



Council of the
European Union

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NOTE

From: General Secretariat of the Council

To: Delegations

No. prev. doc.: 5018/22

Subject: Public access to documents
- Confirmatory application No 44/c/01/21

Delegations will find attached a draft reply to confirmatory application No 44/c/01/21
(see 5018/22).

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 44/c/01/21,
made by email on 22 December 2021
pursuant to Article 7(2) of Regulation (EC) No 1049/2001
for access to documents**

The Council has considered this confirmatory application for the subject documents 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) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 26 October 21, the applicant submitted a request for access "*all briefing material studied by Mr Charles Michel, president of the European Council, on the Democratic Republic of Congo between 1 December 2019 and 26 October 2021*".
2. In its reply dated 20 December 2021, the General Secretariat of the Council of the European Union informed the applicant that it had identified five documents corresponding to his request ("requested documents"), consisting of five briefing/background notes elaborated by the directorate responsible for these policy matters in view of the following events:
 - a) 9/02/2020, meeting of the President of the European Council with the President of the Democratic Republic of Congo (DRC) at the margins of the African Union Summit held in Addis Ababa (Ethiopia);
 - b) 30/09/2020, meeting of the President of the European Council with the DRC President in Brussels;
 - c) 18/02/2021, phone call between the President of the European Council and the DRC President;
 - d) 29/04/2021, visit of the President of the European Council to DRC (including meeting with the Press, in the context of the DRC's chairmanship of the African Union);

- e) 27/08/2021, meeting of the President of the European Council with the DRC President at the margins of its participation in the G20 Compact with Africa Conference in Berlin (Germany).

and refused to grant access to them pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, since their disclosure would undermine the protection of the public interest as regards “international relations”.

3. In his confirmatory application on 22 December 2021, the applicant argued in essence that, given the public interest in holding the institution accountable on how it promotes its declared values without being influenced by national interests, the need for full transparency in this field should prevail over the protection of those national interests.
4. The Council has re-assessed whether, in full consideration of the principles of transparency underlying Regulation (EC) No 1049/2001, full or partial public access can be provided to the abovementioned documents.

GENERAL CONTEXT RELATED TO THE REQUESTED DOCUMENTS

5. The requested documents were drawn up by the General Secretariat of the Council¹ in order to provide the President of the European Council with a detailed background on the EU's relations with the third country concerned, including suggestions to attain the EU's objectives of the abovementioned bilateral events, to facilitate his ongoing comprehension of the geopolitical situation in the region and to suggest appropriate diplomatic and pragmatic approaches to help politically address the EU's counterpart.

THE INVOKED EXCEPTION OF REGULATION (EC) NO 1049/2001

6. At the outset, the Council recalls that, in accordance to 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.

¹ Article 13 of the European Council's Rules of Procedure provides: “*The European Council and its President shall be assisted by the General Secretariat of the Council, under the authority of its Secretary-General*”.

7. On the one hand, *"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 relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*.²
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 (EC) 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"*.³
9. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents focusing on international relations, it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interests.⁴
10. Furthermore, for the purpose of the assessment of a request for access to documents under Regulation 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 risk⁵ 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 exception, the public disclosure of which would undermine the public interest protected by them.

² Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 34 and similarly judgment of 3 October 2012 *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32 and judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32.

³ Judgment of 1 February 2007, *Sison v. Council* C-266/05 P, para. 46 and similarly judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 38 and order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, ECLI:EU:T:2020:210, paragraph 61 and the case-law cited.

⁴ Order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.

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

12. In that regard, it shall be recalled that, in a different context pertaining to ongoing bilateral negotiations between the EU and a third country, the Court has held that the disclosure of elements connected with the objectives pursued by the EU and its Member States in decisions, in particular when they deal with the specific content of current or possible future agreements envisaged or the strategic objectives pursued by the EU in negotiations, would damage the climate of confidence at both high political level and operational/strategic level.⁶ The same reasoning applies all the more in the present case (where the requested documents cover a number of sensitive issues that may be recalled in the bilateral talks) as regards the disclosure of the requested documents, whose content cannot be disclosed any further without disregarding the scope of the protection of the “international relations”.

THE APPLICANT'S ARGUMENTS

13. Contrary to what is argued by the applicant, the risk of causing prejudice to international relations also materialises when the documents, such as the requested documents, contain informal background and an assessment of elements of geo-political nature exchanged on a confidential basis with the President of the European Council in order to facilitate his preparation to meetings with third countries top representatives.

14. While recognizing and stressing the need to assure the fullest degree of transparency, the decision to refuse to release or grant access is always taken on the basis of a thorough "harm test" carried out to verify if the disclosure of each and every requested document, in view of its content, could cause prejudice to the EU's interests protected by the exceptions of Regulation (EC) No 1049/2001.

15. It is recalled that Article 15 of the Treaty on the European Union (“TFEU”) provides that one of the functions of the President of the European Council “*at his level and in that capacity*” is to ensure the external representation of the EU on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

⁶ Judgment of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 44 and 45 and the case-law cited. See, also, judgment of 19 March 2013, In ‘t Veld v European Commission, T-301/10, EU:T:2013:135, paragraphs 35, 36, 39 and 123-126.

16. As clearly spelled out in his Code of conduct,⁷ “*in view of the role of the President of the European Council within the institutional framework of the Union, the general interest requires that he/she acts in a manner in keeping with the dignity and the duties of his/her office and in the sole interest of the Union, both during and after his/her term of office*”. In addition, this code provides that the President of the European Council “*shall behave and perform his/her duties with complete independence, integrity, dignity, with loyalty and discretion, in compliance with the rules laid down in the Treaties and as spelled out in [the] Code of Conduct. He/she shall observe the highest standards of ethical conduct*”. The President of the European Council, according to this code, “*shall avoid any situation which may give rise to a conflict of interest or which may reasonably be perceived as such*”.

PARTIAL ACCESS

17. The Council has also looked into the possibility of releasing parts of the five briefing notes concerned as foreseen in Article 4(6) of Regulation (EC) No 1049/2001. However, as the information contained therein forms an inseparable whole, partial access cannot be granted. It should be noted that, according to well-established case law, the institutions are entitled to refuse partial disclosure that would concern fragmented parts the reading of which would be meaningless⁸.

CONCLUSION

18. The Council concludes that access to the requested documents must be refused in full pursuant to the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of the Regulation (CE) No 1049/2001.

⁷ Please see link https://www.consilium.europa.eu/media/45515/code_of_conduct_pec_en.pdf

⁸ See judgments of 12 July 2001, *Mattila v Council*, T-204/99, ECLI:EU:T:2001:19, paragraph 69; of 20 March 2014, *Reagens v Commission*, T-181/10, ECLI:EU:T:2014:139, paragraphs 172 to 175.