



Council of the European Union
General Secretariat

Directorate-General Communication and Information - COMM
The Director-General

Brussels, 13 July 2021
SGS 21 / 2859

Mr Stefan Soesanto
Email: Stefan Soesanto <ask+request-9126-22469de2@asktheeu.org>

Subject: Your Confirmatory Application 25/c/01/21

Dear Mr Soesanto,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 1 June 2021.

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 Ombudsman.² 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 12 JULY 2021
TO CONFIRMATORY APPLICATION 25/c/01/21,
made by email on 1st June 2021
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents WK 215/2019, WK 1298/2019,
WK 12984/2019, WK 12995/2019 and WK 14056/2019

The Council has considered this confirmatory application for the subject documents 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 "Regulation (EC) 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 24 February 2021, the applicant requested access to several documents pursuant to Regulation (EC) No 1049/2001: WK 14056/2019, WK 12995/2019, WK 12992/2019, WK 12988/2019. WK 12987/2019. WK 12985/2019, WK 12984/2019. WK 9643/2019. WK 6959/2019, WK 3547/2019, WK 3085/2019, WK 1298/2019 and WK 215/2019.
2. The General Secretariat replied to the applicant's initial request through two letters, sent respectively on 12 April 2021 and 28 May 2021. In particular, these responses indicated the following:
 - On 12 April 2021, access to document **WK 215/2019** was refused by the General Secretariat, on the ground of Article 4(1)(a), first indent of the abovementioned Regulation (protection of public interest as regards public security).¹
 - On 28 May 2021, access to documents **WK 1298/2019, WK 12984/2019, WK 12995/2019** and **WK 14056/2019** was refused on the ground of Article 4(1)(a), first and third indent of the abovementioned Regulation (protection of public interest as regards public security and international relations).²
3. Owing to an error, the reply to the applicant's request on 28 May 2021 included not only the documents that were to be released as not covered by any of the exceptions of the abovementioned Regulation, but also the abovementioned WK documents whose disclosure

¹ In this response, the General Secretariat also granted access to document WK 3085/19, partial access to WK 3547/2019 and refused access to WK 6958/2019, and WK 12992/2019.

² In this response, the General Secretariat also granted the applicant full access to WK 12985/2019 and WK 12987/2019 and partial access to WK 9643/2019 and WK 12988/2019.

was refused. Subsequently, those WK documents were published for a limited amount of time in the web platform owner of the e-mail address provided by the applicant to receive the reply to his request.

4. In his confirmatory application dated 1st June 2021, the applicant requested the Council to reconsider its decision regarding documents that were not supposed to be released, which are: **WK 1298/2019, WK 12984/2019, WK 12995/2019, WK 14056/2019 and WK 215/2019**. The Applicant did not contest the exceptions invoked by the General Secretariat to refuse public access, but contended that the Council should at this stage review its position and authorize full access to those documents.
5. The Council has re-assessed whether, in full consideration of the principles of transparency underlying Regulation (EC) No 1049/2001, full or partial public access can be provided to the requested documents.

I. GENERAL CONTEXT RELATED TO THE REQUESTED DOCUMENTS AND THEIR CONTENT

6. Documents **WK 1298/2019, WK 12984/2019, WK 12995/2019 and WK 14056/2019** were drawn up by the European External Action Service for the Horizontal Working Party on Cyber Issues. More particularly, these documents were elaborated in the context of the exercise framework designed to take due account of the interlinkages among the different international organisations cooperating in this field and the exchange of related sensitive operational and intelligence data, in line with the objectives identified by the European Council in its orientations on strengthening the EU and its MS's resilience to multi-faceted and ever-evolving hybrid threats and enhancing cooperation to detect, prevent and counter them.³
7. The other document concerned by this confirmatory application, **WK 215/2019**, to which the General Secretariat refused access in its reply to the applicant on 12 April 2021, is a reflection paper containing national authorities' comments on a set of options for a restrictive measures framework to counter threatening cyber activities attacking the security or foreign policy interests of the EU and its Member States.

³ In particular, the European Council Conclusions of June 2019, March 2019, December 2018. See also document 14972/19, Council Conclusions on 10 December 2019 on complementary efforts to enhance resilience and counter hybrid threats.

II. ASSESSMENT OF THE REQUESTED DOCUMENTS UNDER REGULATION (EC) No 1049/2001

8. Documents **WK 215/2019, WK 1298/2019, WK 12984/2019, WK 12995/2019** and **WK 14056/2019** come within the remit of the exception of protection of the public interest as regards, in particular, public security and international relations (Article 4(1)(a), first and third indent of Regulation (EC) No 1049/2001).
9. At the outset, the Council recalls that, in accordance 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 as compared to the other exceptions included in Article 4. They are framed in mandatory terms.
10. 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"*.⁴
11. 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 (EC) 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
12. Therefore, while the Council enjoys a wide discretion in assessing the impact of the release of documents focusing on the sensitive field of hybrid threats, it is barred from taking into account other legitimate interests in order to override the conclusion that giving access to these documents would harm the protected interests.
13. It also results from the above that the Council has no choice but to refuse access to a document that falls within the scope of the abovementioned exceptions, the public disclosure of which would undermine the public interest protected by them.

⁴ Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, EU:C:2007:75, paragraph 34 and similarly judgment of 3 October 2012 *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32 and judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32.

⁵ Judgment of 1 February 2007, *Sison v. Council* C-266/05 P, para. 46 and similarly judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 38 and order of 20 May 2020, *Nord Stream 2 v Parliament and Council*, T-526/19, EU:T:2020:210, paragraph 61 and the case-law cited.

14. As indicated by its General Secretariat in its reply letter of 28 May 2021, documents **WK 215/2019, 1298/2019, WK 12984/2019, WK 12995/2019 and WK 14056/2019**, drawn up by the European External Action Service (“EEAS”) for the HWP on Cyber Issues, contain information on the EU's and its Member States' strategic approach on building capacities to respond to or deter cyber activities that threaten the security or foreign policy interests of the Union or its Member States.
15. Hence, the release to the public of the elements of the EU capacity and capability building designs and exercises could be used by third parties to identify challenging areas, pitfalls and weaknesses, as well as focus areas of improvement and carry out activities.
16. This would weaken the EU's and MS' efforts to neutralise and sanction the authors of dangerous cyber activities that could damage infrastructures and have a disruptive effect to EU's action in this sensitive field.
17. On this basis, access to these documents should be refused pursuant to the first and third indent of Article 4(1)(a) of Regulation (EC) No. 1049/2001 (protection of the public interest as regards public security and international relations).
18. Additionally, the General Secretariat clearly indicated in its letters of 12 April 2021 and 28 May 2021 that access to documents **WK 215/2019, WK 1298/2019, WK 12984/2019, WK 12995/2019 and WK 14056/2019** was refused. It is therefore evident that the General Secretariat had no intention to render them publicly accessible, since the decision notified to the applicant in the reply to his initial request was manifestly specifying that those documents could not be disclosed as their content is covered by the abovementioned exceptions.
19. The documents therefore were not disclosed in accordance with the provisions of Regulation (EC) No 1049/2001 and therefore they have not entered into the public domain.⁶ It follows that this erroneous release of the documents does not have any bearings on the possibility for the Council to rely on the exception of the protection of public interests as regards public security and international relations (Article 4(1) (a), first and third indent of the abovementioned regulation).⁷
20. Finally, as the applicant was not granted access to documents **WK 215/2019, WK 1298/2019, WK 12984/2019, WK 12995/2019 and WK 14056/2019**, he was prohibited from disclosing these documents to another person or making them public.⁸ Therefore, while reiterating its

⁶ Judgement of 26 March 2020, *ViaSat v Commission*, T-734/17 EU:T:2020:123 paras 53; judgement of 27 November 2018, *VG v Commission*, T-314/16 and T-435/16, EU:T:2018:84 para 51; and judgement of 26 May 2016 *International Management Group v Commission*, T-110/15, EU:T:2016:322 paras 67-68

⁷ Judgement of 21 April 2021, *Pech v Council*, T-252/19, EU:T:2021:203 para 91.

⁸ Judgement of 29 October 2020, *Intercept Pharma v EMA*, C-576/19, EU:C:2020:873, para 41.

position against their release, the Council underlines that the use of documents produced by it made available as a result of a mistake is not authorized.

21. The Council has also looked into the possibility of releasing parts of these documents as foreseen in Article 4(6) of the abovementioned Regulation. However, as the information therein contained forms an inseparable whole, the General Secretariat is unable to give partial access.

III. CONCLUSION

The Council concluded that access to documents **WK 215/2019, WK 1298/2019, WK 12984/2019, WK 12995/2019** and **WK 14056/2019** must be refused in their entirety pursuant to Article 4(1)(a), first and third indent of Regulation (EC) No 1049/2001.
