

REPLY TO CONFIRMATORY APPLICATION 19/c/03/24
made by email on 14 May 2024 and registered on the same day

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 and Annex II to the [Council's Rules of Procedure](#), and has come to the following conclusion:

1. On 22 March 2024 the applicant introduced an initial application for 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.*”.
2. On 13 May 2024, the General Secretariat of the Council (GSC) replied to this application. Out of the 31 documents identified as falling within the scope of the application, the GSC granted full access to two documents, partial access to 11 documents¹ and denied access to 18 documents². The GSC's refusal to provide (full) access to these 29 documents was based on the ground that their disclosure would seriously undermine the decision-making process of the institution³. In substance, the General Secretariat indicated that negotiations between the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the European Parliament on the draft arrangement were still ongoing. It underlined that providing access to the non-disclosed parts of the 11 above-mentioned partially disclosed documents and to the 18 fully withheld documents at this stage would undermine the proper future conduct of negotiations and would compromise the conclusion of an agreement on this file.

¹ Partial access was provided to documents ST 16224/12, ST 17773/12, ST 11496/18, ST 14529/18, ST 14876/18, ST 8513/19, ST 13641/21, ST 13641/1/21 REV 1, ST 12642/23, ST 7985/24 and WK 11262/22.

² Access was denied entirely to documents ST 12641/23, ST 12643/23, ST 15574/23, ST 16504/23, ST 5953/24, ST 6292/24, ST 7851/24, WK 14438/18, WK 9288/21, WK 11724/21, WK 12362/21, WK 12390/21, WK 12653/21, WK 13673/21, WK 16772/23, WK 829/24, WK 829/24 COR 1 and WK 2210/24.

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

With regard to one of the partially disclosed documents (ST 14876/18), the GSC's refusal to provide full access was also based on the ground that a full disclosure thereof would undermine the protection to legal advice⁴. Due to an error internal to the GSC, it was not mentioned in the initial reply that access to paragraphs 15-18 of two other documents (13641/21 INIT and 13641/21 REV 1) should be refused not only because their disclosure would undermine the decision-making process, but also because disclosure would undermine the protection of legal advice, for the same reasons given regarding document ST 14876/18.

3. On 14 May 2024, the applicant introduced a confirmatory application requesting the Council to grant full access to all documents that were fully or partially withheld by the GSC at the stage of the initial access request.
4. In his confirmatory application, the applicant alleges that, as far as the exception protecting the decision-making process is concerned, the GSC *“has not sufficiently demonstrated that disclosure of the document would “seriously undermine” the institution's decision-making process”*. In support of this claim, the applicant invokes the findings of the General Court in Case T-540/15 (Emilio De Capitani v European Parliament).
5. Regarding the exception protecting the legal advice, the applicant claims that the GSC has failed to provide sufficient justifications for the application of this exception. In support of his claim, the applicant invokes the findings of the General Court in Case T-252/19 (Pech v Council).
6. Finally, the applicant invokes the existence of *“an overriding public interest in disclosure of the documents in question. As the European Union's actions in the area of the Common Security and Foreign Policy expand in the light of current international crises, there is a greater need for parliamentary scrutiny in this regard. In the discussion about *how* this parliamentary scrutiny is to happen, the question of special rights of access to classified CSFP documents for the European Parliament is of paramount importance.”*

⁴ Article 4(2), second indent of Regulation (EC) No 1049/2001.

7. The Council has carefully considered the confirmatory application and re-assessed, in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001, whether public access to the abovementioned documents could be granted. In doing so, the Council has carefully scrutinized the content of each one of the requested documents, having due regard to the developments and the current state of play of negotiations on the draft arrangement.
8. At the outset, the Council recalls that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2) and (3) fifth subparagraph) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. The case-law of the General Court on which the applicant himself relies has confirmed this distinction between legislative and non-legislative activities as regards transparency requirements (see, in particular, paragraphs 77-80 of the Judgment in Case T-540/15 (*Emilio De Capitani v European Parliament*) as well as paragraphs 89-92 of the Judgment in Case T-851/16 (*Access Info Europe v Commission*)). The requested documents were not drawn up in the context of legislative activities of the Council but are directed at assisting the Council in its decision-making concerning an interinstitutional arrangement in the administrative domain. Therefore, the wider access, which is also referred to in recital 6 of Regulation (EC) No 1049/2001 and in the case-law invoked by the applicant, is not relevant in the present case.
9. The requested documents were drawn up by Council preparatory bodies for the internal use of the Council in the sense of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and relate to a matter on which the decision-making process is currently ongoing.
10. The Institutions involved are therefore pursuing the examination of this file, which is still subject to thorough analysis. In this context, there are still important elements to be discussed, which concern the specific arrangements to be established between the European Parliament and the Council and the High Representative.

11. In its assessment, the Council has particularly taken into consideration, on the one hand, the public interest in transparency for documents that relate to non-legislative procedures and, on the other hand, the specific nature and the especially sensitive ongoing negotiations on a subject which relates, among others, to the security measures to be put in place in the institutions concerned, to their responsibility to comply with the rules protecting classified documents during their handling and to their commitment to preventing any breach of security, loss or compromise of such information.
12. Upon thorough re-examination of the documents and the decision-making procedure, the Council has concluded that partial access can be granted to those parts of documents ST 5953/24, WK 11724/21 and WK 16772/23 containing background information. Thus, access can be granted to the cover page and Part I of the Annex to document WK 11724/21, to the cover page of document WK 16772/23 and to its Annex II, with the exception of the last sentence of paragraph 3 of that Annex, and to the cover page of document ST 5953/24.
13. The Council recalls that, pursuant to Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 and the case-law, 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 (see paragraphs 93-95 of the Judgment in Joined Cases T-682/21 and T-683/21 (*ClientEarth and Leino-Sandberg v Council*)) if the disclosure of the document undermines the institution's decision making process, unless there is an overriding public interest in disclosure.
14. Given the fact that negotiations (both within the Council and between the participants involved) are ongoing, the Council maintains its view that apart from the partial access granted in paragraph 12, wider access to the requested documents cannot be granted.
15. The Council recalls that it must explain that it is reasonably foreseeable and not purely hypothetical that further access to the documents is capable of undermining, specifically and actually, the decision-making process at hand (see paragraph 34 of the Judgment in Case C-408/21 P (*Council v Pech*)). In this particular case, wider access would reveal to the public a number of detailed pieces of information on the decision-making process behind the proposed arrangement (both internal to the Council and in negotiations with the other participants), such as:

- individual delegations' positions on specific elements of the proposed arrangement at various stages,
- the negotiation strategies of the Council, in particular the Council's positions and 'red lines' in negotiations with the European Parliament,
- the Council Security Committee's assessments of security risks connected to the European Parliament's rights and obligations under various iterations of the proposed arrangement, and
- the Council Legal Service's assessments of the risks posed by certain parts of the changes to the proposal brought forward by the European Parliament.

16. Publication of these categories of detailed information listed above would be detrimental to the negotiating process. It would reveal to the public and the other negotiating partners, in particular the European Parliament, very specific elements on which the Council is basing its negotiating position. Further, disclosure of the Council's specific negotiating position and 'red lines' would in particular deprive the Council of its ability to effectively defend its views in negotiations. These core elements of the ongoing negotiations, especially the roles of the participants, the security rules, and the risk management, would therefore harm the mutual trust between the participants and prevent the negotiation of a compromise solution.
17. Regarding documents 14876/18 and 13641/21 INIT and 13641/21 REV 1, the Council recalls in particular that the Council Legal Service's assessments are meant to aid the Council in its enjoyment of 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. The specific legal analyses contained in those documents form part of the Council's negotiating position vis-à-vis the other participants. Publication of these analyses would similarly prevent the Council from reaching a compromise solution with the other participants.
18. Consequently, further disclosure of the documents would reasonably, foreseeably and not purely hypothetically undermine, specifically and actually, the decision-making process at hand.

19. As regards the exception protecting the legal advice in Article 4(2), second indent, of Regulation (EC) No 1049/2001, the Council recalls that 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 (see in that sense the Judgment in Case T-851/16 referenced above). The legal opinions contained in the withheld parts of document 14876/18, as well as paragraphs 15-18 of documents 13641/21 INIT and 13641/21 REV 1, regarding the composition of arrangements under Article 295 TFEU are of a fundamental nature with a particularly wide scope that has important implications not only for the draft arrangement at hand, but also for future arrangements that seek similar formats for their composition. Publication 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 paragraph 35 of the Judgment in Joined Cases T-682/21 and T-683/21 referenced above).
20. 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 paragraph 34 of the Judgment in Case C-408/21 P referenced above and paragraphs 40-43 of the Judgment in Joined Cases C-39/05 P and C-52/05 P (Sweden and Turco v Council)).
21. Given the sensitive nature of these documents, after having thoroughly examined the context in which these were drafted and the current state of play on this matter, on balance the Council could not identify any evidence suggesting an overriding public interest in their disclosure. In this context, it is recalled that Article 36 TEU provides that the High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defense policy and inform it of how those policies evolve. This obligation (as well as information obligation under Article 218(10) TFEU) ensures that the prerogatives of the Parliament in relation to these policies are respected.

22. It follows that, pursuant to Article 4(2), second indent, and Article 4(3), first subparagraph, no further access other than the partial access granted in paragraph 12 can be given to the requested documents.
23. The Council has examined whether, pursuant to Article 4(6) of Regulation (EC) No 1049/2001, partial access could be granted to those requested documents to which access was denied entirely. In light of this examination, the Council considers no further access can be granted than to the parts of documents referenced in paragraph 12.

CONCLUSION

24. For the above-mentioned reasons, the Council concludes that no further disclosure can be granted to the already partially disclosed documents ST 16224/12, ST 17773/12, ST 11496/18, ST 14529/18, ST 14876/18, ST 8513/19, ST 13641/21, ST 13641/1/21 REV 1, ST 12642/23, ST 7985/24 and WK 11262/22 and that no disclosure can be granted to documents ST 12641/23, ST 12643/23, ST 15574/23, ST 16504/23, ST 6292/24, ST 7851/24, WK 14438/18, WK 9288/21, WK 12362/21, WK 12390/21, WK 12653/21, WK 13673/21, WK 829/24, WK 829/24 COR 1 and WK 2210/24.
25. However, having thoroughly re-examined the requested documents in accordance with the provision on partial access laid down in Article 4(6) of Regulation (EC) No 1049/2001, the Council has concluded that partial access shall also be granted to those parts of documents ST 5953/24, WK 11724/21 and WK 16772/23 containing background information.