



SGS17/07250

Council of the European Union
General Secretariat

Directorate-General Communication and Information
The Director-General

Brussels, 03 -08- 2017

Mr Mathias Schindler
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Subject: confirmatory application No 15/c/02/2017

Dear Sir,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 28 June 2017.

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 Court¹ or to make a complaint to the Ombudsman². 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

¹ For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

² Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

**REPLY ADOPTED BY THE COUNCIL ON 3 AUGUST 2017
TO CONFIRMATORY APPLICATION 15/c/02/17,
made by email on 28 June 2017,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 8146/17, 8146/1/17 REV 1 and 8946/17**

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. On 13 May 2017, the applicant submitted a request for access to the following documents:
 - a) Document **7923/16** which is a Note from the Presidency to Delegations of 10 April 2017 on Draft Council Conclusions on a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) - Examination
 - b) Document **7923/16 REV 1** which is a revised version dated 8 May 2017 of the Note from the Presidency to Delegations of 10 April 2017 on Draft Council Conclusions on a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) - Examination
 - c) Document **8907/17** which is a Note from the Presidency to Delegations of 11 May 2017 on Draft Council Conclusions on a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) - Compilation of comments (*from some Member States*)

- d) Document **8146/17** which is a Note from the General Secretariat of the Council to Delegations of 18 April 2017 on a "Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) - Member States' comments
- e) Document **8146/17 REV 1** which is a revised version dated 8 May 2017 of the Note from the General Secretariat of the Council to Delegations of 18 April 2017 on a "Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) - Member States' comments, and
- f) Document **8946/17** which is a Note from the Presidency to Delegations of 11 May 2017 on a "Joint Diplomatic Response to Cyber Operations (Cyber Toolbox)- presentation of the revised text and initial views

2. The applicant also requested access to "other revisions" of these documents and "any documents" related to a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox).
3. In its reply dated 27 June 2017, the General Secretariat of the Council gave access to the documents referred to under 1 a), b) and c) but refused access to the documents referred to under 1 d) e) and f) pursuant to Article 4.1(.a) third indent of Regulation No 1049/2001, since their disclosure would seriously undermine the protection of the public interest as regards international relations and pursuant to Article 4.3. second subparagraph, since their disclosure would also seriously undermine the decision making process of the Council.
4. In the confirmatory application dated 28 June 2017 and registered on 29 June 2017, the applicant asks the Council to reconsider this position. The applicant claims that the scope of his request has not been fully addressed since no documents other than those listed under 1 have been identified, that an overriding public interest in the disclosure of the documents exist in particular in the light of current cyber security related events and ongoing public discussions in other relevant EU institutions, that the marking of the documents as LIMITE instead of a classification, disproves that the documents are very sensitive in nature and finally that the reading and interpretation that third parties might make of the documents are not relevant to assess whether access can be given to the requested documents.

5. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the request and carried out renewed consultations, it has re-assessed the request for access in full consideration of the principles underlying Regulation No 1049/2001, the aim of ensuring the widest possible public access to documents.
6. In so doing the Council has carefully scrutinized the content of the documents, having due regard to the current state of play on negotiations related to the issues.
7. The Council notes that after having examined the individual documents mentioned under 1 and 13, all these documents are of the same nature. They provide comments, present positions and options submitted by the Member States, the Presidency and other institutional actors as part of the decision making process of the Council leading to the adoption of the Framework for a joint EU diplomatic response to malicious cyber activities (Cyber Toolbox)

General context

8. The documents to which access was refused, concern the implementation of the Council Conclusions on a framework for a Joint EU Diplomatic Response to malicious cyber activities ("Cyber Diplomatic Toolbox") which were adopted by the Council on 19 June 2017 (*public document 9916/17 of 7 June 2017*). These conclusions are building on prior Council Conclusions on Cyber Diplomacy which amongst other things hold that in particular a common and comprehensive EU approach for cyber diplomacy could contribute to conflict prevention, the mitigation of cybersecurity threats and greater stability in international relations (*public document 6122/15 of 11 February 2015*).
9. The Council Conclusions of 19 June 2017 affirm in their point 5 that "*measures within the Common Foreign and Security Policy, including, if necessary, restrictive measures, adopted under the relevant provisions of the Treaties, are suitable for a Framework for a joint EU diplomatic response to malicious cyber activities and should encourage cooperation, facilitate mitigation of immediate and long-term threats, and influence the behavior of potential aggressors in a long term.*"

10. They call on the Member States, the European External Action Service (EEAS) and the Commission to develop a Framework for a joint EU diplomatic response to malicious cyber activities (hereafter "Cyber Toolbox")
11. This Cyber Toolbox will provide on one hand a series of diplomatic instruments that are suitable both for an immediate response to incidents as well as for elements that can be used to influence behaviour and deter malicious cyber activities in the longer term. On the other hand it will provide for detailed implementation measures as regards the preparation, the taking and the follow-up of decisions on the use of these instruments.
12. Whereas the initial idea of the relevant Council preparatory body i.e. the Horizontal Working Party on Cyber Issues was to submit both the Council Conclusions and the Cyber Toolbox itself simultaneously, preparatory work started in parallel but it quickly revealed that the work on the Cyber Toolbox was an issue of a very sensitive and delicate diplomatic nature for Member States. Preparatory work on the Council Conclusions and the Cyber Toolbox was therefore separated and work is still ongoing.

Scope of the request

13. The applicant requested on 13 May 2017 " Any documents related to a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox), including but not limited to the following documents:

- * 7923/17 REV 1 and other revisions, including the initial revision
- * 8146/17 REV 1 and other revisions, including the initial revision
- * 8946/17 and other revisions
- * 8907/17 and other revisions"

Whereas no "other revisions" of the documents explicitly requested existed at the moment of the applicant's initial request and the "initial revisions" of the first two documents have been identified as the initial, non-revised versions, the Council has re-consulted the responsible policy service of the General Secretariat of the Council. Since debates so far had rather focused on the preparation of the Council Conclusions only one additional document has been identified i.e.

Working document WK 2569/17 of 7 March 2017 from EEAS/COM to the Political and Security Committee and which is the Joint EEAS- Commission services issue paper on a Joint Diplomatic Response to Cyber Operations (Cyber Toolbox) and which contains the initial proposal for the Cyber Toolbox.

Prejudice to the protection of the public interest as regards international relations

14. The applicant states that the claim of the General Secretariat of the Council that "information and positions contained in the documents could provide misleading information on provisional positions which ultimately have not been agreed *"is irrelevant to this access to documents request or, if any, would require the release of *additional* documents to convey the proper positions"*. He claims that this is *"not a factor to access to documents requests to anticipate if and how any third party will read and interpret any document and whether this interpretation is intended or shared by anyone else"*.
15. At the outset, the Council 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.
16. 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.
17. 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.

¹ ECJ case C-266/05, Sison, para. 35.

² ECJ case C-266/05, Sison, para. 46.

18. 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.
19. As recalled in the Council Conclusions on Cyber Diplomacy, a strategic engagement with key partners and international organisations is needed to ensure a broad and effective policy coordination. Developments in this area have taken place for example in the United Nations, OSCE, NATO, OAS, ASEAN etc. and are still ongoing.
20. The creation of an EU Cyber Toolbox, should be considered as a EU specific complementary instrument supporting the wider compliance with existing international law, the aim to reach common positions in international fora and the enhancement of the protection of the EU's political, security and economic interests.
21. Documents **8146/17**, **its REV 1**, **8946/17** and **WK 2569/17** reveal the diplomatic instruments and their expected impact that could be used by the EU and/or its Member States to protect these interests. They indicate amongst other things in detail the channels, scale, scope, duration and intensity of the instruments to be used and describe the decision making approach. Disclosure of these details would first of all undermine the deterrent influence on malicious cyber activities by State and non-state actors. Furthermore, and as already stated in the reply to the initial application, the documents only partially reflect the evolving debates in the preparatory bodies of the Council. Their release would provide misleading information on provisional positions and may undermine the EU's and Member States' negotiating powers in international fora. Disclosing some Member States' positions on certain pending issues in a diplomatic context as reflected in documents **8146/17 and its REV 1**, may moreover involve an increased risk for diplomatic retaliatory measures against these Member States.

22. Taking into account the aforementioned wide discretion conferred to the Council by the case law of the Court of Justice, the applicant's claim that *the anticipation of if and how any third party will read and interpret any document and whether this interpretation is intended or shared by anyone else, is irrelevant to his access to documents request*, is rejected. The Council considers that an appropriate harm assessment of the release of the documents should exactly take such factors into account to determine whether or not the public interest is affected.
23. For these reasons, the Council concludes that the disclosure of the documents would undermine the protection of the public interest as regards international relations and that as a consequence, the Council confirms that pursuant to Art.4.1.a. third indent, access to documents **8146/17, its REV 1, 8946/17 and WK 2569/17** is refused.

Serious undermining of the decision making-process of the Council.

24. The Council has also re-assessed the initial refusal of access to documents **8146/17, its REV 1 and 8946/17** based on the argument that this would seriously undermine the decision making process of the Council.
25. The Council confirms that these documents do not contain the views of all Member States, and do not fully represent the ongoing debates. Disclosure of provisional views and positions which ultimately may not be agreed could increase the risk of misperception, and/or create expectations by the public and stakeholders. These could be incited to launch interventions and/or actions that would put the Presidency and Member States under additional pressure. The fact that discussion papers and opinions of delegations on a sensitive issue still under discussion were to become public, may moreover refrain delegations from expressing their opinions which would diminish the chances of reaching an agreement.
26. Disclosure of documents **8146/17, its REV 1 and 8946/17** would therefore impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this subject.

27. Disclosure of these documents would therefore seriously undermine the decision making-process of the Council and as a consequence, the Council confirms that pursuant to Art.4.3.second subparagraph, access to documents **8146/17, its REV 1, 8946/17 and WK 2569/17** is refused.

Marking of the documents 8146/17, its REV 1, 8946/17 and WK 2569/17 as LIMITE

28. The applicant claims that that the reply of the General Secretariat of the Council stating that "the documents are very sensitive by nature", *"is disproven by the apparent classification of these documents as LIMITE. As explained in the note on Handling of documents marked LIMITE (5847/06), LIMITE is a distribution marking, not a classification level. If they were sensitive as claimed, they would be classified with all the implications of such as classification."*
29. Whereas Council document 5847/06, which is a Note from the General Secretariat to Delegations of 16 March 2006, indeed indicates that "LIMITE" is a distribution marking, and not a classification level, this has however no bearing on the sensitive nature of the information contained in the requested documents.
30. As a matter of fact, the conditions for making a document classified EUCI are strictly defined by Council Decision 2013/488 and linked to an increasing degree of intensity as to the possible prejudice for the interests of the Union or of one or more of its member states (Article 2). It is therefore clear that those conditions go beyond the threshold of being a "very sensitive information", since they refer to a sensitive information of a particular kind.
31. On the other hand, LIMITE is a circulation markings that aims at protecting, with an obligation of professional secrecy the confidentiality of documents that, if disclosed, could undermine one of the interests protected by Regulation 1049/2001. In that regard, the sensitive character of the information contained in the document can well be one of the parameters to be taken into consideration when marking a document as LIMITE'.

32. The Council further notes that contrary to what seems to be claimed by the applicant, it is not the qualification as "very sensitive" of the documents which automatically leads to a refusal to grant access to them. It are rather the potential harmful consequences of disclosure of the documents which are the criteria for assessing access.

The overriding public interest in disclosing the requested documents

33. At the outset, the Council notes that "overriding public interest" is an assessment criterion which does not apply to the exception under Article 4.1.a. third indent (protection of international relations). It only applies in the current case to the exception under Article 4.3 second subparagraph (protection of the decision making process of the Council) of Regulation 1049/2001. In the letter of reply of the General Secretariat of the Council of 27 June 2017 this exception is mentioned as a complementary ("*also*") reason to refuse access to some of the requested documents. The Council therefore concludes that the alleged existence of an overriding public interest does not affect the overall assessment to refuse access to the documents pursuant to Art. 4.1.a.3.
34. Nevertheless the Council has examined the applicant's claim which is mentioning "*current cyber related events and public discussions in other relevant EU institutions*" as an overriding public interest. The Council notes that these are general, non detailed considerations which substantially amount at alleging that the topic is somehow being discussed by the public. The Council considers that these considerations fail to show that the need for the public to have access to the requested documents is particularly pressing in the present case and that it should override the interest in protecting the ongoing decision making process. This is all the more so in relation to the fact that the decision-making process at hand is not a legislative one but one that pertains to the broader policy making, including in the sphere of international relations. In such a domain the public interest in transparency does not bear the same weight than in case of law making and the effectiveness of the decision making of the Institutions deserve particular protection. The Council therefore concludes that no overriding public interest in the disclosure of the documents has been demonstrated.

Partial access to the documents

35. Pursuant to Article 4 (6) of Regulation 1049/2001, the Council has re-assessed the possibility of granting partial access to the documents to which access was refused.
36. The structure and content of the documents and the format of Member States' contributions make that the documents form each a coherent text for which it is not possible to separate parts to which the exceptions mentioned above would not apply.
37. The Council therefore concludes that it is not possible to give partial access to documents **8146/17, its REV 1, 8946/17 and WK 2569/17.**

Conclusion

38. For the above-mentioned reasons, the Council concludes that:
Pursuant to Article 4.1.a third indent and 4.3 second subparagraph of Regulation 1049/20001 no access can be granted to documents **8146/17, 8146/1/17 REV 1, 8946/17 and WK 2569/17.**
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