



Council of the European Union
General Secretariat

Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 13 May 2024

Mr Alexandre Fanta
E-mail: ask+request-14402-def992bc@asktheeu.org

Ref. 24/1050

Request made on: 22.03.2024
Deadline extension: 17.04.2024

Dear Mr Fanta,

Thank you for your request for access to documents of the Council of the European Union.¹

You have requested access to *“All documents concerning a draft arrangement between the European Parliament, the Council and the High Representative of the Union for Foreign Affairs and Security Policy concerning access by the European Parliament to classified information held by the Council and the European External Action Service in the area of the common foreign and security policy. This is meant to include versions of the draft agreement, legal opinions, exchanges with the Parliament, etc.”*

We have identified the following 31 documents as relevant to your access request:

- ST documents : ST 15343/12, ST 16224/12, ST 17773/12, ST 11496/18, ST 14529/18, ST 14876/18, ST 8513/19, ST 13641/21+REV 1, ST 12641/23, ST 12642/23, ST 12643/23, ST 15574/23, ST 16504/23, ST 5953/24, ST 6292/24, ST 7851/24, ST 7985/24 ;
- WK documents : WK 14438/18, WK 9288/21, WK 11724/21, WK 12362/21, WK 12390/21, WK 12653/21, WK 13038/21, WK 13673/21, WK 11262/22, WK 16772/23, WK 829/24 + COR 1, WK 2210/24.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

Please find attached the full versions of documents **ST 15343/12** and **WK 13038/21**.

Please find attached also partially accessible versions of documents **ST 11496/18**, **ST 14529/18**, **ST 8513/19**, **ST 12642/23**, **ST 7985/24** and **WK 11262/22**.² You may also consult documents **ST 16224/12** and **ST 17773/12**, which are partially accessible on the Council's [Public Register](#).

However, I regret to inform you that full access to these documents cannot be given for the reasons set out below.

All eight of these documents contain information on discussions within the Council's preparatory bodies regarding issues that are currently being negotiated between the Council, the European Parliament and the High Representative (hereinafter referred to as "negotiating partners"). The subject of these negotiations is a draft Arrangement between the European Parliament, the Council and the European External Action Service concerning access by the European Parliament to classified information in the area of the Common Foreign and Security Policy (hereinafter referred to as "draft Arrangement").

For the Council to agree on its position in these negotiations, its Member States hold initial consultations and exploratory talks. By extension, for an agreement to be reached amongst the negotiating partners, there is a need for a space where ideas can be aired and discussed in full discretion and trust. To reveal the full contents of the information contained in the above-mentioned documents before a final agreement on the draft Arrangement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement both within the Council and amongst the negotiating partners. Full disclosure of these documents would therefore seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse full access to these documents.³

Having examined the context in which these documents were drafted and the current state of play in the negotiations, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in the full disclosure of these documents.

Please find attached also partially accessible versions of documents **ST 14876/18**, **ST 13641/21** and **ST 13641/1/21 REV 1**.⁴ However, I regret to inform you that full access to these documents cannot be given for the reasons set out below.

Document ST 14876/18 is a contribution of the Council Legal Service regarding the legal basis of the draft arrangement between the European Parliament (EP), the Council, and the High Representative (HR) on the forwarding to and handling by the European Parliament of classified information in the area of CFSP. It is a follow-up to an oral intervention made by the Legal Service at the meeting of the Working Party on General Affairs on 9 November 2018.

² Article 4(6) of Regulation (EC) No 1049/2001.

³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁴ Article 4(6) of Regulation (EC) No 1049/2001.

The document contains assessments made by the Council Legal Service regarding the then-current draft of the arrangement. Part of the assessments (contained in paragraphs 5-8 of the document) concern the question of the inclusion of parties not named in Article 295 TFEU and/or the exclusion of parties named therein in arrangements pursuant to that provision.

The General Secretariat of the Council recalls that, under Article 4(2) second indent of Regulation 1049/2001, it may refuse to disclose legal advice when disclosure would undermine the protection which must be afforded to that advice.

In the context of non-legislative procedures, such as is the case here, the General Court has held that the public interest in disclosure of legal advice is not as pressing as when it comes to legislative procedures; the publication of preparatory and internal legal advice that does not definitely fix the institution's position would actually and in a foreseeable manner undermine that institution's interest in receiving frank, objective and comprehensive advice from its various departments in order to prepare its final position as an institution (Judgment of 7 February 2018, T-851/16, *Access Info Europe v Commission*, paragraphs 89-93).

The legal opinion contained in the above-mentioned part of document ST 14876/18 regarding the composition of arrangements under Article 295 TFEU is of a fundamental nature with a particularly wide scope that has important implications not only for the draft arrangement at hand, but also for other arrangements pursuant to that provision. This includes other such arrangements which are part of an ongoing decision-making process (such as for the proposed Interinstitutional Ethics Body, see COM(2023) 311 final) and future arrangements that seek similar formats for their composition. Publication of this legal opinion would therefore severely affect ongoing and future negotiations to conclude arrangements and thus undermine the Council's interest in the protection of legal advice (see in that sense Judgment of 13 March 2024, T-682/21 and T-683/21, *ClientEarth and Leino-Sandberg v Council*, paragraph 35).

The advice given can, in a reasonably foreseeable way, become the subject of litigation. Disclosing advice by the Council Legal Service before the Council has taken a decision, and in light of the risk of litigation, risks hurting the Legal Service's ability to provide frank, objective and comprehensive advice in a reasonably foreseeable way (see in that sense Judgment of 8 June 2023, C-408/21 P, *Council v Pech*, paragraph 34 and Judgment of 1 July 2008, C-39/05 P and C-52/05 P, *Sweden and Turco v Council* paragraphs 40-43).

It is further recalled that, pursuant to Article 4(3) first subparagraph of Regulation 1049/2001, access to a document drawn up by an institution for internal use, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process.

The General Court has ruled that this provision is intended to ensure that the institutions are able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted; accordingly, disclosure to third parties of documents forming part of a decision-making process still pending at the date on which the decision on the

request for access is adopted must be refused (Judgment of 13 March 2024, T-682/21 and T-683/21, *ClientEarth and Leino-Sandberg v Council* paragraphs 93-95).

Negotiations between the Council and the other parties concerned are ongoing and entering a critical phase. Disclosure of the part of the Legal Service's assessment described above would deprive the Council of its space for deliberation and ability to make a final decision regarding the draft arrangement.

Finally, regarding both grounds for refusal of full access, the General Secretariat of the Council considers that, on balance, the principle of transparency which underlies the Regulation 1049/2001 would not, in the present case, prevail over the public interest in disclosure so as to justify the full disclosure of the document.

In light of the foregoing, the General Secretariat of the Council refuses access to paragraphs 5-8 of document 14876/18 (the part described above) and grants partial access only to paragraphs 1-4 and 9-10.

Document ST 13641/21 is a contribution of the Council Legal Service concerning the same draft arrangement. The revised version thereof (ST 13641/21 REV 1) differs only in the addition of a sub-code in the header of the document with otherwise identical content. This contribution is a follow-up to an oral intervention made by the Legal Service at the meeting of the Working Party on General Affairs on 12 October 2021.

Parts of the contribution contain an in-depth legal assessment of the changes to the draft arrangement proposed by the EP which the Council received on 9 July 2021.

As stated above, pursuant to Article 4(3) first subparagraph of Regulation 1049/2001, access to a document drawn up by an institution for internal use, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process (see references to the case-law above).

Disclosure of these parts of the document, which consist of the Legal Service's assessment of the European Parliament's proposed changes and related questions would deprive the Council of its space for deliberation and ability to make a final decision regarding the draft arrangement, especially regarding the negotiations on the specific points proposed by the European Parliament.

In the view of the foregoing, the General Secretariat of the Council refuses access to paragraphs 12-18 and 20-51 of documents ST 13641/21 and ST 13641/1/21 REV 1 (the parts described above) and grants partial access only to paragraphs 1-11 and 19 of these two documents.

Finally, I regret to inform you that no access can be given to the rest of the identified documents above for the reasons set out below.

Document **ST 17773/12** contains a negotiating mandate agreed upon within the Council at some stage of the negotiations. Providing access to this text at this stage would amount to revealing to the other negotiating Institutions the Council's negotiating margins at a critical point of the ongoing negotiations. This would seriously undermine the Council's decision-making process as it would weaken the Council's position in these negotiations and would render more difficult to reach agreement on further updates of this type of evolving negotiating mandates.

Document **WK 16772/23** contains a request by the Chair of the Council's Working Party on General Affairs to the Council's Security Committee for an opinion on the matters within its areas of competence on a version of the draft Arrangement. Documents **ST 16224/12**, **WK 11724/21**, **WK 12653/21**, **WK 13673/21**, **ST 5953/24**, **ST 6292/24**, **ST 7851/24** and **ST 7985/24** contain various drafts of the opinion of the Council's Security Committee, whereas documents **WK 12362/21**, **WK 12390/21**, **WK 829/24 + COR 1** and **WK 2210/24** contain comments by Member States' delegations within the Council Security Committee on these drafts.

Documents **WK 9288/21**, **ST 12641/23**, **ST 12643/23** and **ST 15574/23** contain texts discussed among the Institutions concerned at various stages of the interinstitutional negotiations. Document **ST 16504/23** contains Member States' delegations' comments within the Council's Working Party on General Affairs on these texts.

Documents **ST 11496/18**, **WK 14438/18**, **ST 14529/18**, **WK 13038/21**, **WK 11262/22** and **ST 12642/23** contain Presidency reports on the state of play in the interinstitutional negotiations for the draft Arrangement and proposals for the way forward.

As already stated above, for the Council to agree on its position in these negotiations, its Member States hold initial consultations and exploratory talks. By extension, for an agreement to be reached amongst the negotiating partners, there is a need for a space where ideas can be aired and discussed in full discretion and trust. To reveal the contents of the information contained in the above-mentioned documents before a final agreement on the draft Arrangement has been reached would interfere with the negotiations and could jeopardise the conclusion of an agreement both within the Council and amongst the negotiating partners. Disclosure of these documents would therefore seriously undermine the decision-making process. As a consequence, the General Secretariat has to refuse full access to these documents.⁵

Having examined the context in which these documents were drafted and the current state of play in the negotiations, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in the disclosure of these documents.

We have also looked into the possibility of releasing parts of these documents.⁶ However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access at this stage.

⁵ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁶ Article 4(6) of Regulation (EC) No 1049/2001.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosures