



Council of the
European Union

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NOTE

From: General Secretariat of the Council

To: Delegations

No. prev. doc.: 16102/23

Subject: Public access to documents
- Confirmatory application No 37/c/01/23

Delegations will find attached a draft reply to confirmatory application No 37/c/01/23
(see 16102/23).

**REPLY TO CONFIRMATORY APPLICATION 37/c/01/23
made by email on 24 November 2023 and registered on 27 November 2023**

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 documents¹ (hereinafter referred to as “Regulation (EC) No 1049/2001”) and Annex II to the Council’s Rules of Procedure², and has come to the following conclusion:

2. On 17 November 2023, the Applicant introduced an initial application for access to:

“All documents in the Council’s possession that contain information about the hearings of Hungary in accordance with Article 7(1) TEU - hearings held on 16 September 2019, 10 December 2019, 22 June 2021, 23 May 2022, 18 November 2022 and 30 May 2023, as well as all documents that contain information about the discussion on the state of play regarding respect for EU values in Hungary held on 15 November 2023 in the General Affairs Council.

In particular:

- all documents (minutes, transcriptions, recordings) on the basis of which the General Secretariat of the Council compiled its published reports on the above-mentioned hearings*
- all written submissions in connection with the Article 7(1) procedure against Hungary (by Hungary, other Member States, the Commission or other entities)*
- all documents that contain information about the discussion of the Article 7(1) procedure against Hungary in the preparatory bodies of the Council.”*

¹ OJ L 145, 31.5.2001, p. 43.

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

3. On 21 November 2023, the General Secretariat of the Council (GSC) replied to the Applicant that all documents in its possession containing information related to the respective hearings of Hungary in accordance with Article 7(1) TEU are public and available for download in the public register of Council documents. A link to the public register of Council documents was provided to the Applicant. As regards the General Affairs Council of 15 November 2023, the GSC informed the Applicant that no additional document had been issued, since the state of play was based on an oral update given by the European Commission.
4. On 24 November 2023, the Applicant submitted a confirmatory application asking the Council “to try to identify other documents on the basis of which the General Secretariat compiled its reports on the hearings and decide about their disclosure according to Regulation 1049/2001.” If such documents do not exist, the Applicant asked the Council to explain “how it is possible that the Council draws up summary reports about long and complicated discussion without the help of any pre-existing documentation”, and to explain “the process by which these reports were drawn up”.
5. Furthermore, the Applicant asked the Council “to try to identify documents that contain information about the ‘state of play’ discussion during the General Affairs Council on 15 November 2023”. Moreover, the Applicant expressed the opinion that the Council should have provided him a link for each of the documents in the register that fall within the scope of his request. The Applicant also complained that the Council did not inform him of his right to make a confirmatory application in the reply to his initial request.
6. Following this confirmatory application, the Council has reassessed the GSC reply to the initial request in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in light of the Applicant's comments.

7. It needs to be recalled that 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 that are in the possession of the institution concerned.³ Regulation (EC) No 1049/2001 cannot oblige the institution to grant access to a document that is not in its possession⁴ or that does not exist.⁵
8. The GSC has conducted a new thorough investigation in order to ensure that the initial research had been exhaustive and handled properly. It has confirmed that all documents in the possession of the Council corresponding to the Applicant's request are public and available for download in the public register of Council documents.
9. The Applicant identified the following documents when searching in the public register of Council documents: document 14022/18 containing factual information on the values-related infringement proceedings in relation to Hungary drafted by the European Commission, documents 11385/19 and 12345/19 related to the hearing of Hungary on 16 September 2019, documents 14402/19 and 5775/20 related to the hearing of Hungary on 10 December 2019, documents 9295/21 and 10247/21 related to the hearing of Hungary on 22 June 2021, documents 8473/22 and 9574/22 and 9574/22 COR 1 related to the hearing of Hungary on 23 May 2022, documents 14124/22 and 15199/22 related to the hearing of Hungary on 18 November 2022 and documents 8913/23 and 10101/23 related to the hearing of Hungary on 30 May 2023.

³ Judgment of the Court of Justice of 11 January 2017 in case C-491/15 P, *Typke v Commission*, EU:C:2017:5, paragraph 31.

⁴ Judgment of the General Court of 26 April 2016 in case T-221/08, *Strack v Commission*, EU:T:2016:242, paragraph 66.

⁵ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 46.

10. Furthermore, documents 14892/19, 14892/19 COR 1, 14892/19 AMD 1, 14892/19 AMD 2, 6293/20, 7608/20 and 7762/20 related to a reply to a parliamentary question on the hearing of Hungary on 16 September 2019 are also identifiable as results of the same search. In addition, two information notes from the Hungarian Government to the General Affairs Council on the Resolution on Hungary adopted by the European Parliament on 12 September 2018 are available in the public register of Council documents as well, documents 14225/18 and 12133/19. The respective hearings on Hungary in accordance with Article 7(1) TEU having been prepared by the Permanent Representative Committee on 4 September 2019, 27 November 2019, 9 June 2021, 18 May 2022, 4 November 2022 and 24 May 2023, the corresponding Summary records are also available in the public register of Council documents, documents 12255/19, 15086/19, 10269/21, 10300/22, 15311/22 and 9857/23.
11. As regards the discussion during the General Affairs Council on 15 November 2023, the Council has indeed not issued any additional document. The state of play exchange was based on an oral update given by the European Commission, as explained to the Applicant in the reply to his initial request, and formally based on the original reasoned proposal by the European Parliament (document 12266/18) as is evident from the background note of 14 November 2023, a link to which was provided to the Applicant as part of the reply to his initial request. It should be noted that all subsequent versions of the document 12266/18 – documents 12266/18 ADD 1, 12266/18 REV 1 and 12266/18 REV 1 COR 1 – are also available for download in the public register of Council documents.. No recording and no transcription of the proceedings were made by the Council and thus no such document is held by the institution. Furthermore, if written notes were taken by any of the participants in the hearings, for their personal use, they have not been transmitted to the Council, thus the Council does not hold any such document.

12. It is settled case-law that any statement of the institutions relating to the non-existence of a document benefits from a presumption of legality.⁶ This presumption applies by analogy where the institution declares that it is not in possession of the document(s) concerned.⁷
13. By virtue of the presumption of legality attaching to such a declaration by an EU institution, it would be incumbent upon the Applicant to rebut the GSC's statement that it does not hold any such documents by relevant and consistent evidence.⁸ In this regard, the Council notes that the Applicant merely assumes that such documents exist, and appears to express doubts regarding the GSC's ability to create summary reports without the existence of further documents.⁹ According to the case-law, however, "relevant and consistent evidence" capable of putting into question the institution's statement goes well beyond merely finding the non-existence of the requested documents "difficult to believe".¹⁰
14. Regarding the Applicant's complaint that the Council did not inform him of his right to make a confirmatory application in the reply to the initial request, it should be noted that Article 7(1) of the Regulation (EC) No 1049/2001 clearly links such information to cases of refusal, full or partial, of access to the requested document(s).

Conclusion

15. In light of the above, the Council confirms that it does not hold copies of minutes, transcriptions, recordings or any other similar document requested by the Applicant. All documents in the possession of the Council containing information related to the respective hearings of Hungary in accordance with Article 7(1) TEU are public and available for download in the public register of Council documents. They are all listed in this reply to the confirmatory application.

⁶ See judgment of the General Court of 23 April 2018 in case T-468/16, *Verein Deutsche Sprache v Commission*, EU:T:2018:207, paragraph 35, and the case-law cited (judgment confirmed in the Order of the Court of Justice of 30 January 2019 in appeal case C-440/18P, *Verein Deutsche Sprache v Commission*, EU:C:2019:77, paragraph 14, and the case-law cited).

⁷ Judgment of the General Court of 11 June 2015 in case T-496/13, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50.

⁸ See judgment of the General Court of 25 September 2018 in cases T-639/15 to T-666/15 and T-94/16, *Psara et al v European Parliament*, EU:T:2018:602, paragraph 33, and the case law cited.

⁹ "It transpires from the published reports that there must exist more detailed documents [...], as it is not reasonable to suppose [...]".

¹⁰ See judgment of 25 September 2018 in joined cases T-639/15 to T-666/15 and T-94/16, *Psara et al v European Parliament*, above, paragraph 34 et seq.