



European Council

Brussels, 7 January 2020  
(OR. en)

EUCO 35/19

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**NOTE**

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From:	President of the European Council
To:	European Council
No. prev. doc.:	14580/19
Subject:	Public access to documents - Confirmatory application No 39/c/01/19

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The draft reply to confirmatory application No 39/c/01/19 for public access to documents was endorsed by the Working Party on Information on 16 December 2019.

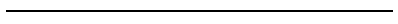
The following statement was made:

SE: "*Sweden votes YES to the draft reply. However, Sweden would like to underline that the scope of the regulation is clearly defined in articles 2.3 and 3 a and that additional conditions should not be added since they risk being perceived as limiting the scope of the regulation. Sweden would like to emphasize that the scope of the regulation should not be limited by the reasons in para 5 adding conditions to what is already defined in the regulation 1049/20019. As an example we find that it is clear from the wording of article 3 a that a document can have any content, whatever its medium, as long as it concerns a matter relating to the policies (...). It is not clear, however, why a document cannot be short-lived and what kind of mobile-phone-based communication is considered as short-lived and thus exempted from the scope of the regulation.*"

Delegations agreed to make public the result of the vote.

It is suggested that the European Council, by written procedure, approve the draft reply, as set out in the annex to this document.

The annex is available in English only.



**REPLY ADOPTED BY THE EUROPEAN COUNCIL ON xxxx  
TO CONFIRMATORY APPLICATION 39/c/01/19,  
made by email on 25 November 2019,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to mobile-phone based messages sent by the President of the European  
Council to EU and foreign heads of state or heads of government in 2018**

The European 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 Article 10(2) of its Rules of Procedure (European Council Decision No 2009/882/EU, OJ L 315, 2.12.2009, p. 51) which makes Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) applicable *mutatis mutandis* and has come to the following conclusion:

1. On 5 November 2019, the applicants filed an initial application with the European Council for access to *"All text messages (i.e., SMS messages) and other mobile-phone-based text communications (e.g., WhatsApp, Telegram, iMessage, Facebook Chat, SnapChat, Slack, Facebook and Twitter "direct messages," Signal Messenger, Wire, etc.) sent by – or on behalf of – Council President Donald Tusk in exchange with EU and foreign heads of state or heads of government in 2018"*.

On 25 November 2019, the General Secretariat replied to this application on behalf of the European Council, informing the applicants that no such SMS messages or other mobile-phone-based text communications sent out in the professional context containing substantial and not short-lived information that would constitute documents drawn up by the European Council within the meaning of Article 3(a) of Regulation (EC) No 1049/2001 are in its possession.

The same day, the applicants filed a confirmatory application against this reply, challenging the assertion that the European Council does not hold any documents covered by the application.

2. In their confirmatory application, the applicants argue that text messages and other mobile-phone based text communications fall under the definition of "*document*" under Article 3 (a) of Regulation (EC) No 1049/2001, which "*does not limit certain types of content (such as substantial or non-substantial; short-lived or long-lived) that could define a document as such*" and that the exceptions provided by Article 4 of the said Regulation do not include "*non-substantial or short-lived as legitimate grounds for refusing access to an EU document*". The applicant also contends that "*it is common practice by EU institutions to release documents that constitute futile or short-lived communications between EU-officials such as e-mails*", that "*in the year 2019, there is little difference between email communication and text message communication*" and that "*ensuring the right of public access to documents should be consistent with technological development*".
3. The European Council has carefully considered the confirmatory application in the light of the applicants' arguments and it has re-assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001.
4. First of all, the European Council wishes to draw the attention of the applicants on the following provisions of Regulation (EC) No 1049/2001 :

Article 3 (a) of Regulation (EC) No 1049/2001 defines as a document "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*".

Article 2 (3) of the said Regulation defines its material scope as follows: "*This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union*".

5. It results from the combined reading of those provisions that the medium is irrelevant and thus a content exchanged by phone or via social networks such as a text message or a mobile-phone-based text communication may under certain exceptional circumstances qualify as a document falling within the scope of Regulation (EC) No 1049/2001, as long as two additional conditions are met. On the one hand, such a content must concern a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. On the other hand, such a content must be "*held by the institution*", that is to say "*drawn up or received*" by it and remaining "*in its possession*". The European Council considers that in order to be drawn-up by it, a content requires a minimum degree of stability and formality. In other words, the European Council considers that a text message or other mobile-phone-based text communication is a document held by it only if it relates to the policies, activities and decisions falling within the European Council's sphere of responsibility, if it is not ephemeral or short-lived and if it contains substantial information, in which case the information contained therein needs to be exchanged, registered, saved and eventually archived in accordance with the applicable rules, including with regard to the security of such information.
6. The European Council has examined whether it holds any documents that would correspond to the request of the applicants in view of the above considerations.
7. Following its examination, the European Council confirms that it has not been possible to identify any document corresponding to the request introduced by the applicants. In that regard, the European Council also wishes to underline that it is not in the practice of the institution that information containing substantial content and which concerns matters falling within the institution's sphere or responsibility is exchanged by instant messaging communications of its President.

## CONCLUSION

8. In the light of the above, the European Council confirms the assessment of the General Secretariat that it does not hold documents that would correspond to the applicants' request.