REPLY TO CONFIRMATORY APPLICATION 26/c/03/23
made by email on 28 July 2023 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[1] (hereinafter referred to as "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure[2], and has come to the following conclusion:

1. On 12 June 2023, the applicant requested access to "all documents held regarding a proposal by the Commission for new common guidelines concerning the use of modern communication tools such as text and instant messages", specifically mentioning an "initial note" from the Commission, registered as Ares(2022)6527884, and a "scoping note", registered as Ares(2023)1595460.

2. In its reply of 25 July 2023, the General Secretariat of the Council (GSC) identified and released (subject to the redaction of handwritten signatures) three letters from the GSC on the matter. It also identified and fully released an internal note on the use of commercial messaging apps.

3. In the same reply, the GSC also identified three documents emanating from the European Commission, i.e. a note signed on 17 November 2022 – invitation to a meeting of services, a note signed on 21 September 2022 (which is the first document specifically mentioned by the applicant – Ares(2022)6527884) and a summary record of a meeting held on 9 December 2022, dated 21 December 2022 (together with a cover note). After due consultation of the European Commission pursuant to Article 4(4) of Regulation (EC) No 1049/2001, the GSC refused access to those documents on the basis of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 (protection of the institution's ongoing decision-making process).

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[1] OJ L 145, 31.5.2001, p. 43.
[2] Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35.

4. Finally, the GSC informed the applicant in its reply that at the date of receipt of the application, the Council did not hold the second document specifically mentioned by the applicant, i.e. the "scoping note" registered as Ares(2023)1595460.

5. On 5 May 2023, the applicant submitted a confirmatory application arguing "that the reply did not sufficiently substantiate why disclosure would undermine decision-making in a serious and non-hypothetical manner", furthermore invoking an overriding public interest in disclosure based on the fact that the "documents in question concern the institutional framework for access to documents", recognised as a fundamental right. According to the applicant, "failure to give public access to these documents risks depriving the public of an opportunity to participate in the debate about the exercise of this fundamental right".

DOCUMENTS COVERED BY THE CONFIRMATORY APPLICATION

6. The Council notes that the applicant does not contest the redaction of signatures in three of the four Council documents released.

7. The applicant does contest the refusal of access to the three documents mentioned in paragraph 3 above.

8. In addition, the second document specifically mentioned by the applicant in the initial application, the "scoping note" registered as Ares(2023)1595460 by the Commission, which initially was not held by the Council, was received by it later – on 19 June 2023. This document therefore is now covered by the confirmatory application.

REASSESSMENT OF THE DOCUMENTS COVERED BY THE CONFIRMATORY APPLICATION

9. The Council has again consulted the Commission, author of the documents, and based on the explanations of the latter has come to the following conclusion.

10. The three documents withheld in the initial phase and also the document additionally identified in paragraph 8 above are part of an administrative decision-making process

involving several institutions and bodies, amongst which the Council. However, taking into account all relevant aspects of this application, the Council comes to the conclusion that the public interest in having access to information about the matter concerned outweighs any consideration related to the protection of this decision-making process.

11. Nevertheless, these documents contain personal data of certain staff members. Such personal data is necessary for the organisation of the work of the Council.

12. Data protection rules at EU level[3] provide that Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law.

13. Moreover, according to the abovementioned EU data protection rules, personal data could only be transferred "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient, or* […] *establishes that it is necessary to have the data transmitted for a specific purpose in the public interest*."[4].

14. Neither in the initial application nor in the confirmatory application has the applicant justified the need for a legitimate prevailing public interest in the release of such personal data, nor that such a transfer is necessary for a specific purpose in the public interest.[5]

15. As stated by the Court of Justice, "it is for the person applying for access to establish the necessity of transferring that data"[6].

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3 Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295 21.11.2018, p. 39).

4 Article 9 of Regulation (EU) No 2018/1725.

5 On the contrary, as noted in paragraph 6 above, the applicant did not contest the redaction of comparable personal data in three other documents in the initial phase.

6 Judgment of the Court of Justice of 2 October 2014, , *Strack v Commission*, C-127/13, EU:C:2014:2250, paragraph 107.

16. In the absence of any justification or any convincing argument by the applicant in order to demonstrate the necessity for that personal data to be transferred, the Council is not able to weigh up the various interests of the parties concerned and cannot verify whether there is any reason to assume that the data subjects' legitimate interests might be prejudiced. In those circumstances, the Council must conclude that the personal data concerned cannot be transferred, with the exceptions of the names of senior staff members.

17. Moreover, the personal data that has been redacted has an ancillary character, not having a substantial interest in the request for access introduced by the applicant. Hence, it does not prevent access to the substantial information of the partially released documents.

18. Therefore, the Council considers that the release of that personal data would undermine the privacy and the integrity of the identified individuals[7].

CONCLUSION

19. The Council therefore gives access to the documents covered by the confirmatory application (paragraphs 7 and 8 above), with the exception of those items of personal data that need to be protected pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001.

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[7] Article 4(1)(b) of Regulation (EC) No 1049/2001.