

REPLY TO CONFIRMATORY APPLICATION 22/c/02/23
made by email on 7 June 2023 and registered on 8 June 2023

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 documents¹ (hereinafter referred to as “Regulation (EC) No 1049/2001”) and Annex II to the Council’s Rules of Procedure², and has come to the following conclusion:

1. On 8 May 2023, the Applicant submitted a request for access to documents, registered on the same day, seeking access to document 9012/23, which is a note from the Presidency to the Permanent Representatives Committee concerning a *Secure videoconferencing system for the European Council and the Council*.
2. On 7 June 2023, the General Secretariat of the Council (GSC) replied to the Applicant, giving partial access to the requested document, while withholding certain parts based on protection of public security.
3. On the same day, the Applicant submitted a confirmatory application, registered on 8 June 2023, insisting that at least more extensive partial access to the document should be possible.
4. The Council has thoroughly re-examined the requested document also in the light of the Applicant’s arguments. It has nevertheless come to the conclusion that it has to uphold the refusal of access to the parts of the document withheld in the initial phase.

¹ OJ L 145, 31.5.2001, p. 43.

² Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35.

5. At the outset, the Council recalls that according to well established case law, documents issued in the context of a Union institution's administrative activities, such as the one requested for the purpose of this application, are not subject to the same extensive access to documents regime under Regulation (EC) No 1049/2001 as that applicable to documents pertaining to its legislative activity.³
6. The parts of the document withheld in the initial phase set out sensitive aspects of the secure videoconferencing system that is being put in place.
7. These aspects concern details about the capability to support classified discussions among heads of state and government, ministers and permanent representatives which could be used to draw security-relevant conclusions – including from allocated resources – on the relevant technical system architecture and equipment and the availability of services. Their disclosure would impact this capability. In addition, it would provide sensitive information on measures taken in Member States to protect their relevant systems.
8. As regards all of these aspects, disclosing the information withheld in the initial phase would clearly undermine protection of IT security of the institution and the Member States in a way that is reasonably foreseeable and not purely hypothetical and access to the relevant parts of the document must therefore be refused on the basis of Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regards public security).
9. Concerning the judgment in the *Evropaïki Dynamiki* case invoked by the applicant,⁴ it should be noted that in that case the Commission had refused access to a large number of documents on the basis of the individual examination of only a part of those documents, while it became clear, during the proceedings, that partial access to the documents would have been possible. By contrast, the GSC has thoroughly examined the requested document in the initial phase and actually given the partial access the General Court had called for in the *Evropaïki Dynamiki* case.

³ Judgment of the Court of Justice of 27 February 2014 in case C-365/12 P *Commission v EnBW*, ECR, EU:C:2014:112, paragraph 91 and the case-law cited.

⁴ Judgment of the General Court of 6 December 2012 in case T-167/10, *Evropaïki Dynamiki v. Commission*, EU:T:2012:651.

10. The Council also 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 (EC) No 1049/2001 are subject to a particular regime if compared to the other exceptions included in Article 4.
11. On the one hand, the Council enjoys 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.
12. 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”*.⁵
13. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of a document on public security and it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document or parts of a document would harm the protected interest.
14. While the refusal of access to the relevant parts of the document is thereby firmly grounded in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001, the Council wishes to point out that the document also concerns an ongoing administrative decision-making process. The disclosure of security-sensitive information contained in the requested document would also seriously undermine that process.

⁵ Judgment of the Court of Justice of 1 February 2007 in case C-266/05, Sison v Council, EU:C:2007:75, paragraph 46.

15. In this regard, the General Court held that the interest of the public in obtaining access to a document pursuant to the principle of transparency “*does not carry the same weight in the case of a document drawn up in an administrative procedure*”.⁶ Therefore, the existence of an overriding public interest in release cannot be presumed and it would be for the applicant to demonstrate that, in the present case, the principle of transparency is especially pressing and capable, therefore, of prevailing over the interest of protecting the Council’s ongoing-decision making process which justifies the refusal to fully disclose the document in question.⁷ The Council considers that the mere mention of the fact that the applicant is a journalist is not enough to demonstrate the existence of an overriding public interest in disclosure in the present case. Consequently, access to the parts concerned must therefore also be refused pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.
16. Following its thorough re-examination of the application, the Council has also come to the conclusion that all parts withheld in the initial phase are covered by the exceptions outlined above. More extensive partial access, as foreseen in Article 4(6) of Regulation (EC) No 1049/2001, therefore cannot be given.

CONCLUSION

17. The Council therefore confirms that no further access to document 9012/23 can be given, beyond the partial access already given in the initial phase.

⁶ Judgment of the Court of first Instance of 9 September 2008 in case T-403/05, *MyTravel v Commission*, EU:T:2008:316, paragraph 49.

⁷ Judgment of the Court of Justice of 2 October 2014 in case C-127/13, *Strack v Commission*, EU:C:2014:2250 paragraph 131.