



Council of the
European Union

Brussels, 14 May 2024
(OR. en)

9905/24

API 83
INF 146

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 19/c/03/24

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 22 March 2024 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 13 May 2024 (Annex 2);
- the confirmatory application dated 14 May 2024 and registered on the same day (Annex 3).

From: **DELETED**

Sent: Friday 22 March 2024 13:45

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: access to documents request - Draft agreement on access to classified information

Dear Council of the European Union,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

- All documents concerning a draft arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy. This is meant to include versions of the draft agreement, legal opinions, exchanges with the Parliament, etc.

Yours faithfully,

DELETED



Council of the European Union

General Secretariat

Directorate-General Communication and Information - COMM

Directorate Information and Outreach

Information Services Unit / Transparency

Head of Unit

Brussels, 13 May 2024

DELETED

Email: **DELETED**

Ref. 24/1050

Request made on: 22.03.2024

Deadline extension: 17.04.2024

Dear **DELETED**

Thank you for your request for access to documents of the Council of the European Union.¹

You have requested access to “*All documents concerning a draft arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy. This is meant to include versions of the draft agreement, legal opinions, exchanges with the Parliament, etc.*”

We have identified the following 31 documents as relevant to your access request:

- ST documents : ST 15343/12, ST 16224/12, ST 17773/12, ST 11496/18, ST 14529/18, ST 14876/18, ST 8513/19, ST 13641/21+REV 1, ST 12641/23, ST 12642/23, ST 12643/23, ST 15574/23, ST 16504/23, ST 5953/24, ST 6292/24, ST 7851/24, ST 7985/24 ;

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

- WK documents : WK 14438/18, WK 9288/21, WK 11724/21, WK 12362/21, WK 12390/21, WK 12653/21, WK 13038/21, WK 13673/21, WK 11262/22, WK 16772/23, WK 829/24 + COR 1, WK 2210/24.

Please find attached the full versions of documents **ST 15343/12** and **WK 13038/21**.

Please find attached also partially accessible versions of documents **ST 11496/18**, **ST 14529/18**, **ST 8513/19**, **ST 12642/23**, **ST 7985/24** and **WK 11262/22**.² You may also consult documents **ST 16224/12** and **ST 17773/12**, which are partially accessible on the Council's [Public Register](#).

However, I regret to inform you that full access to these documents cannot be given for the reasons set out below.

All eight of these documents contain information on discussions within the Council's preparatory bodies regarding issues that are currently being negotiated between the Council, the European Parliament and the High Representative (hereinafter referred to as "negotiating partners"). The subject of these negotiations is a draft Arrangement between the European Parliament, the Council and the European External Action Service concerning access by the European Parliament to classified information in the area of the Common Foreign and Security Policy (hereinafter referred to as "draft Arrangement").

For the Council to agree on its position in these negotiations, its Member States hold initial consultations and exploratory talks. By extension, for an agreement to be reached amongst the negotiating partners, there is a need for a space where ideas can be aired and discussed in full discretion and trust. To reveal the full contents of the information contained in the above-mentioned documents before a final agreement on the draft Arrangement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement both within the Council and amongst the negotiating partners. Full disclosure of these documents would therefore seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse full access to these documents.³

Having examined the context in which these documents were drafted and the current state of play in the negotiations, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in the full disclosure of these documents.

Please find attached also partially accessible versions of documents **ST 14876/18**, **ST 13641/21** and **ST 13641/1/21 REV 1**.⁴ However, I regret to inform you that full access to these documents cannot be given for the reasons set out below.

² Article 4(6) of Regulation (EC) No 1049/2001.

³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁴ Article 4(6) of Regulation (EC) No 1049/2001.

Document ST 14876/18 is a contribution of the Council Legal Service regarding the legal basis of the draft arrangement between the European Parliament (EP), the Council, and the High Representative (HR) on the forwarding to and handling by the European Parliament of classified information in the area of CFSP. It is a follow-up to an oral intervention made by the Legal Service at the meeting of the Working Party on General Affairs on 9 November 2018.

The document contains assessments made by the Council Legal Service regarding the then-current draft of the arrangement. Part of the assessments (contained in paragraphs 5-8 of the document) concern the question of the inclusion of parties not named in Article 295 TFEU and/or the exclusion of parties named therein in arrangements pursuant to that provision.

The General Secretariat of the Council recalls that, under Article 4(2) second indent of Regulation 1049/2001, it may refuse to disclose legal advice when disclosure would undermine the protection which must be afforded to that advice.

In the context of non-legislative procedures, such as is the case here, the General Court has held that the public interest in disclosure of legal advice is not as pressing as when it comes to legislative procedures; the publication of preparatory and internal legal advice that does not definitely fix the institution's position would actually and in a foreseeable manner undermine that institution's interest in receiving frank, objective and comprehensive advice from its various departments in order to prepare its final position as an institution (Judgment of 7 February 2018, T-851/16, *Access Info Europe v Commission*, paragraphs 89-93).

The legal opinion contained in the above-mentioned part of document ST 14876/18 regarding the composition of arrangements under Article 295 TFEU is of a fundamental nature with a particularly wide scope that has important implications not only for the draft arrangement at hand, but also for other arrangements pursuant to that provision. This includes other such arrangements which are part of an ongoing decision-making process (such as for the proposed Interinstitutional Ethics Body, see COM(2023) 311 final) and future arrangements that seek similar formats for their composition. Publication of this legal opinion would therefore severely affect ongoing and future negotiations to conclude arrangements and thus undermine the Council's interest in the protection of legal advice (see in that sense Judgment of 13 March 2024, T-682/21 and T-683/21, *ClientEarth and Leino-Sandberg v Council*, paragraph 35).

The advice given can, in a reasonably foreseeable way, become the subject of litigation. Disclosing advice by the Council Legal Service before the Council has taken a decision, and in light of the risk of litigation, risks hurting the Legal Service's ability to provide frank, objective and comprehensive advice in a reasonably foreseeable way (see in that sense Judgment of 8 June 2023, C-408/21 P, *Council v Pech*, paragraph 34 and Judgment of 1 July 2008, C-39/05 P and C-52/05 P, *Sweden and Turco v Council* paragraphs 40-43).

It is further recalled that, pursuant to Article 4(3) first subparagraph of Regulation 1049/2001, access to a document drawn up by an institution for internal use, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process.

The General Court has ruled that this provision is intended to ensure that the institutions are able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted; accordingly, disclosure to third parties of documents forming part of a decision-making process still pending at the date on which the decision on the request for access is adopted must be refused (Judgment of 13 March 2024, T-682/21 and T-683/21, *ClientEarth and Leino-Sandberg v Council* paragraphs 93-95).

Negotiations between the Council and the other parties concerned are ongoing and entering a critical phase. Disclosure of the part of the Legal Service's assessment described above would deprive the Council of its space for deliberation and ability to make a final decision regarding the draft arrangement.

Finally, regarding both grounds for refusal of full access, the General Secretariat of the Council considers that, on balance, the principle of transparency which underlies the Regulation 1049/2001 would not, in the present case, prevail over the public interest in disclosure so as to justify the full disclosure of the document.

In light of the foregoing, the General Secretariat of the Council refuses access to paragraphs 5-8 of document 14876/18 (the part described above) and grants partial access only to paragraphs 1-4 and 9-10.

Document ST 13641/21 is a contribution of the Council Legal Service concerning the same draft arrangement. The revised version thereof (ST 13641/21 REV 1) differs only in the addition of a sub-code in the header of the document with otherwise identical content. This contribution is a follow-up to an oral intervention made by the Legal Service at the meeting of the Working Party on General Affairs on 12 October 2021.

Parts of the contribution contain an in-depth legal assessment of the changes to the draft arrangement proposed by the EP which the Council received on 9 July 2021.

As stated above, pursuant to Article 4(3) first subparagraph of Regulation 1049/2001, access to a document drawn up by an institution for internal use, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process (see references to the case-law above).

Disclosure of these parts of the document, which consist of the Legal Service's assessment of the European Parliament's proposed changes and related questions would deprive the Council of its space for deliberation and ability to make a final decision regarding the draft arrangement, especially regarding the negotiations on the specific points proposed by the European Parliament.

In the view of the foregoing, the General Secretariat of the Council refuses access to paragraphs 12-18 and 20-51 of documents ST 13641/21 and ST 13641/1/21 REV 1 (the parts described above) and grants partial access only to paragraphs 1-11 and 19 of these two documents.

Finally, I regret to inform you that no access can be given to the rest of the identified documents above for the reasons set out below.

Document **ST 17773/12** contains a negotiating mandate agreed upon within the Council at some stage of the negotiations. Providing access to this text at this stage would amount to revealing to the other negotiating Institutions the Council's negotiating margins at a critical point of the ongoing negotiations. This would seriously undermine the Council's decision-making process as it would weaken the Council's position in these negotiations and would render more difficult to reach agreement on further updates of this type of evolving negotiating mandates.

Document **WK 16772/23** contains a request by the Chair of the Council's Working Party on General Affairs to the Council's Security Committee for an opinion on the matters within its areas of competence on a version of the draft Arrangement. Documents **ST 16224/12, WK 11724/21, WK 12653/21, WK 13673/21, ST 5953/24, ST 6292/24, ST 7851/24 and ST 7985/24** contain various drafts of the opinion of the Council's Security Committee, whereas documents **WK 12362/21, WK 12390/21, WK 829/24 + COR 1 and WK 2210/24** contain comments by Member States' delegations within the Council Security Committee on these drafts.

Documents **WK 9288/21, ST 12641/23, ST 12643/23 and ST 15574/23** contain texts discussed among the Institutions concerned at various stages of the interinstitutional negotiations. Document **ST 16504/23** contains Member States' delegations' comments within the Council's Working Party on General Affairs on these texts.

Documents **ST 11496/18, WK 14438/18, ST 14529/18, WK 13038/21, WK 11262/22 and ST 12642/23** contain Presidency reports on the state of play in the interinstitutional negotiations for the draft Arrangement and proposals for the way forward.

As already stated above, for the Council to agree on its position in these negotiations, its Member States hold initial consultations and exploratory talks. By extension, for an agreement to be reached amongst the negotiating partners, there is a need for a space where ideas can be aired and discussed in full discretion and trust. To reveal the contents of the information contained in the above-mentioned documents before a final agreement on the draft Arrangement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement both within the Council and amongst the negotiating partners. Disclosure of these documents would therefore seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse full access to these documents.⁵

Having examined the context in which these documents were drafted and the current state of play in the negotiations, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in the disclosure of these documents.

We have also looked into the possibility of releasing parts of these documents.⁶ However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access at this stage.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosures

⁵ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁶ Article 4(6) of Regulation (EC) No 1049/2001.

From: **DELETED**

Sent: Tuesday, 14 May 2024 09:32

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Internal review of access to documents request - Draft agreement on access to classified information

Dear Council of the European Union,

Please pass this on to the person who reviews confirmatory applications.

I am filing the following confirmatory application with regards to my access to documents request 'Draft agreement on access to classified information'.

I find the long reply I received to be somewhat contradictory and confusing. While it is not entirely clear to me which redacted and withheld documents were based on what exception, exactly, I surmise that the Council's refusal largely rests on the exception for ongoing decision-making, Article 4 (3.) of Regulation 1049, as well as on the exception in Article 4 (2.) for legal advice in regard to opinions drawn up by the Council Secretariat.

I wish to challenge all withheld information from the documents in question. In regard to those documents withheld or severely redacted in reference to Article 4 (3.), the Regulation clearly says in recital 7 that wider access should be granted to institutions in their law-making capacity. I contend that the Council has not sufficiently demonstrated that disclosure of the document would "seriously undermine" the institution's decision-making process, as is required under this exception. In this context, I would like to point out the findings of the court in the De Capitani ruling (T-540/15). The Court stated that "it is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole." [para. 78] The Court drew a link between openness and the strengthening of democracy and noted that the possibility for citizens to find out the considerations underpinning legislative action was a precondition for the effective exercise of democratic rights. It further noted that the Court had never before recognized a presumption of non-disclosure in respect of documents that formed part of the legislative process. It observed that "the effectiveness and integrity of the legislative process cannot undermine the principles of publicity and transparency which underlie that process." [para. 83] The Court accepted that a risk of external pressure could constitute a legitimate ground for restricting access to documents related to the decision-making process, but "the reality of such external pressure must ... be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure". [para. 99]

As regards the refusals based on the exception for legal advice, the General Court said in the case *Pech v Council*, "it should be noted that allegedly sensitive subject matter cannot be confused with a sensitive document" (para 57). Rather, the court noted that to validate the claim of special sensitivity in grounding non-disclosure, "it is the content of the opinion itself which must be particularly sensitive" (para 93). As for the claim that disclosure would make "public preliminary views on possible course of action", in the *Pech* case the Court found that "it should be noted that disagreement between the Council's members is more the rule than the exception and does not per se justify application of the exception" (para 56). I further would like to point out the finding of the court in *Pech* in regard to Article 4(2), second indent, which is invoked in the reply. "In that regard, as the Court of Justice has observed, it is precisely transparency concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated" (para 55).

I hope the Council can re-consider my request and grant greater disclosure. Furthermore, I believe there is an overriding public interest in disclosure of the documents in question. As the European Union's actions in the area of the Common Security and Foreign Policy expand in the light of current international crises, there is a greater need for parliamentary scrutiny in this regard. In the discussion about *how* this parliamentary scrutiny is to happen, the question of special rights of access to classified CSFP documents for the European Parliament is of paramount importance. Transparency over the question of increased parliamentary scrutiny will enable the discussion and likely lead to a quicker resolution of the file that has been ongoing for several years.

Yours faithfully,

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