



Council of the
European Union

Brussels, 5 July 2021
(OR. en)

8882/21

LIMITE

INF 148
API 87

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	8817/21
Subject:	Public access to documents - Confirmatory application No 23/c/02/21

Delegations will find attached a draft reply to confirmatory application No 23/c/02/21 (see 8817/21).

REPLY ADOPTED BY THE COUNCIL ON XX JUNE 2021
TO CONFIRMATORY APPLICATION 23/c/01/21,
made by email on 14 May 2021, and registered on 17 May,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents ST 9118/16 INIT, ST 11906/17 INIT RESTREINT UE,
ST 11906/17 REV 1 RESTREINT UE, ST 11945/17 INIT, ST 11951/17 INIT,
ST 12031/17 ADD 1 and ST 12237/17 INIT RESTREINT UE

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 documents (OJ L 145 of 31.5.2001, p. 43) (hereafter referred to as "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 19 April 2021, the applicant made an initial request for access to documents **9118/16, 11906/17 INIT + REV 1, 11945/17, 11951/17, 12031/17 ADD 1 and 12237/17.**
 - a) Documents **9118/16** of 27 May 2016 is an 'I/A' item note from the General Secretariat of the Council to the Permanent representatives Committee (Part 2)/Council on *Draft EU - Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay.*
 - b) Documents **11906/17 INIT + REV 1** of 5 and 13 September 2017 contain a *Link between Visa policy and return/readmission: Bangladesh.* They are classified documents bearing the classification "RESTREINT UE" under Council Decision 2014/233/EU of 14 April 2014 amending Decision 2013/488/EU on the security rules for protecting EU classified information.

- c) Document **11945/17** of 6 September 2017 is a note from the Commission services to delegations on *Draft EU - Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay*.
- d) Document **11951/17** of 19 September 2017 is an 'I/A' item note from the General Secretariat of the Council to the Permanent Representatives Committee (Part2)/Council on *Draft EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay*.
- e) Document **12031/17 ADD 1** of 21 September 2017 contains an *Annex to the Commission Decision on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay*.
- f) Document **12237/17** of 15 September 2017 contains a *Link between Visa policy and return/readmission: Bangladesh*. It is a classified document bearing the classification "RESTREINT UE" under Council Decision 2014/233/EU of 14 April 2014 amending Decision 2013/488/EU on the security rules for protecting EU classified information.

2. On 26 April 2021, the General Secretariat of the Council refused access of the applicant to these documents 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. On 14 May 2021, the applicant made a confirmatory application, registered on 17 May 2021, against the General Secretariat's refusal of access as mentioned above (see also document **8817/21**).
4. The Council has carefully considered the confirmatory application. Having thoroughly examined the requested documents and carried out the necessary consultations, it has reassessed the request in full consideration of the principles underlying Regulation (EC) No 1049/2001, with the aim of ensuring the widest possible public access to documents.

I. CONTEXT OF THE DOCUMENTS

5. The requested documents contain information on relations with Bangladesh in the area of migration and migration-related issues. They mainly define standard operating procedures for the identification and return of persons without an authorisation to stay as part of the reinforcement of the cooperation on returns and readmission between the EU and Bangladesh as well as the possible linkages between readmission and visa policies vis a vis Bangladesh.
6. The effective returns is key to successful migration policy, and third country cooperation on returns and readmission is essential in that respect - no returns are possible without the cooperation of third countries.
7. According to Commission Communication on Enhancing cooperation on return and readmission as a part of a fair, effective and comprehensive EU migration policy (COM(2021) 56 final, page 9), *"it appears that for almost one third of the countries covered by the 2020 assessment cooperation works well with most Member States, for almost another one third the level of cooperation is average, with improvements needed with regard to a number of Member States while for more than one third the level of cooperation needs to be improved with most Member States concerned. Member States' data and information confirm that all EU readmission agreements bring a significant added value in facilitating cooperation in readmission"*.
8. Bangladesh is an important third country for the EU regarding the number of the return decisions issued for Bangladeshi nationals throughout the EU. According to the latest available Eurostat data 9575 Bangladeshi nationals have been ordered to leave the EU in 2019¹, while 820 have actually left², resulting in a return rate of 9%³. Also, the asylum recognition rate for Bangladeshi citizens is low - according to Eurostat data in 2019 it was 6%⁴.

¹ https://ec.europa.eu/eurostat/databrowser/view/migr_eiord/default/table?lang=en (select "country of citizenship": "Bangladesh")

² https://ec.europa.eu/eurostat/databrowser/view/migr_eirtn/default/table?lang=en (select "country of citizenship": "Bangladesh")

³ Return rate is calculated as a proportion of those ordered to leave and those actually returned

⁴ Asylum recognition rate is calculated as a proportion of the total number of the first instance asylum decisions and the number of asylum decisions granting Geneva Convention or subsidiary protection status at first instance, based on Eurostat data available at: https://ec.europa.eu/eurostat/databrowser/view/migr_asydcfsta/default/table?lang=en (select "country of

9. Moreover, discussions are now ongoing in the Council on linking readmission and visa policies, in the context of the mechanism established by Article 25a of the revised Visa Code⁵, which allow to use positive or negative visa measures so as to improve third country cooperation on readmission. The ongoing exercise is based on the Commission's assessment on the level of third country cooperation on readmission, which covers all visa bound third countries to whose nationals more than 1000 return decisions have been issued in the EU in 2018. Therefore readmission cooperation of Bangladesh is also assessed under this report.

II. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) NO 1049/2001

10. As a preliminary remark, it is recalled that both the TEU (Article 16(8)) and the TFEU (Article 15(2)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. The requested documents were not drawn up in the context of legislative activities.⁶ Therefore, even if such documents fall within the scope of Regulation (EC) No 1049/2001,⁷ the wider access which is also referred to in recital 6 of Regulation (EC) No 1049/2001 is not relevant in the present circumstances.

The invoked exception of Regulation (EC) No 1049/2001

11. According to settled 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.
12. 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"*.⁸

citizenship": "Bangladesh" and select "Decisions": "Total" to get the number of total decisions issued for Bangladeshi citizens; then select "country of citizenship": "Bangladesh" and select: "Decisions": "Geneva conventions status" and "Subsidiary protection status" to get the number of positive decisions issued)

⁵ [Regulation \(EC\) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas \(Visa Code\)](#), OJ L 243, 15.9.2009, p. 1

⁶ See judgement of 11 July 2018, T-644/16, ClientEarth v Commission, EU:T:2018:429, paragraph 56 and the case-law cited.

⁷ See judgment of 3 July 2014, Council v in 't Veld, C-350/12 P, EU:C:2014:2039, paragraph 107.

⁸ Judgments of 1 February 2007, Sison v Council, C-266/05 P, EU:C:2007:75, paragraph 34; Besselink v Council, T-331/11, EU:T:2013:419, paragraph 32, and Jurašinović v Council, T-63/10, EU:T:2012:516, paragraph 32.

13. 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"*.⁹
14. 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 would harm the protected interest and granting access nonetheless.¹⁰ Moreover, for the purpose of the assessment of a request for access to document under Regulation (EC) No 1049/2001, the Council 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 risk.¹¹
15. In practice, in its answer to a confirmative application, the institution must provide the applicant with plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU's international relations and whether, in the institution's broad discretion in applying the exceptions in Article 4(1) of Regulation (EC) No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical. However, in the description of the document for the purpose of its answer, the institution cannot reveal its content in further detail as doing so may disregard the scope of the interest protected by that provision.¹²

⁹ Ibid, and Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited.

¹⁰ 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.

¹¹ Judgment of 25 November 2020, *Bronckers v Commission*, T-166/19, EU:T:2020:557, paragraph 60.

¹² See, to that effect, judgments *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 106; of 7 February 2018, *Access Info Europe v Commission*, T-851/16, T:2018:69, paragraphs 54 and 122, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraphs 51 and 113-114.

16. Having thoroughly examined the content of documents **9118/16, 11945/17, 11951/17** and **12031/17 ADD 1**, having re-consulted with the originating source of documents when appropriate and taking into account the state of play on the matter, the Council considers that full public access can be granted to them. Negotiations on EU - Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay have been finalised and the arrangements agreed with Bangladesh have been made public by the services of the European Commission who negotiated them.
17. By contrast, having thoroughly examined the content of documents **11906/17 INIT + REV 1** and **12237/17** and taking into account the state of play of return and readmission cooperation with Bangladesh and the ongoing exercise on linking readmission and visa policies, the Council considers that access to these documents cannot be granted as they contain detailed internal considerations on possible linkages between readmission cooperation and visa policies vis-à-vis Bangladesh. These documents are related to the implementation of the arrangements agreed with Bangladesh for the return and readmission of persons found illegally on the territory of Member States.
18. In that regard, the Court has held that documents pertaining to the implementation phase of an agreement are protected from disclosure in the same way as those linked to the negotiation phase if their disclosure entails a risk of undermining the relations with the third country concerned.¹³
19. In the present case, the Council considers that release of documents **11906/17 INIT + REV 1** and **12237/17** to the public would reveal the concrete means to be used so as to achieve the EU's strategic objectives in the ongoing cooperation on returns and readmission with Bangladesh. Public access to these documents would reveal to anyone, including to other third countries with whom cooperation in the field of returns and readmission is ongoing and with whom similar exercise is ongoing, information regarding measures, notably visa measures, that can be taken so as to achieve various aims which the EU seeks in the field of returns and readmission. Releasing this information to the public would weaken the EU's position vis-à-vis Bangladesh in the implementation of the agreed standard operating procedures on return and readmission, as well as with other third countries involved in a similar exercise.

¹³ Judgment of the General Court of 25 November 2020 in case [Bronckers v European Commission, T-166/19](#), EU:T:2020:557 paragraph 70.

20. Such disclosure is also likely to damage the climate of mutual trust necessary for the ongoing cooperation, as the release of the documents **11906/17 INIT + REV 1** and **12237/17** would explain the EU's internal views on readmission and visa policies with a specific third country, with the risk of affecting the ongoing cooperation with Bangladesh.
21. It follows from the above that the Council has no choice but to refuse access to documents **11906/17 INIT + REV 1** and **12237/17** pursuant to the third indent of Article 4(1) (a) of Regulation (EC) No 1049/2001.
22. In his confirmatory application, the applicant states that some of the requested documents have been allegedly disclosed by a third party and are already available in the public domain. It was not possible to ascertain this information as the website provided in support of this claim cannot be found.
23. In any case, the Council considers that an unauthorized leak does not prevent the institution from processing applications for public access to documents according to Regulation (EC) No 1049/2001. More importantly, the alleged claim that the documents are already available in the public domain due to a leak cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.¹⁴ An opposite approach would have the pernicious effect of encouraging leaks as a way to push institutions to make public the relevant documents and in so doing it would undermine the public interests protected by Regulation (EC) No 1049/2001 and the purpose itself of the Regulation.
24. In light of the above, the Council considers that the applicant's arguments pertaining to the alleged leak of information contained in some requested documents are not effective and, in any case, not relevant nor sufficient to establish the necessity of the release by the Council of the documents **11906/17 INIT + REV 1** and **12237/17** to the public domain and that, as confirmed by the EU Courts, it is unacceptable for leaks to be used as a means to overturn the applicable legal framework on access to documents.

¹⁴ See in that regard, Judgment of 25 October 2013, T-561/12 Beninca v Commission, EU:T:2013:558 paragraph 55, according to which the unauthorised disclosure of a document cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001. Also to that effect, judgement of 20 May 2020, T-526/19. Nord Stream 2 AG v European Parliament and Council, EU:T:2020:210 paragraph 52 to 56; and Order of 17 December 2020 in T-350/20 Lukáš Wagenknecht v European Commission, paragraphs 18 to 21.

25. Finally, the applicant claims that the requested documents "*have an impact on EU legislation*" and even if the matter is considered as "*non-legislative*", non-legislative activity of the institutions does not fall outside the scope of Regulation (EC) No 1049/2001.

The Council recalls that the requested document were not draw up in the context of the legislative activities. Even if such documents fall within the scope of Regulation (EC) No 1049/2001, their disclosure would undermine the protection of the EU's international relations, for the above-mentioned reasons, and their disclosure must be refused pursuant to Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001.

Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001

26. The Council has also examined the possibility of granting partial access to documents **11906/17 INIT + REV 1** and **12237/17**, as provided for in Article 4(6) of Regulation (EC) No 1049/2001. However, it has come to the conclusion that the entire documents are covered by the abovementioned exception since those documents do not entail several parts that could be disclosed without indirectly revealing the content and substance of the remaining parts.

III. CONCLUSION

27. In the light of the above considerations, the Council considers that:
- a) full public access can be granted to documents **9118/16, 11945/17, 11951/17 and 12031/17 ADD 1**; and
 - b) access to documents **11906/17 INIT + REV 1** and **12237/17** has to be refused pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 (protection of the public interest as regards international relations).