

**REPLY ADOPTED BY THE COUNCIL ON 5 OCTOBER 2015
TO CONFIRMATORY APPLICATION 19/c/2/15,
made by email on 31 August 2015,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 10749/15**

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. The applicant refers to document 10749/15 which sets out an implementation report 2015 for the EU-Pakistan 5-year Engagement Plan.
2. In its reply dated 31 August 2015, the General Secretariat refused public access to the document pursuant to Article 4(1)(a), third indent (protection of the public interest as regards international relations) of Regulation No 1049/2001.
3. In his confirmatory application dated 31 August 2015, the applicant asks the Council to reconsider this position. He claims that parts of the report should contain objective reporting of events and that at least such parts should be publicly accessible, since they concern events that have taken place and not the EU's opinion on the said events.
4. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comment, whether public access can be provided to the requested document and has come to the conclusions set out below.

THE CONTEXT

5. The EU cooperation with Pakistan dates back to 1974, but the 2004 cooperation agreement paved the way for closer relations. EU-Pakistan ad hoc Summits were held in 2009 and 2010, and in March 2012 a new political framework - the EU-Pakistan 5-year Engagement Plan - was endorsed by both sides. The Plan is intended to take relations to a new level by intensifying dialogues across priority areas including: political cooperation, security, governance and human rights, trade, energy and a range of sectorial cooperation areas. The EU has also initiated dedicated dialogues with Pakistan on counter-terrorism and non-proliferation.
6. Trade is an essential element in EU-Pakistan relations. From January 2014, Pakistan has been granted preferential access to EU's market under GSP+ - a trade scheme, which offers trade incentives to vulnerable developing countries to implement core international conventions on human and labour rights, sustainable development and good governance.
7. The EU and its Member States provide development assistance to Pakistan in a wide range of areas such as education, rural development, good governance, including the rule of law and the strengthening of democratic institutions, as well as disaster management and rehabilitation, with the aim of ensuring stability and promoting economic growth.
8. The EU-Pakistan dialogue has broadened and deepened over recent years on a wide range of issues, including counter-terrorism, disarmament and non-proliferation, and migration management. The EU remains fully committed to continuing its dialogue and engagement with Pakistan under the 5-year Engagement Plan. Depending on progress achieved on the main elements of the Engagement Plan, including human rights, this could lead to a third EU-Pakistan ad hoc Summit.

9. Nevertheless, there are issues related to Pakistan that are of concern to the EU¹. Respect, protection and promotion of freedom of religion or belief, the rights of persons belonging to minorities, the rights of women and rights of the child and freedom of expression need to be respected by Pakistan. Furthermore, the Council has called on Pakistan to continue to build on the steps it has taken to prevent and fight terrorism and counter violent extremism, curb financing of terrorist organisations, enforce the ban on proscribed organisations, take effective steps against religious persecution and register and regulate madrassas. Moreover, Pakistan's decision to lift the moratorium on executions in place since 2008 and to resume executions was strongly condemned by the EU.

THE APPLICABLE EXCEPTIONS

General remarks

10. Based on their content, as set out above, the requested documents come within the remit of exception concerning the protection of the public interest as regards international relations (Article 4(1)(a) third indent) of Regulation No 1049/2001.
11. At the outset, the Council deems it useful to underline that while the requirements of transparency are greater when the EU Institutions are acting in their legislative capacities, public participation in the domain of external relations - which in principle falls within the domain of the executive - is necessarily restricted. The EU courts reasserted this principle in a number of occasions in relation to requests for access to directives for the negotiation of international agreements. There can be no doubt that it all the more applies to a document relating to the implementation of an agreement with a third country².

¹ See for example Council conclusions on Pakistan, doc. 11054/15.

² Judgment of the General Court in case T-529/09, In't Veld, para.88, confirmed on the point by the Court of Justice on appeal. Judgment of the General Court of 19 March 2013 in case T-301/10, In't Veld, para 120.

12. The General Secretariat also recalls that, according to the constant case law of the Court of Justice, the public interest exceptions disciplined by Article 4(1)(a) of Regulation No 1049/2001 are subject to a different regime compared to the other exceptions included in Article 4.
13. 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"*³.
14. 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"*⁴.
15. The Council acknowledges that, according to the Court, even when invoking one of the public interest exceptions identified by Article 4(1)(a), EU institutions are required to explain how disclosure of the requested documents could specifically and actually undermine the interest protected by the exception.⁵ The Council nevertheless points out that its obligation to provide a statement of reasons cannot result in an indirect disclosure of the information which the invoked exception is aimed at protecting or in the need to provide the evidence of a threat which is - by definition - merely foreseeable, since in so doing the exception will be deprived of its very purpose.⁶

³ Judgment of the Court of Justice in case C-266/05, Sison, para. 35.

⁴ Judgment of the Court of Justice in case C-266/05, Sison, para. 46.

⁵ Judgment of the Court of Justice in case C-350/12P, In 't Veld v Council, para. 64.

⁶ Judgment of the Court of First Instance in case T-264/04, WWF, para. 37; judgment of the Court of Justice in case C-266/05, Sison, para. 83.

16. Document 10749/15 is a "I/A" Item Note setting out in its annex the implementation report 2015 for the EU-Pakistan 5-year Engagement Plan. It was submitted to the Council (Foreign Affairs) on 20 July 2015 and approved by the Council that same day.
17. The document contains information about political and economic developments in Pakistan since the last report which was issued in June 2014. It also sets out a description of the latest developments relating to the implementation of the EU-Pakistan 5-Year Engagement Plan on a strategic and political level, on security, democracy, governance, human right and socio-economic development, on trade and investment, energy and sectorial cooperation. On the basis of this, the document sets out conclusions and proposes ways forward in the EU-Pakistan relations in order to deepen and strengthen them further. Finally, in its annex, the document sets out an overview of planned assistance of the EU and the Member States in 2015 and 2016.
18. As mentioned by the applicant in his confirmatory application, some of the contents of the document indeed set out objective reporting of events which took place during the reporting period. This however is not the case for the whole document. Some parts of the document contain internal assessments about cooperation with Pakistan and the work of the Pakistani government, army and authorities, especially in the areas covered by the EU-Pakistan 5-Year Engagement Plan. These parts of the document also identify the challenges met and possible areas for improvement in the EU's cooperation with Pakistan. Furthermore, some of the assessments include references to specific episodes and are drafted in frank terms, meant for internal consideration only. If released to the public at large, these assessments, meant for internal use only and aimed at fostering an internal reflection, would affect the climate of mutual trust that exists between the EU and Pakistan and thereby undermine the quality and extent of the existing forms of cooperation and affect the possibility of developing new ones. Full disclosure of the document would thus undermine the protection of the public interest as regards international relations.

19. Furthermore, Pakistan remains of key importance to the security of the EU, as it is central to regional stability and security in the area. Disclosure of the above-mentioned internal assessments to the public would jeopardise the quality and depth of the EU-Pakistan dialogue and thereby endanger the maintenance of the constructive momentum in EU-Pakistan relations and risk a loss of commitment from the Pakistani side to work further with the EU on essential security-related issues such as counter-terrorism. Full disclosure of the document would thus undermine the protection of the public interest as regards public security.
20. As regards the overview of planned assistance of the EU and the Member States in 2015 and 2016 which is set in the annex to the document, the Council would recall that in the areas of development cooperation and humanitarian aid, the Union and the Member States share competences. According to the Treaty on the Functioning of the European Union, the EU has competence to carry out activities and conduct a common policy in these areas; however, the exercise of that competence does not prevent Member States from exercising theirs.
21. In August 2014, the EU decided to allocate an indicative amount of €653 million in the new Multi-annual Indicative Programme (MIP) 2014-20 to support rural development, education and good governance, including democracy, human rights and rule of law in Pakistan. National funding from Member States complements the EU support, with a total amount of 901 million € in 2015 and 805 million € in 2016. Even though there is a large degree of similarities in the goals and objectives between the EU and Member States actions in the framework of the MIP, Member States are free to exercise their competence in this area and choose not to participate in the funding of all the actions. The table set out in the annex to document 10749/15 gives an overview of planned assistance of the EU and the Member States in 2015 and 2016.

22. **If details relating to** the areas chosen by the Member States for national funding were disclosed, this would enable third countries to compare the effort and the activities the Member States have chosen to engage in in Pakistan with those in their respective countries. Such a comparison might show that certain Member States choose to contribute more in certain key areas in Pakistan than in another third country, and this could lead to false presumptions by certain third countries as to the preferences in their international relations by those Member States. This would negatively affect Member States and EU relations with the concerned third countries and cause harm to the climate of mutual trust and willingness of the third countries to cooperate. As **EU development policy is a cornerstone of EU relations with the outside world, alongside with foreign, security and trade policy**, disclosure of the table in the annex would thus undermine the protection of the public interest as regards international relations.
23. In exercise of its wide margin of discretion in the matter, the Council therefore considers that full disclosure of the content of document 10749/15 would undermine the protection of the public interest as regards public security and international relations. Full public access to the document must therefore be refused pursuant to Article 4(1)(a), first and third indents, of Regulation No 1049/2001.
24. The Council has also examined the possibility of granting extended partial access to this document as foreseen in Article 4(6) of the Regulation. It has concluded that there are indeed further parts in the document which are not covered by the above-mentioned exceptions. Extended partial access may thus be granted to document 10749/15.
- As far as the remaining parts of the document are concerned, the Council is of the opinion that it is not possible to grant public access to them without compromising one or both of the protected interests referred to above.
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