

EUROPEAN EXTERNAL ACTION SERVICE



DG Resource Management
The Director-General

Brussels, 4 March 2022
eeas.sg.2 (2022) 1618835

Mr Samuel Stolton
by electronic mail

Subject: Your confirmatory request for access to documents

Our ref: 2022/020

Dear Mr Stolton,

I would like to thank you for your confirmatory application of 18 February 2022 following your request for access to documents (EEAS ref: 2022/020).

As requested, I have examined our reply of 17 February 2022, stating that your request was considered inadmissible with the reasoning that there were no new elements compared to those in your previous application (EEAS ref: 2021/141), making the new request simply repetitive. I came to the following conclusion:

In your request of 28 January 2022 you asked for access to the same documents as in your previous request, which was dated 17 September 2021 (EEAS ref: 2021/141) to which we replied on 14 October 2021. Subsequently, you failed to submit a confirmatory application within the deadline foreseen in the Regulation 1049/2001. In your new request of 28 January 2022, you acknowledged that your application is a duplicate of the previous one. In light of the conditions set out by the EU Courts¹, I came to the conclusion that we shall maintain our position and that your new request cannot be accepted as a new application. Indeed, in the absence of any new element, accepting the handling of your alleged new request would result in allowing you to circumvent the mandatory deadline of 15 working days as provided for in Article 7(2) of the Regulation and the definitive nature that a decision on the initial request that is not contested in due time shall acquire.

¹ See judgment of 27 November 2019, Izuzquiza and Semsrott/Frontex, T-31/18, EU:T:2019:815, paragraphs 30-32.

In any case, notwithstanding the confirmation of this main ground of rejection of your request of 18 February 2022, please note for the sake of completeness that the EEAS considers that the grounds set out in the reply to the first initial request are still valid. As already explained, the identified documents contain information that is used in the ongoing negotiations on cyber issues and related data security matters within multilateral fora. The documents have a highly sensitive content as they detail the positions of EU Member States and their opinions on ongoing negotiations at international level. Disclosure of these documents to the general public would harm EU's international relations and would jeopardise the mutual trust and confidence between the EEAS and EU Member States as well with third countries involved in the discussion at the international level.

In that regard, it shall be recalled that 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.

On the one hand, the institution "*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*"².

On the other hand, once the institution 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*".³

Therefore, while the EEAS enjoys a wide discretion in assessing the impact of the release of documents on public security and international relations, it is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless⁴.

After carefully assessing the arguments in your new confirmatory application, I regret to inform you that they did not lead us to reverse our position, since disclosure of the requested documents would seriously undermine the EU's public security and international relations, as per Article 4(1)(a), first and third indents of the Regulation 1049/2001, as well as the EEAS decision-making process, as per Article 4(3), first indent, of the Regulation 1049/2001.

² Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34; of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, paragraph 32; and of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 32.

³ Judgments of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraph 40, and *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, paragraph 40 and the case-law cited

⁴ 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.

As for the possibility to grant you a partial access under Article 4(6) of the Regulation 1049/2001, after careful examination no parts of the documents at issue can be disclosed without revealing information the protection of which is covered by the exception relating to the protection of the public interest as regards public security and international relations⁵.

Therefore, I hereby confirm that the requested documents cannot be released to the public, neither fully nor partially.

Should you not be satisfied with this response, you have a right, in accordance with Article 8 of the Regulation, to institute court proceedings against the European External Action Service and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the Treaty on the Functioning of the EU respectively.

Yours sincerely,

[e-signed]

Bjorn Larsson, Acting DG RM

Gianmarco Di Vita

⁵ See, to that effect, judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 82, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 106, and of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, paragraphs 121 and 122.