 1 is a corrigendum to document 11000/15 ADD 1.
2. In its reply dated 31 August 2015, the General Secretariat refused public access to the documents pursuant to Article 4(1)(a), first indent (protection of the public interest as regards public security), and, in the absence of any evidence of an overriding public interest in release, also Article 4(3), first subparagraph (protection of the Council's decision-making process), of Regulation No 1049/2001.

3. In his confirmatory application dated 31 August 2015, the applicant asks the Council to reconsider this position. He claims to have some insight into the design of security concepts for technical installations and therefore finds it hard to believe that releasing a document on security concepts would help to circumvent them. This is why he cannot accept that the release of the documents would create an operational risk but alleges that both GNSS and EEAS security practices should be able to withstand public knowledge of said practices.
4. Following the receipt of the confirmatory application and in accordance with Article 4(4) of Regulation 1049/2001, the Council consulted the author of the documents, the European External Action Service (EEAS), in order to assess if an exception in Article 4(1) or 4(2) of the Regulation is applicable. Following this consultation, the Council carried out its own assessment on whether the requested documents can be disclosed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comments. It came to the conclusions set out below.

## **THE CONTEXT**

5. Galileo is Europe's programme for a global navigation satellite system, providing an autonomous satellite-based positioning, navigation and timing capability and a set of five worldwide services. When reaching full operational capability, it will consist of 30 satellites and of an extended ground infrastructure. Galileo is key for ensuring Europe's independence in a sector that has become critical for its economy and the well-being of its citizens; it also contributes to maintaining and developing Europe's know-how in the space, receivers and applications sectors, securing economic revenues and jobs. Galileo is developed in collaboration between the European Union and the European Space Agency.
6. Society's reliance on high integrity positional, navigational and timing data is growing. The easy and cheap availability of global navigation satellite systems has meant that their use as primary sources of data can be found in an increasing number of products and services. The range of applications stretch from highly accurate surveying to in-car navigation, and from

network synchronisation to climate research. Due to its strategic nature, the European Global Navigation Satellite System (GNSS) is a sensitive infrastructure that could be susceptible to malicious use. Given the increasing usage of satellite navigation across a great number of fields of activity, an interruption in the supply of services could lead to significant harm to modern society.

7. Council Decision 2014/496/CFSP<sup>1</sup> sets out the responsibilities for the Council and the High Representative of the Union for Foreign Affairs and Security Policy to address two fundamental Global Navigation Satellite System (GNSS) security issues:
  1. *"a threat to the security of the Union or one or more Member States or to ... the essential interests of the Union or of one or more Member States arising from the deployment, operation or use of the European Global Navigation Satellite System, in particular as a result of an international situation requiring action by the Union"*; or
  2. *"a threat to the operation of the system itself or its services"*.
8. In the event of such a threat, the Member States have to inform the Council and the HR immediately of all the elements at their disposal which they consider relevant. Furthermore, Member States have to designate points of contact to assist in the operational management of a threat.
9. Furthermore, Article 5 of the Council Decision requires the High Representative to prepare, within six months from the adoption of the Decision and with the support of experts from the Member States, the necessary early operational procedures for the practical implementation of the provisions set out in that Decision. Complete operational procedures have to be submitted for approval within one year from the adoption of the Decision.

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<sup>1</sup> Council Decision 2014/496/CFSP of 22 July 2014 on aspects of the deployment, operation and use of the European Global Navigation Satellite System affecting the security of the European Union and repealing Joint Action 2004/552/CFSP; see OJ L 219, 25.7.2014, p. 53.

## THE REQUESTED DOCUMENTS

10. Document 11000/15 is a working document by the EEAS to the Political and Security Committee setting out a framework to further elaborate and agree the Complete Operational Procedures required by Council Decision 2014/496/CFSP. By reason of its nature and sensitive content, this document is classified RESTREINT UE/ EU RESTRICTED as its disclosure would be disadvantageous to the interests of the European Union.
11. Document 11000/15 ADD 1 sets out two unclassified annexes to document 11000/15, namely a draft list of principal points of contact in the Member States and other stakeholders and an Administrative Decision of the High Representative of 23 June 2015 on Operational Procedures for the European GNSS Security Architecture in relation to Council Decision 2014/496/CFSP. Document 11000/15 ADD 1 COR 1 is a corrigendum to document 11000/15 ADD 1.

### *General remarks*

12. Based on their content, as set out above, the requested documents come within the remit of the exception concerning the protection of the public interest as regards public security (Article 4(1)(a) first indent) of Regulation No 1049/2001.
13. At the outset, the Council deems it useful to underline that while the requirements of transparency are greater when the EU Institutions are acting in their legislative capacities, public participation in the domain of public security - which in principle falls within the domain of the executive - is necessarily restricted. Furthermore, the case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. According to the Court, the concept of public security can cover the interruption of supplies of essential commodities which may threaten the very existence of a country. Furthermore,

the concept also encompasses situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities.<sup>2</sup> As indicated above, the European Global Navigation Satellite System is a sensitive infrastructure that could, due to its strategic nature, be susceptible to malicious use. Since an interruption in the supply of its services could lead to significant harm to modern society, the documents clearly fall within the domain of public security.

14. The Council also recalls that, according to the constant case law of the Court of Justice, the public interest exceptions disciplined by Article 4(1)(a) of Regulation No 1049/2001 are subject to a different regime than the other exceptions included in Article 4.
15. 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>3</sup>.
16. 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>4</sup>.

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<sup>2</sup> Judgment of the Court of first Instance in case T-174/95 Svenska Journalistförbundet v Council, para 121.

<sup>3</sup> Judgment of the Court of Justice in case C-266/05, Sison, para. 35.

<sup>4</sup> Judgment of the Court of Justice in case C-266/05, Sison, para. 46.

17. The Council acknowledges that, according to the Court, even when invoking one of the public interest exceptions identified by Article 4(1)(a), EU institutions are required to explain how disclosure of the requested documents could specifically and actually undermine the interest protected by the exception.<sup>5</sup> The Council nevertheless points out that its obligation to provide a statement of reasons cannot result in an indirect disclosure of the information which the invoked exception is aimed at protecting or in the need to provide the evidence of a threat which is - by definition - merely foreseeable, since in so doing the exception will be deprived of its very purpose.<sup>6</sup>
18. As far as the protection of the decision-making process is concerned, the Court has underlined that the *administrative* decision-making of the institutions - such as the one at stake here - deserves particular protection since the interest of the public in obtaining access to a document pursuant to the principle of transparency does not have in this domain of activity the same weight that it carries when the institutions are acting in their legislative capacity.<sup>7</sup> The Court has further stressed the special importance to protect administrative procedures from undue influences that could affect the quality of the final decision and to preserve the serenity and good handling of the administrative proceedings.<sup>8</sup>

*Assessment of the harm to the protected interests ensuing from the disclosure of the documents*

19. The Council would first note that, following a renewed assessment of document 11000/15 ADD 1 COR 1, the Council considers that disclosure of this document would not cause harm to any of the protected interests set out in Article 4 of Regulation No 1049/2001. Full access may thus be granted to this document.

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<sup>5</sup> Judgment of the Court of Justice in case C-350/12P, *In 't Veld v Council*, para. 64.

<sup>6</sup> Judgment of the Court of First Instance in case T-264/04, *WWF*, para. 37; judgment of the Court of Justice in case C-266/05, *Sison*, para. 83.

<sup>7</sup> See judgment of the General Court of 15 January 2013 in case T-392/07, *Strack v Commission*, para 244; judgment of the General Court of 9 September 2008 in case T-403/05, *MyTravel v Commission*, para. 49.

<sup>8</sup> See judgment of the General Court of 11 December 2014 in case T-476/12, *Saint Gobain Glass Deutschland v Commission*, para. 80 to 84.

*a) Exception pursuant to Article 4(1)(a), first indent*

20. Document 11000/15 sets out a first identification of threat scenarios to the Galileo infrastructure for which a mitigation action can be expected. Public disclosure of the document would reveal details of the consideration of possible vulnerabilities of the system and/or governance. Releasing this document would therefore be counterproductive to the efforts to create efficient mitigating actions and, consequently, detrimental to the effective and secure management of the system.
21. As indicated above, an interruption in the supply of GNSS services could lead to significant harm to modern society. The integrity of the system and the continuity of the services, which are essential factors for the performance of the GNSS, could be compromised if the details set out in document 11000/15 were disclosed. Release to the public of the information contained in the document would therefore constitute a major threat to the public security of the Union and of its Member States. Full disclosure of document 11000/15 would thus undermine the protection of the public interest as regards public security.
22. Document 11000/15 ADD 1 sets out a draft list of principal points of contact in the Member States and of other stakeholders and an Administrative Decision of the High Representative of 23 June 2015 on Operational Procedures for the European GSNN Security Architecture in relation to Council Decision 2014/496/CFSP. This decision sets out the internal procedures for the EEAS to function in a situation in which one of the threat scenarios has become reality. Disclosure of the operational details set out in the decision would reveal to the public the concrete role of particular EEAS staff members in a crisis situation, as well as the communication means used in such a situation. Misuse of this information would undermine the effectiveness of the actions taken to mitigate a threat, thereby causing serious harm to the performance of the GNSS system and thus to the essential interests of the Union or one or more of its Member States. It could also put at risk the individuals concerned. Full disclosure of document 11000/15 ADD 1 would thus undermine the protection of the public interest as regards public security.



*b) Exception pursuant to Article 4(3), first subparagraph*

23. The requested documents constitute a report to the PSC with a framework to elaborate and agree the Complete Operational Procedures required by Council Decision 2014/496/CFSP. Discussions within the EEAS and the Council on these procedures are still on-going, as are consultations with Member States and relevant European institutions and bodies, including the European Space Agency.
24. The Council considers that disclosure of the documents at this stage, while negotiations within the EEAS and the Council's preparatory bodies and consultations with the relevant stakeholders are still on-going, would expose the decision-making to undue influences that could affect the quality of the final decision and jeopardise the handling of the proceedings. The Council considers that the risk of such undue influences is likely, specifically and actually, to undermine the protection of the institution's on-going decision-making process, and that the risk of this interest being undermined is reasonably foreseeable and not purely hypothetical. The Council therefore confirms the General Secretariat's view at the initial stage that disclosing the documents would seriously undermine the protection of the institution's on-going decision-making process pursuant to Article 4(3), first subparagraph, of Regulation No 1049/2001.
25. When the institution takes the view that disclosure of a document would undermine the protection of its decision-making process as defined above, it is incumbent on the institution to ascertain whether there is any overriding public interest justifying disclosure, despite the fact that its decision-making process would thereby be undermined. The case-law of the Court however provides that it is for the applicant to show that there is an overriding public interest to justify the disclosure of the documents concerned.

26. In his confirmatory application, the applicant claims that releasing a document about security concepts would not help to circumvent them. He cannot accept that the release of the documents would create an operational risk but claims that both GNSS and EEAS security practices should be able to withstand public knowledge of said practices. While the Council agrees with the applicant that security concepts should be able to withstand public scrutiny, the Council would underline that the documents are of a different nature than what the applicant appears to believe. The documents set out operational procedures including details of potential threat scenarios, communication means to be used and staff to be involved, rather than factual information about the security concepts. In this respect, the Council can assure the applicant that all technically available means are in place at the level of the designers, manufacturers and present operators of the satellites to ensure the necessary security. On the basis of the above, the Council considers that the applicant has not shown that there would be an overriding public interest to justify the disclosure of the documents concerned.
27. The Council has weighed the public interest relating to the efficiency of its internal decision-making process against the public interest in increased openness, which guarantees that the EU institutions enjoy greater legitimacy and are more accountable to the citizens, and has considered whether there existed an overriding public interest in full disclosure of the requested document. In view of the fact that Council Decision 2014/496/CFSP on aspects of the deployment, operation and use of the European Global Navigation Satellite System affecting the security of the European Union is publicly available, as well as the fact that the applicant has not shown that there would be an overriding public interest to justify the disclosure of the documents concerned, the Council has come to the conclusion that the advantages stemming from the openness of the Council's on-going decision-making process do not prevail in the present case over the public interest in protecting the Council's decision-making process.

28. Against this background, the Council considers that, on balance, all possible factors which would, at the present stage, favour releasing the requested documents in their entirety are outweighed by the need to protect the Council's decision-making process. The Council therefore concludes that in the case at hand and at this point in time, the protection of the Council's decision-making process outweighs the applicant's interest in the disclosure of the withheld information.

*Extended partial access pursuant to Article 4(6) of Regulation 1049/2001*

29. The Council has also examined the possibility of granting extended partial access to documents 11000/15 and 11000/15 ADD 1 as foreseen in Article 4(6) of the Regulation. It has concluded that there are indeed parts of the documents which are not covered by the above-mentioned exceptions. Public access may thus be granted to document **11000/15 EXT 1**, the partially declassified version of document 11000/15. Furthermore, public access may be granted to document **11000/15 ADD 1 EXT 1**, the publicly available version of document 11000/15 ADD 1. As far as the remaining parts of the documents are concerned, the Council is of the opinion that it is not possible to grant public access to them without compromising one or both of the protected interests referred to above.

## CONCLUSION

30. In exercising its wide margin of discretion in the matter, the Council therefore considers that full disclosure of the content of documents 11000/15 and 11000/15 ADD 1 would undermine the protection of the public interest as regards public security and the protection of the Council's on-going decision-making process. Full public access must therefore be refused pursuant to Article 4(1)(a), first indent, and Article 4(3), first subparagraph, of Regulation No 1049/2001.