



SGS15/03673

Council of the European Union
General Secretariat

Directorate-General Communication and Document Management
The Director-General

Brussels, 31 -03- 2015

Ms Eva Schram
Piet Heinkade 181H
1019 HC Amsterdam
The Netherlands

Subject: Your confirmatory application

Dear Madam,

Please find enclosed the reply from the Council to your confirmatory application dated 18 February 2015.

You will also find enclosed the documents to which the Council decided to grant extended partial access.

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 27 MARCH 2015
TO CONFIRMATORY APPLICATION 04/c/1/15,
made by email on 18 February 2015,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 5474/15, 6224/13, 6224/13 ADD 1,
6224/13 ADD 2 and 16045/13**

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 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. The applicant requested "all the operational results of the Joint Operations "Mos Maiorum", which was carried out from 13-26 October 2014 and presided over by the Italian government, as mentioned in document 11671/14 and the operational results of previous Joint Operations held during the last Presidencies of the Council of the UE".
2. In its reply dated 12 February 2015, the General Secretariat identified the following documents as corresponding to the request :
 - 5474/15 which contains the operational results of the Joint Operation "Mos Maiorum";
 - 17816/10 which contains the final report on Joint Operation HERMES;
 - 6224/13, 6224/13 ADD 1, 6224/13 ADD 2 which contain a final report on Joint Police Operation APHRODITE; and
 - 16045/13 which contains the final report on operation PERKŪNAS.

3. Full access was given to document 17816/10.

Pursuant to Article 4(6) of Regulation No 1049/2001, a partial access was granted to document 5474/15. Access to the remaining parts of the document was refused pursuant to Article 4(1) (a) first indent, of Regulation No 1049/2001 (protection of the public interest as regards public security).

Document 6224/13 was already partially available and no further partial access was granted. Access to the remaining parts of the document was refused pursuant to Article 4(1) (a) first indent, of Regulation No 1049/2001 (protection of the public interest as regards public security). Access to documents 6224/13 ADD 1 and 6224/13 ADD 2 was denied on the same basis.

Document 16045/13 was already partially available and no further partial access was granted. Access to the remaining parts of this document was refused pursuant to Article 4(1) (a) first and third indents of Regulation No 1049/2001 (protection of the public interest as regards public security and external relations).

4. In her confirmatory application dated 18 February 2015, the applicant contests the assessment made by the General Secretariat of the Council and asks for the Council to reconsider its position. She claims that the Council gave little evidence that full disclosure of the requested documents would undermine the protection of the public interest as regards public security. Regarding document 16045/13, she indicates that it was not clear from the reply the relations with which third country would be affected by the full disclosure of this document.
5. The Council has considered the confirmatory application in the light of the applicant's arguments and has concluded as indicated below.

Applicable exceptions: protection of the public interest as regards public security (all documents concerned) and international relations (document 16045/13)

6. Based on their content, as set out above, the requested documents come within the remit of the exceptions of protection of the public interest as regards public security (Article 4(1)(a) first indent) and international relations (Article 4(1)(a) third indent) for document 16045/13.
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"¹.
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"².
10. Therefore, the Council enjoys a wide discretion in assessing the probable impact of the release of a document on public security and international relations and 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 interests and grant access nonetheless.

The harm to the public interest as regards public security

11. All the abovementioned documents contain a final report on Joint Operations which were held in the recent past with the aim of combating illegal immigration, identifying the link between illegal EU external border crossings and irregular migration within the EU and Schengen area, as well as focusing on the secondary movements of irregular migrants who entered the Member States irregularly.
12. The requested documents contain information about the discovered practices of persons or groups involved in illegal immigration and the routes followed by such persons or groups to access the EU area. If released, this information, which for instance include maps showing the location where illegal immigrants were apprehended, could be used by facilitators, smugglers

¹ ECJ case C-266/05, Sison, para. 35.

² ECJ case C-266/05, Sison, para. 46.

or criminal organisations involved in illegal migration in order to facilitate the planning of their illicit activities or to adapt their *modus operandi* and find new spots.

The requested documents also contain information about operational concepts and the operational arrangements of the Joint Operations which, if released, could be used to cause damage to the activities undertaken by public authorities and could harm the course of future operations.

Finally disclosure of detailed information on the results of the Joint Operations in relation to certain geographic areas or categories of illegal immigrants would reveal elements on the strategic planning and on the effectiveness of the Operations which in turn could affect their effect of deterrence.

13. In conclusion, in exercise of the wide discretion that the case laws recognises to it, the Council considers that the release of such information would jeopardize the EU's efforts to combat illegal immigration and therefore clearly undermine the public interest as regards public security.

The harm to the public interest as regards international relations

14. In addition to the type of information already mentioned above, document 16045/13 - which sets out the final report on Operation PERKŪNAS - also contains confidential information which was given by a third-country, namely Morocco. The Council considers that disclosing this information would harm the future cooperation with this country relating to information exchange on issues dealing with illegal immigration and could also be harmful to future cooperation with other countries. If the Council discloses information received from a third country on a confidential basis, other countries would be very reluctant to provide the EU with such information in the future.

15. In light of the above, the Council considers, in exercise of its wide margin of discretion, that disclosure of these parts of the document would therefore also undermine the protection of the public interest as regards international relations and should therefore be refused.

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

16. The Council has carried out new consultations and has thoroughly re-examined the requested documents in accordance with Article 4(6) of Regulation 1049/2001. It has specifically assessed which parts of the documents could, if disclosed, entail a specific and actual risk for the public interest as regards public security and international relations as identified above.

17. As a consequence, it has concluded that an extended partial access could be granted to documents 5474/15 and 6224/13, no further partial access could be given to document 16045/13 and that no partial access could be granted to documents 6224/13 ADD 1 and 6224/13 ADD 2.

Conclusions

18. Having regard to the above, the Council confirms that full public access to documents 6224/13 ADD 1 and 6224/13 ADD 2 has to be refused pursuant to the first indent of Article 4(1)(a) (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001 and that no further partial access can be granted to document 16045/13 for the same reason. In addition, it confirms that access to some parts of document 16045/13 has to be refused also pursuant to the third indent of Article 4(1) (a) (protection of the public interest as regards international relations). Having examined the possibility of providing further partial access to the requested documents in accordance with Article 4(6) of Regulation 1049/2001, the Council has come to the conclusion that the applicant may have access to some additional parts of document 5474/15 and 6224/13 which are not covered by the abovementioned exceptions.
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