

**REPLY TO CONFIRMATORY APPLICATION 14/c/01/23,
made by email on 14 May 2023 and registered on 15 May 2023**

The Council has considered the 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, 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, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. Further to a request for public access to documents introduced by the Applicant on 6 March 2023, in its replies on 27th March, 20th April and 24th April 2023, the General Secretariat of the Council (GSC):
 - a. provided full access to the following twenty-seven documents: **WK 1495/23, WK 1495/23 REV 1, WK 739/23, WK 529/23, WK 263/2023, WK 17483/2022, WK 17153/22, WK 17153/22 REV 1, WK 17152/22, WK 17152/22 REV 1, WK 17161/22, WK 17001/22, WK 17001/22 ADD 1, WK 17001/22 ADD 2, WK 16881/22, WK 16880/22, WK 16880/22 REV 1, WK 16564/2022, WK 16564/2022 ADD1, WK 16370/2022, WK 16241/2022, WK 16135/22, WK 15847/22, WK 15847/22 COR 1, WK 15189/2022, WK 9516/2022 REV 1 and WK 9516/2022;**
 - b. granted partial access to the following three documents: **WK 17753/2022, WK 16575/2022** (these two documents containing personal data redacted in line with Article 4(1)(b) of Regulation (EC) No 1049/2001) and **WK 17072/2022** (parts redacted based on the exception of Art. 4(1), first indent of the abovementioned Regulation);
 - c. refused to release the following three documents in their entirety: **WK 768/2023** (contents redacted in line with Article 4(1)(a), first indent of Regulation (EC) No 1049/2001), **WK 1513/2022** and **WK 1505/2022** (the contents of these two documents covered by the exception of Article 4(3), first subparagraph of the abovementioned Regulation).;

2. On 14 May 2023, the Applicant asked the Council to review its position as regards two of the three refused documents: **WK 1505/2023** and **WK 1513/2023**, claiming in essence that the release of these two documents would not undermine the ongoing negotiations on the two respective files and that there is indeed an overriding public interest in following the evolution of discussion in the priority field of migration.
3.
 - a. Document **WK 1505/2023** is a working document drawn up by the General Secretariat of the Council for the Asylum Working Party. It contains a compilation of comments from delegations on the proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].
 - b. Document **WK 1513/2023** is a working document drawn up by the General Secretariat of the Council for the Justice and Home Affairs Counsellors (Asylum). It contains a compilation of comments from delegations concerning the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third- country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818

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

4. Having thoroughly examined the two documents concerned in the light of the applicant's arguments and carried out renewed consultations, the Council has re-assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001, including the aim of ensuring the widest possible public access to documents. It should be noted, as pointed out by the General Court, while legislative documents are subject to wider openness in the legislative process, however “that does not mean that EU primary law

provides for an unconditional right of access to legislative documents”.¹ Indeed, the provisions of the FEU Treaty and of the Charter governing the right of access to documents of the institutions, bodies, offices and agencies of the Union provide that the exercise of that right may be subject to limits and conditions laid down by regulations, including as regards access to legislative documents.² As pointed out by the General Court, while it is true that access to legislative documents must be as wide as possible, the fact remains that the provisions of the Treaties and of the Charter cannot be interpreted as precluding, as a matter of principle, access to such documents from being refused on the ground that their disclosure would seriously undermine the institution in question’s decision-making process, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.³

5. Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 provides that access to a document “*drawn up by an institution for internal use or received by an institution, 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, unless there is an overriding public interest in disclosure*”.
6. The Council submits that documents WK 1505/2023 and WK 1513/2023 fall within the scope of Article 4(3), first subparagraph, for the following reasons.
7. The requested documents concern the ongoing reform of the Common European Asylum System. Negotiations on this sensitive issue are currently underway with the European Parliament as regards the EURODAC Regulation, while those concerning the Asylum and Migration Management (AMMR) are just beginning. Both documents contain elements forming the position of Member States, exchanged as preliminary or intermediate comments for internal use on legislative files, one of which is just undergoing the initial trilogue procedural steps. The disclosure of these comments would reveal the trade-offs and compromises requested or accepted by delegations and the alternatives proposed or considered, as well as strategic approaches for negotiations of the Council, thus weakening and making more difficult its negotiating position and having a negative impact on its future discussions with the European Parliament. In this context, and considering the content of the

¹ General Court judgment of 25 January 2023, in Case T-163/21, *De Capitani v Council* EU:T:2023:15, paragraph 39.

² General Court judgment of 25 January 2023, in Case T-163/21, *De Capitani v Council* EU:T:2023:15, paragraph 47.

³ General Court judgment of 25 January 2023, in Case T-163/21, *De Capitani v Council* EU:T:2023:15, paragraph 61.

two requested documents, the Council considers that their disclosure would specifically and actually undermine the decision making process of the institution.

8. In the light of the above, the Council considers that, owing to the sensitive nature of their contents, both documents **WK 1505/2023** and **WK 1513/2023** cannot be released to the public at this stage, since the public interest in disclosure does not prevail over the need for the Council to be able to analyse and exchange information within the Council's preparatory bodies on the two sensitive inter-institutional files concerned.
9. The Council has also thoroughly re-examined documents **WK 1505/2023** and **WK 1513/2023** in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001. Following this examination, the Council has concluded that partial access to these documents cannot be granted, since their content is considered an inseparable whole and their release would seriously undermine the protection of the ongoing decision-making process.

CONCLUSION

10. For the reasons set out above, the Council concludes that public access to documents **WK 1505/2023** and **WK 1513/2023** must be refused in their entirety, since their content is still fully covered by the exception to disclosure in Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.
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