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NOTE

From: General Secretariat of the Council

To: Delegations

No. prev. doc.: 16748/23

Subject: Public access to documents
- Confirmatory application No 38/c/01/23

Delegations will find attached a draft reply to confirmatory application No 38/c/01/23
(see 16748/23).

REPLY TO CONFIRMATORY APPLICATION No 38/c/01/23
made by email on 29 November 2023 and registered on the same day

Following this confirmatory application, the Council has considered the possibility to grant access to the document requested thereby, in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001¹ and Annex II to the Council's Rules of Procedure², and has come to the following conclusion:

1. Further to the initial request for public access to documents **WK 7409/2021 REV 1 + REV 1 ADD 1**, on 15 November 2023 the General Secretariat of the Council (GSC) refused to grant access to them, since their disclosure would cause prejudice to the public interest as regards international relations (Art. 4(1)(a), third indent of Regulation (EC) No. 1049/2001).
2. On 29 October 2023, the Applicant submitted a confirmatory application asking the Council to review its position. The Applicant, a law firm, claims that the General Secretariat has not provided sufficient explanations as to how the disclosure of the requested documents could specifically and actually undermine public interest. Moreover, the Applicant argues that parts of the requested documents had been explicitly referred to in the EU General Court Judgment on 6th September 2023 in Case T 526/21³, in which the interests of the Applicant's client are involved, and therefore should be released as a bare minimum even if full access is denied by the Council.
3. The Council has re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and in the light of the Applicant's comments, whether full or partial public access can be provided to the requested documents.

¹ OJ L 145, 31.5.2001, p. 43.

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

³ <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-526/21>.

THE REQUESTED DOCUMENTS

4. Documents **WK 7049/2021 REV 1 + REV 1 ADD 1** were drawn up by the European External Action Service (EEAS) for the Council Working Party of Foreign Relations Counsellors and the Working Party on Eastern Europe and Central Asia.
5. The requested documents contain underlying/supporting evidence submitted by the EEAS to the Council in relation to a proposal to impose EU restrictive measures in view of the situation in Belarus. During the period concerned, the Council adopted implementing Decisions on restrictive measures in this regard on 21 June 2021 and on 24 February 2022.⁴

ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION (EC)

No 1049/2001

6. 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.
7. 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”*.⁵
8. 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*

⁴ Council Implementing Decision (CFSP) 2021/1002 of 21 June 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021D1002>).

Council Decision (CFSP) 2022/307 of 24 February 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D0307>).

⁵ 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.

*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”.*⁶

9. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations, 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.
10. 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 rather the existence of a reasonably foreseeable and not purely hypothetical risk⁷ for which, as previously recalled, the institution enjoys a margin of discretion.
11. 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 exceptions, the public disclosure of which would undermine the public interests protected by them.
12. Documents **WK 7409/2021 REV 1 + REV 1 ADD 1** provide evidentiary basis for the proposal to adopt a Council Decision and Council Regulation applying EU restrictive measures to a natural person, including elements concerning the associations between that person with other individuals connected to the Lukashenko regime, to whom the EU has imposed similar restrictive measures considering the persistent gravity of the situation in Belarus caused by the continued lack of respect for human rights, democracy and rule of law in that country.⁸
13. These documents contain information collected from different sources, serving as the basis for proposals for a Council’s Decision in this field⁹, submitted by the High Representative, and for joint proposals for implementing a Council’s Regulation, submitted by the High Representative and the European Commission, which constitute third-party documents within the meaning of Article 4(4) of Regulation (EC) No 1049/2001.

⁶ Judgment of 1 February 2007 , *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 46; and similarly judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 38.

⁷ Judgment of 25 November 2020, *Bronckers v Commission*, T-166/19, EU:T:2020:557, paragraph 60.

⁸ The Council first adopted restrictive measures against Belarus under Common Position 2004/661/CFSP (see OJ L 301, 28.9.2004, p. 67).

⁹ In line with subsequent decisions and regulations, the individual concerned is still subject to restrictive measures.

14. Following new consultations and based on a renewed assessment, the Council considers that the release of the document to the public must be refused on the ground of Article 4(1)(b) of Regulation (EC) No. 1049/2001 (protection of personal data) and based on the protection of the public interest as regards international relations (Art. 4(1)(a), third indent, of Regulation (EC) No. 1049/2001).
15. If the Union were to publicly release the evidence information collected in this regard, this would undermine EU's close coordination and cooperation with the EU's partners, causing prejudice to the climate of mutual confidence in this sensitive field, this being a concrete and not hypothetical risk. Moreover, the disclosure of the evidence files would reveal critical elements of the EU's strategy and the key information sources that must be kept confidential in order to maintain the efficiency and the effectiveness of the EU action with respect to restrictive measures.
16. Moreover, the requested documents are made of various elements including a wide range of personal data, including names, pictures and e-mail addresses of natural persons. Even if certain such elements may be available in the public domain, their selection for the purposes related to restrictive measures constitutes a new compilation of personal data. This information clearly falls within the scope of the exception relating to the protection of the privacy and the integrity of the individual in accordance with Union legislation regarding the protection of personal data (Article 4(1)(b) of Regulation (EC) No 1049/2001). Such Union legislation, as applicable to the GSC, is contained in Regulation (EU) No 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 (hereinafter "Regulation (EU) 2018/1725").
17. In accordance with Article 3(1) of Regulation (EU) No 2018/1725, personal data is defined very broadly as "any information relating to an identified or identifiable natural person". The Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. It has, in particular, stressed that professional data or information provided as part of a professional activity may well be characterised as personal data¹⁰; it has also further stressed that the fact that some information has already been made public does not exclude its

¹⁰ See, among others, judgment of 19 September 2018 in Case T-39/17, *Port de Brest v Commission*, EU:T:2018:560, paragraphs 38 and 43.

characterisation as personal data¹¹; finally, names and forenames, even when alone, qualify as personal data¹².

18. According to established case law, when an application is made seeking access to personal data within the meaning of Article 3(1) of Regulation (EU) No 2018/1725, the provisions of that Regulation become applicable in their entirety¹³. More specifically, pursuant to Article 9(1)(b) of Regulation (EU) No 2018/1725, personal data may be transferred to recipients established in the Union only if two cumulative conditions are met. Firstly, the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. Secondly, the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose, after having demonstrably weighed the various competing interests.
19. It also has to be stressed that, in the present case, the personal data are not an accessory set of details, since they are at the core of documents **WK 7409/2021 REV 1 + REV 1 ADD 1**, which are compilations of different sources concerning one particular natural person.
20. It is for the Applicant to first establish the need to have the data transferred, the institution concerned not being obliged to verify itself whether reasons justifying the transfer of personal data exist¹⁴. In the case at hand, the Applicant has not established, to a sufficient degree, the necessity of the transfer in the confirmatory application. Hence, it is therefore not necessary for the Council to proceed to determining whether there is any reason to assume that that transfer might prejudice the legitimate interests of the data subject.
21. The Applicant's assertion that access to the documents concerned or parts of them is needed to defend its client in national judicial proceedings in the English Court, (an element which the Applicant did not refer to in its initial request) cannot influence the examination of this request for public access on the ground of Regulation (EC) No 1049/2001. It is important to point out that public access is granted (or not) on the basis of objective criteria laid down in that Regulation and strictly related to the content of the document whose access is sought and not on subjective criteria linked to the Applicant's objectives or motives. Furthermore,

¹¹ 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*, EU:T:2018:602, paragraph 52.

¹² Judgment in Case C-28/08 P, *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 68.

¹³ *Ibid.*, paragraph 63, regarding the predecessor of Regulation (EU) 2018/1725, Regulation (EC) No 45/2001.

¹⁴ See, among others, judgment of 2 October 2014 in Case C-127/13, *Strack v Commission*, EU:C:2014:2250, paragraphs 106-107.

granting access to a document pursuant to Regulation (EC) No 1049/2001 has the effect of rendering public the document, thus making it accessible “erga omnes”, which would make its use possible beyond the reasons declared by the Applicant.

22. In addition, with regard to the Applicant’s assertion that references to parts of the requested documents are made by the General Court in its Judgment in Case T-526/21, and that therefore the EU would have already publicly released the information contained in the requested documents by the way of the Judgment, it is worth mentioning that reference is made from the Court only to very specific elements contained in the requested documents and to information already published in the website quoted. These elements only represent a very limited part of the content of the requested documents. The fact that some individual elements may be already available to the public does not imply that the documents in question have lost their sensitive character. In addition, it should be recalled that the General Court, in case T-252/19 *Pech v Council*, considered that the circumstance that a document had been subject to press leak – with the result that its entire content was already publicly available – could not have “any bearing on the possibility” for the Council to rely on the exceptions provided under Regulation (EC) No 1049/2001.¹⁵ By analogy, this finding is all the more relevant in relation to the requested documents, since as explained above, only a very limited part of the requested document have been addressed in the Judgment in question. Consequently, and in accordance with the case law cited, as such, this circumstance has no bearing on the Council’s ability to rely on the exceptions provided under the Regulation.
23. In view of above, the release of documents **WK 7409/2021 REV 1 + REV 1 ADD 1** to the public would cause a reasonably foreseeable and not purely hypothetical prejudice to the protection of international relations, that is a public interest safeguarded under Article 4(1)(a) of Regulation (EC) No 1049/2001, and to the protection of personal data, an interest protected under Article 4(1)(b) of the above Regulation. This serious risk remains clearly valid even after the Council’s adoption of the restrictive measures against the person concerned, since this has no bearing on investigations which, given the regular re-assessment of the impact and continuous application of restrictive measures against the persons concerned, are necessarily ongoing.

¹⁵ Judgment of the General Court of 21 April 2021 in case T-252/19 *Pech v Council*, paragraph 91.

24. The Council has also looked into the possibility of releasing parts of documents **WK 7409/2021 REV 1 + REV 1 ADD 1** in line with Article 4(6) of Regulation (EC) No 1049/2001. However, it has found that the abovementioned exceptions apply to their entire content.

CONCLUSION

25. For the reasons set out above, the Council concludes that access to documents **WK 7409/2021 REV 1 + REV 1 ADD 1** must be refused in their entirety on the ground of Article 4(1)(a), third indent and Article 4(1)(b) of the abovementioned Regulation.
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