



Council of the
European Union

**Brussels, 12 September 2023
(OR. en)**

12864/23

**INF 199
API 149**

NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Public access to documents
- Confirmatory application No 31/c/01/23

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 12 July 2023 and registered on the same day (Annex 1);
- the replies from the General Secretariat of the Council dated 3 and 25 August 2023 (Annex 2);
- the confirmatory application dated 7 September 2023 and registered on 8 September 2023 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Wednesday 12 July 2023, 10:59]

From: **DELETED**

Sent: mercredi 12 juillet 2023 10:59

To: TRANSPARENCY Access to documents (COMM) Access@consilium.europa.eu

Subject: working papers dual-use regulation [#283729]

Dear Council,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting the following documents:

- 1) WK 3710 2018 INIT - 26/03/2018- Commission's Proposal for a Regulation setting up a Union regime for control of exports, transfer, brokering, technical assistance and transit of Dual-Use items - AT, BE, CY, DE, EE, FI, FR, HR, IE, MT, NL, PL, RO, SE, SI and UK proposals
- 2) WK 8577 2018 INIT 11/07/2018 Overview of Member State Positions on Issue 6 Re-evaluation of intra-EU transfer controls, enhanced information exchange and publication of public annual reports
- 3) WK 4656 2018 INIT 19/04/2018 Commission Proposal for a Regulation setting up a Union regime for control of exports, transfer, brokering, technical assistance and transit of Dual-Use items - French Comments
- 4) WK 7360 2018 INIT 15/06/2018 Netherlands comments on the commission's proposal for a revised dual-use regulation
- 5) WK 5669 2018 INIT 14/05/2018 German comments to the Commission proposal for recast of Reg. 428/2009 (Dual-use)
- 6) WK 5753 2018 INIT 15/05/2018 Overview of Member State Positions - Review Issue 4. Convergence of catchall controls, Review of brokering controls, Review of transit controls
- 7) WK 5498 2018 INIT 07/05/2018 Export Licenses for Mobile Telecommunications Interception Equipment (5A001.f)
- 8) WK 2690 2023 INIT 22/02/2023 Israel's request for a dialogue concerning Export Controls
- 9) WK 7507 2018 INIT 19/06/2018 Recast of Regulation 428/2009 - For an effective, focused and balanced control of cyber-surveillance items

10) WK 5689 2018 INIT 14/05/2018 Swedish comments regarding articles 2.6-2.7, 2,10, 4.1-4.6, 5, 6 and 8, Commission Regulation 428/2009 (recast)

11) WK 5675 2018 INIT 14/05/2018 Danish comments on the Commission proposal for Regulation 428/2009 (recast)

12) WK 2685 2018 REV 3 13/04/2018 Overview of Member State Positions

13) WK 2685 2018 REV 2 12/04/2018 Overview of Member State Positions

Please don't hesitate to contact me if you have any doubts or question in regards to this request.

Yours faithfully,

DELETED



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 3 August 2023

DELETED

Email: **DELETED**

Ref. 23/2112-vl/vk

Request made on: 12.07.2023

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached, as requested, the following documents: **WK 2685/2018 REV 2, WK 2685/2018 REV 3, WK 3710/2018, WK 5669/2018, WK 5675/2018, WK 5689/2018, WK 5753/18, WK 7360/2018, WK 7507/2018 and WK 8577/2028.**

Please note that the General Secretariat is still conducting consultations necessary to the examination of the remaining documents that you requested (**WK 2690/2018, WK 4656/2018 and WK 5498/2018**). Therefore, for this part of your request we have to extend the deadline by 15 working days, until 25.08.2023.²

Yours Sincerely,

Fernando FLORINDO

Enclosures: 10

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

² Article 7(3) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 25 August 2023

Ref. 23/2112-ADD-vl/vk

Request made on: 12.07.2023

Dear **DELETED**,

As a complement to our initial reply on 3 August 2023, please find here below the conclusion reached by the General Secretariat on the remaining three documents concerned by your request.

I regret to inform you that access to documents **WK 2690/2023**, **WK 4656/2018** and **WK 5498/2018** cannot be granted, for the reasons set out below.

Document **WK 2690/2023**, drawn up by the European Commission for the Council's Working Party on Dual-Use Goods, concerns Israel's request for a dialogue concerning Export Controls.

Document **WK 4656/2018** contains comments submitted by a Member State to the abovementioned Working Party as regards the European Commission's proposal for a Regulation setting-up a Union regime for control of experts, transfer, brokering, technical assistance and transit of Dual-Use items.

Document **WK 5498/2018** contains information shared by a Member State with the abovementioned Working Party's delegations focusing on Export Licenses for Mobile Telecommunications Interception Equipment.

Following our consultations, the General Secretariat considers that the release of these documents to the public cannot be granted, since their disclosure would reveal confidential information on sensitive matters that could be used by EU's adversaries to cause prejudice to its strategy for the exports control of the dual-use items and to its cooperation, internal and with third countries, in this field. This would undermine public interest as regards defence and military matters and international relations.³

We have also looked into the possibility of releasing parts of these three documents.⁴ However, as the information contained therein forms an inseparable whole, the General Secretariat is unable to give partial access.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours Sincerely,

Fernando FLORINDO

³ Article 4(1)(a), second and third indent of Regulation (EC) No 1049/2001.

⁴ Article 4(6) of Regulation (EC) No 1049/2001.

[E-mail message sent to access@consilium.europa.eu on Thursday, 7 September 2023, 17:07]

From: **DELETED**

Sent: jeudi 7 septembre 2023 17:07

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: AW: Ref. 23/2112-ADD-vl/vk [#283729]

Dear Sir or Madam,

Please forward this to the person responsible for reviewing confirmatory applications.

With letter dated 25 August 2023 the Council of the EU refused access to the requested documents WK 2690/2023, WK 4656/2018 and WK 5498/2018 on the following basis:

„Following our consultations, the General Secretariat considers that the release of these documents to the public cannot be granted, since their disclosure would reveal confidential information on sensitive matters that could be used by EU’s adversaries to cause prejudice to its strategy for the exports control of the dual-use items and to its cooperation, internal and with third countries, in this field. This would undermine public interest as regards defence and military matters and international relations. We have also looked into the possibility of releasing parts of these three documents. However, as the information contained therein forms an inseparable whole, the General Secretariat is unable to give partial access.“

I hereby argue that the refusal of even partial access to the requested documents is not covered by Article 4(1)(a), second and third indent of Regulation (EC) No 1049/2001.

According to the case law on Article 4(1)(a) of Regulation No 1049/2001 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 could undermine the public interest. The review of legality of such a decision is therefore limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (EuGH, 01.02.2007, C-266/05 P, para. 34 – Sison v Council).

With regard to this case-law, the Council in the present case failed to comply with the duty to state reasons. Furthermore there has been a manifest error of assessment as several relevant factors were not taken into account.

Regards the duty to state reasons, the case-law states that the institution which has refused access to a document is obliged to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

With regards to the manifest error of assessment, the Council failed to consider that the requested working papers were part of a legislative process and as such have already been widely distributed. In contrast to the case Sison v Council in which the wide margin of appreciation was recognized the documents of the present request are not classified as “CONFIDENTIAL”. Instead they were widely distributed to all Member States, the European Parliament and therefore a high and unforeseeable number of persons. They were not part of a military strategy meeting or alike.

It is therefore not understandable that the documents contain confidential information on sensitive matters that could be used by EU's adversaries to cause prejudice to its strategy for the exports control of the dual-use items and to its cooperation, internal and with third countries, in this field. If the requested documents contain such sensitive information, they should have been classified accordingly.

In addition, Article 4(6) of Regulation (EC) No 1049/2001 clarifies that the exceptions only apply to concrete information and not to entire documents. If only a part of a document is covered by an exception, that part can be redacted and the rest of the document has to be released.

The Council failed to convincingly explain why even partial access was refused.

The argument put forward that the documents form an inseparable whole and that therefore passages cannot be redacted is insufficient. It is not understandable why individual passages cannot be redacted and the rest of the document can be released. The remaining value of information granted access is not to be evaluated by the Council but by the applicant.

As regards the WK 4656/2018 and WK 5498/2018 the Council has clearly stated that they contain comments which are allegedly of sensitive nature. Hence, the document includes more information which must be released as it is not covered by the exception.

Best regards

DELETED
