



**Council of the European Union**  
General Secretariat

Directorate-General Communication and Document Management  
*The Director-General*

SGS16/07682

Brussels, 12 -09- 2016

Mr Othman El Ferdaous  
Email: ask+request-2698-54f5eca0@asktheeu.org

**Subject:** Your confirmatory application


Dear Sir,

Please find enclosed the reply from the Council to your confirmatory application dated 15 June 2016.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court or to make a complaint to the Ombudsman. The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,



Reijo KEMPPINEN

**REPLY ADOPTED BY THE COUNCIL ON 9 SEPTEMBER 2016  
TO CONFIRMATORY APPLICATION 15c/01/16,  
made by email on 15 June 2016,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to documents SN 2711/87 and SN 2759/87**

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) 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 18 March 2016, the applicant submitted a request for access to document **SN 2711/87** which contains a reply to the letter from King Hassan II of Morocco dated 8 July 1987 and to document **SN 2759/87** which contains a note from the (Foreign Affairs) Council of 14 September 1987 concerning Morocco's membership application.
2. In its reply dated 9 June 2016 the General Secretariat refused public access in its entirety to document **SN 2711/87** and partially to document **SN 2759/87** pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation No 1049/2001.
3. In the confirmatory application dated 15 June 2016, the applicant asked the Council to review its position. The applicant claims that "given that these documents are more than 29 years old, I would like this decision to be reviewed and overturned. Especially I would argue that on the contrary these documents would allow a better understanding of EU-Morocco relations in the light of the 1987 refusal of Morocco's candidacy. If necessary these documents could be made available to me on an individual and contractual basis, for historiographical/research purposes."

4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001, whether public access can be provided to document SN 2711/87 and further public access provided to document SN 2759/87 and has come to the conclusions set out below.

Documents SN 2711/87 and SN 2759/87

5. Document SN 2711/87 contains a reply to the letter from King Hassan II of Morocco dated 8 July 1987, whereas document SN 2759/87 contains a note from the (Foreign Affairs) Council of 14 September 1987 concerning Morocco's membership application.

Exception applicable to the requested documents: protection of the public interest as regards international relations

6. Based on their content, as set out above, the requested documents come within the remit of the exception of protection of the public interest as regards international relations (Article 4(1)(a) third indent of Regulation No 1049/2001).
7. At the outset, the General Secretariat recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
8. 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"*<sup>1</sup>.

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<sup>1</sup> ECJ case C-266/05, Sison, para. 35.

9. 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 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"*<sup>2</sup>.
10. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of documents on international relations but 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 interest and grant access nonetheless.
11. The applicant argues that the requested documents should be released, given that they are now 29 years old. The exceptions as laid down in Article 4 paragraphs 1-3 of Regulation No 1049/2001 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period. However, the 30-year rule is an abstract cut-off date established by the legislator, and the fact that an exception cannot be invoked anymore after 30 years does not necessarily imply that in a given case there can be no more harm in making the document concerned public. This is all the more so where the maximum period has not yet been reached, but is only close.

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<sup>2</sup> ECJ case C-266/05, Sison, para. 46.

12. The diplomatic relations between the European Union and the Kingdom of Morocco are currently at a delicate state, notably following a series of issues relating to the liberalisation of reciprocal trade in agricultural products, processed agricultural products, fish and fishery products between the two parties, which are currently the subject of litigation before the EU Courts. In spite of the efforts deployed by the EU to improve its relations with the Kingdom of Morocco, the current legal proceedings have adversely affected the relations between the two parties, and may also have negative repercussions on future negotiations between the EU and Morocco. In the light of this, the Council considers, that a unilateral decision to fully release the content of the requested documents at this juncture in time would have a negative bearing on the diplomatic relations with Morocco would therefore undermine the protection of the public interest as regards international relations.

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

13. As regards document SN 2711/87, the Council considered in its initial decision that the information in the document forms an inseparable whole and therefore even partial disclosure of the content of the document was not possible. The Council has thoroughly re-examined the requested document in accordance with the provision on partial access laid down in Article 4(6) of Regulation 1049/2001. Following this examination, the Council must confirm that no partial access to the document is possible.
14. As regards document SN 2759/87 in its initial decision, the Council gave partial access to the document. The Council has thoroughly re-examined the requested document in accordance with the provision on partial access laid down in Article 4(6) of Regulation 1049/2001 whether further access can be given. It has specifically assessed which parts of the document could, if disclosed, entail a specific and actual risk for the public interest as regards international relations as identified above. Following this examination, it has concluded that no further partial access to document SN 2759/87 can be given.

### Conclusion

15. In exercising its wide margin of discretion in the matter, the Council therefore considers that disclosure of the content of document SN 2711/87 and further disclosure of document SN 2759/87 would undermine the protection of the public interest as regards international relations. Public access to document SN 2711/87 and further public access to document SN 2759/87 must therefore be refused pursuant to Article 4(1)(a), third indent of Regulation No 1049/2001.
  16. Furthermore, the Council would like to point out that the applicant's specific interest in gaining knowledge of the requested documents for academic research cannot be taken into account by the institution when assessing a request for public access to documents, given that the purpose of Regulation (EC) No 1049/2001 is to give the general public a right to access to documents of the institutions and not to establish rules on privileged access. When the Council releases a document pursuant to Regulation (EC) No 1049/2001, it is obliged to do so *erga omnes*. Privileged access, such as suggested by the applicant, is therefore not possible.
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