



Council of the  
European Union

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**NOTE**

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From: General Secretariat of the Council

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To: Delegations

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No. prev. doc.: 12696/23

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Subject: Public access to documents  
- Confirmatory application No 29/c/01/23

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Delegations will find attached a draft reply to the confirmatory application No 29/c/01/23  
(see document ST 12696/23).

**REPLY TO CONFIRMATORY APPLICATION No 29/c/01/23  
made by e-mail on 1st September 2023 and registered on the same day**

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<sup>1</sup> (hereinafter referred to as “Regulation (EC) No 1049/2001”) and Annex II to the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

1. On 5<sup>th</sup> July 2023 (request registered on 7<sup>th</sup> July 2023), the Applicant requested access to:
  - a) all documents forwarded from the Member States to the Council related to the proposal, made by the European External Action Service (EEAS), to add its client to the list of individuals affected by restrictive measures as by Annex to Council Decision No 2014/145/CFSP and Annex I to Regulation (EU) No 269/2014;
  - b) all documents produced by the Council and its preparatory bodies that led to the decision to add their client to the abovementioned list.
2. In its reply on 28 August 2023 (ref. 23/2065-vl/nb), the General Secretariat of the Council (“GSC”):
  - a) informed the Applicant that the documents providing evidence in support of the Council’s Decision and Regulation referred to in point 1a) are **WK 3073/2022** and **WK 17621/2022**, both released to the applicant under privileged access procedure respectively on 13 April 2022 and on 22 December 2022, and **WK 10524/2023 INIT + REV 1**, produced at a later stage (on 9 and 10 August 2023), for which the applicant could introduce a new request under the same abovementioned procedure.
  - b) indicated that the four abovementioned WK documents could not be released to the public as, owing to their sensitive content, their disclosure would undermine the privacy and integrity of the individuals referred therein and cause prejudice to public interest as regards international relations (Article 4(1)(a), third indent and Article 4(1)(b) of Regulation (EC) No 1049/2001;

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35.

- c) identified eighteen documents concerning the preparatory work leading to the adoption of the Council decision, releasing nine of them in their entirety, providing partial access to five of them (**ST 11349/22, ST 16184/22, ST 6811/23, ST 9620/23 and ST 11045/23**) redacting Annexes containing draft correspondence with the individuals concerned by the restrictive measures and with their lawyers invoking the data protection needs (i.e. the abovementioned Article 4(1)(b));
- d) informed the Applicant that, as regards the four remaining documents (**ST 7122/22, ST 7124/22, ST 6807/23 and ST 6809/23**, containing the EEAS' proposals for the related Council's Decision and implementing Regulation), consultations with the EEAS were still ongoing and therefore the Applicant would receive a complementary reply as soon as those consultations would be achieved.
3. On 1<sup>st</sup> September 2023, the Applicant submitted a confirmatory application asking the Council to reconsider the GSC's position, contending that the documents released by the General Secretariat did not correspond to its request, since they did not enable to identify which Member States had taken the initiative leading to the EEAS' proposal to adopt restrictive measures towards its client.
4. By e-mail on 4<sup>th</sup> September the General Secretariat, acknowledging the applicant's reply, specified that the Council did not hold any document received from the EU Member States concerning the EEAS' proposals and that there were no further documents on this topic, with the exception of the four EEAS' documents referred to in point 2d) above.
5. In its reply on 5<sup>th</sup> September, the applicant reiterated its confirmatory application and requested to receive confirmation that "*no Member State had informed the Council that it would wish to include its client to the list*".
6. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principles underlying Regulation (EC) No 1049/2001, on account of the Applicant's arguments and of new consultations whether more documents held by it and corresponding to the applicant's request could be identified and if full public access can be provided to the requested documents referred to in point 2.c above.

7. The Council has completed the assessment of the four outstanding documents (i.e. four EEAS' proposals) referred to in point 2.d above, to which the applicant may now have partial access in the light of the completed consultations with the EEAS. For the reasons developed here below (see paragraphs 19 to 22) the parts of these documents containing personal data on individuals are not disclosed.
8. The undisclosed parts of these proposals contain information on individuals whose names were withdrawn and therefore were not retained in the final list of sanctioned subjects adopted by the Council.

## **ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION (EC)**

### **No 1049/2001**

#### **A. THE EXCEPTION in ARTICLE 4(1)(a), third indent (INTERNATIONAL RELATIONS) of REGULATION (EC) No 1049/2001 INVOKED TO REFUSE ACCESS TO DOCUMENTS WK 3073/2022, WK 17621/2022 and WK 10524/2023 INIT + REV 1 IN THEIR ENTIRETY**

9. The Council recalls that, in accordance with 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.
10. On the one hand, "*in respect of the public interest exceptions provided for in Article 4(1)(a)*" of Regulation (EC) No 1049/2001, the Council must be recognised as "*enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision*".<sup>3</sup>
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<sup>3</sup> Judgments of 11 July 2018, *ClientEarth v Commission*, T-644/16, EU:T:2018:429, paragraph 25, and of 27 November 2019, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, T-31/18, EU:T:2019:815, paragraph 65.

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>

12. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents focused on international relations, but it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document or parts of a document would harm the abovementioned protected interest.
13. Besides, for the purpose of the assessment of a request for access to documents under Regulation (EC) No 1049/2001, it is not required to establish the existence of a definite risk of undermining the protection of the European Union's international relations, but merely the existence of a reasonably foreseeable and not purely hypothetical risk<sup>5</sup> for which, as previously recalled, the institution enjoys a margin of discretion.
14. 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 interests protected by them.
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<sup>4</sup> Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 46; and similarly judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, ECLI:EU:T:2018:69, paragraph 38.

<sup>5</sup> Judgment of 25 November 2020, *Bronckers v Commission*, T-166/19, EU:T:2020:557, paragraph 60.

Having carried out a new assessment of their contents (following consultations within the Council's services and with the EEAS), the Council considers that documents **WK 3073/2022, WK 17621/2022 and WK 10524/2023 INIT + REV 1** cannot be made public. They contain sensitive information forming the evidence package (composed of different sources) that led to the inclusion of the Applicant's client and other individuals in the list of restrictive measures as a result of an analytical process that takes into account the evolution of the file and all the political and security implications as well as the strategic needs to be met in this context, an exercise that requires a safe, cautious and pragmatic approach in the relations between the European Union, its Member States and its international partners.

16. The Council has also looked into the possibility of releasing parts of these four WK documents on the ground of Article 4(6) of Regulation (EC) No 1049/2001, but concluded that this is not possible as the information contained therein forms an inseparable whole.

**B. THE EXCEPTION in ARTICLE 4(1)(b) (DATA PROTECTION) RAISED FOR PARTIAL ACCESS TO DOCUMENTS ST 7122/22, ST 7124/22, ST 11349/22, ST 16184/22, ST 6807/23, ST 6809/23, ST 6811/23, ST 9620/23 and ST 11045/23**

17. As regards documents **ST 11349/22, ST 16184/22, ST 6811/23, ST 9620/23 and ST 11045/23**, as specified in para 2c above, the undisclosed parts contain draft Annexes submitted to the Permanent Representatives Committee and to the Council for approval, concerning correspondence to be initiated with the individuals targeted by the restricted measures or with their lawyers.
18. The Council noted that the Applicant has not specifically entered any claim with respect to the partial access granted to these documents, since it does not consider them as corresponding to its request. Nevertheless, the Council wishes to underline that, in absence of any specific reference from the Applicant to a legitimate prevailing public interest in the release of such personal data, it does not see any convincing argument that would plead for the disclosure of the Annexes of these documents that were not released in the initial reply.

19. As regards documents **ST 7122/22, ST 7124/22, ST 6807/23** and **ST 6809/23**, the undisclosed parts of these proposals contain information on individuals and whose names were withdrawn and therefore were not retained in the final list of sanctioned subjects adopted by the Council.
20. The redacted parts of these nine documents contain personal data about identified persons included therein as deemed necessary for the organisation of the work of the Council.
21. The data protection rules at EU level<sup>6</sup> provide that, when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data.
22. After carefully considering all the principles related to this request, on balance the Council has concluded that disclosure of the personal data contained in those Annexes would undermine the protection of privacy and the integrity of the identified individuals. As a consequence, neither full access, nor more extensive partial access as foreseen in Article 4(6) of Regulation (EC) No 1049/2001, can be given to documents **ST 11349/22, ST 16184/22, ST 6811/23, ST 9620/23, ST 11045/23, ST 7122/22, ST 7124/22, ST 6807/23** and **ST 6809/23**<sup>7</sup>.

## **ON THE APPLICANT'S ARGUMENTS**

23. As regards the Applicant's allegation that the preparatory documents identified by the General Secretariat do not correspond to its request, the Council confirms that the eighteen documents referred to in the initial phase are the only documents held by the Council in relation to the EEAS' proposals for the restrictive measures concerning the Applicant's client.
24. Nevertheless, following thorough consultations with its Directorate for External Relations, the Council has identified one additional document (**CFSP-XXX-0013-22**) containing the sole contribution to this file from a Member State, by which that country's authorities provided some evidence that led the Council to adopt its Decisions in 2022 and 2023.

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<sup>6</sup> 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).

<sup>7</sup> Article 4(1)(b) of Regulation (EC) No 1049/2001.

25. It ought to be noted that COREU documents are produced in an intergovernmental framework following the COURTESY framework and do not appear in the data bases of the Council, since the repository of these documents is the EEAS. Nevertheless, in the case of this COREU document, it was in the possession of the GSC and therefore it must be considered as being “held” by the Council in line with Article 1(3) of Regulation (EC) No 1049/2001.
26. COREU document **CFSP-XXX-0013-22** contains information on few individuals and entities composing the whole list finalised at the final stage of the Council’s adoption of the Decision concerned published in the Official Journal. It also contains three entries (two persons and one organisation) that were not included in the final list of subjects affected by the related restrictive measures.
27. Following consultations with the Member State who produced this COREU, the Applicant can have access to the contents of the document, with the exception of the abovementioned three entries and those parts identifying the originating source.
28. The Council considers that disclosing the aforementioned elements of the text would seriously weaken the confidential framework that governs the sanctions’ regime, expanding sanctions and vanish the key objectives of its implementation. This, in consequence, could cause prejudice to public interest as regards the international cooperation on which the efficiency and the effectiveness of the imposition of restrictive measures are based. Moreover, the release of the two entries related to individuals whose names were not added in the final list adopted by the Council would clearly constitute a breach to data protection for the identical reasons stated in paragraphs 15 and 19 to 22 above. Finally, the public disclosure of the entity which was not added in the Council decision would be liable to damage its reputation and be liable to undermine its commercial interest in the sense of Article 4(2), first indent, of Regulation (EC) No 1049/2001.
29. Hence, full release of this COREU document to the public must be refused since those parts are covered by Article 4(1)(a) third indent (protection of public interest as regards international relations) as well as Article 4(1)(b) and Article 4(2); first indent, of Regulation (EC) No 1049/2001.

30. With the exception of the abovementioned COREU document, there are no further documents held on this procedural framework and there are no other Members States' documents held in the Council's premises, neither as regards the contribution to the EEAS' proposals nor to the preparatory phase leading to the adoption of the Council's Decisions and Regulations concerned.

## CONCLUSION

31. In light of the above, the Council therefore concludes that :

- a) access to **documents WK 3073/2022, WK 17621/2022 and WK 10524/2023 INIT + REV 1** must be refused in their entirety on the ground of Article 4(1)(a), third indent and Article 4(1)(b) of Regulation (EC) No 1049/2001;
- b) no full access and no extended partial access can be granted to the documents identified as regards the preparatory process concerned (**ST 7122/22, ST 7124/22, ST 11349/22, ST 16184/22, ST 6807/23, ST 6809/23, ST 6811/23, ST 9620/23 and ST 11045/23**), since the undisclosed parts are covered by Article 4(1)(b) of the abovementioned Regulation;
- c) there are no Members States' documents held in the Council's premises with regard to the file concerned, with the exception of document **COREU CFSP-XXX-0013-22** to which the Applicant may be granted partial access, since parts of that document are covered by Article 4(1)(a), third indent, 4(1)(b) and 4(2), first indent, of the abovementioned Regulation.