



**COUNCIL OF
THE EUROPEAN UNION**

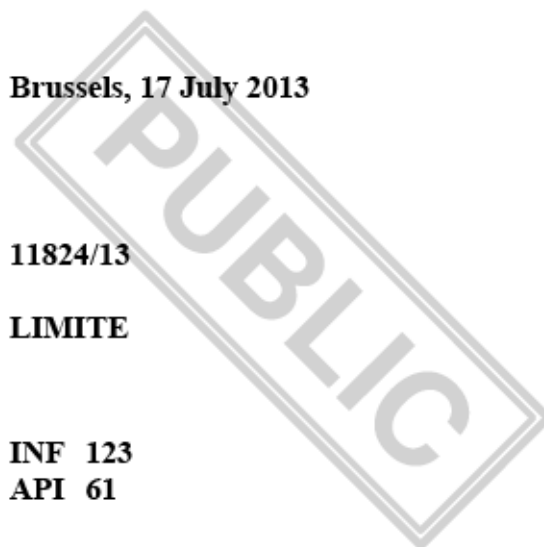
Brussels, 17 July 2013

11824/13

LIMITE

INF 123

API 61



"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 11822/13

Subject : Public access to documents

- Confirmatory application made by Mr O'Huiginn (No 14/c/01/13)

Delegations will find enclosed a draft reply from the Council to confirmatory application made by Mr O'Huiginn (No 14/c/01/13), approved unanimously by the Working Party on Information by written consultation which ended on 17 July 2013.

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT

REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 14/c/01/13,
made by e-mail on 1 July 2013,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents
7613/13 and 7613/1/13 REV 1 RESTREINT UE/EU RESTRICTED

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 (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. The applicant refers to documents 7613/13 and 7613/1/13 REV 1, both classified RESTREINT UE/EU RESTRICTED. Document 7613/13 is a cover note from the European External Action Service (EEAS) to the Political and Security Committee and the European Union Military Committee containing EEAS document EEAS 00610/13 "*Op ALTHEA - Six Monthly Review Number 17, Non- paper on surplus munitions and weapons in BiH*". Document 7613/1/13 REV 1 is a revised version of 7613/13 which includes the last page of the document which was inadvertently not attached.
2. In its reply dated 10 June 2013, the General Secretariat refused public access to these documents pursuant to Article 4(1)(a), second and third indents (protection of the public interest with regard to defence and military matters and with regard to international relations).

3. In the confirmatory request made on 1 July 2013, the applicant asks the Council to reconsider the decision not to release the documents and considers that "*the document does not fall entirely under exempt categories of 1049/2001*", "*at least a partial release should be possible, given the nature of the document*" and "*the public interest is best served by disclosure, because of the issues involved and EU policy on them, and because the request is for the purpose of public-interest journalism*".
4. Having thoroughly examined the requested documents and carried out consultations with European Union Military Staff which is the relevant department of the European External Action Service (EEAS), the Council has come to the conclusion set out below.
5. Documents 7613/13 and 7613/1/13 REV 1 of 18 and 21 March 2013 contain a non-paper on surplus munitions and weapons (AWE) in Bosnia and Herzegovina (BiH). The Council Joint Action on the European Union Military operation in BiH requires that a review of the operation be held every six months. This non-paper was drafted as a contribution to the six-monthly review process. It was presented to the Political and Security Committee (PSC) on 19 March 2013 and remains a basis for further discussions in the ongoing review process, notably for the report of September 2013. By reason of their nature and sensitive content, the documents are classified EU RESTRICTED as their disclosure would be disadvantageous to the interests of the European Union.

Exceptions pursuant to Article 4(1)(a), second and third indents

6. One of the main objectives of ALTHEA military operation is to support BiH efforts to maintain a secure and safe environment. The non-paper on the AWE surplus is closely linked to the main objectives and tasks of the military mission. It is the result of a joint effort by the International Community and the EU and contains assessments and analyses exchanged on the difficulties encountered and proposing lines of actions to address the different components of the question. Addressing the AWE surplus is also an essential precondition for advancing the Euro-Atlantic integration process in BiH.

7. The applicant argues that the exceptions of Article 4.1(a), second and third indents do not apply and that, at least, partial access to these documents should be considered. To support his view, the applicant refers to document 15188/04 which specifies the practical arrangements for the six-monthly review for Operation ALTHEA and was partially declassified, to EU public statements at the UN Security Council and to document 5319/06 containing the "EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition".
8. The Council would like to draw the applicant's attention to the fact that the above mentioned documents do not concern specifically the issue of AWE surplus in BiH, but refer to general aspects of the review process (15188/04) or to the combat illicit accumulation and trafficking of SALW and their ammunition (5319/06). Also, the EU public statement referring to "the problem of unstable stockpiles of surplus arms and ammunition" does not contain assessments on the situation or details on the lines to take in BiH.
9. Having regard to the main objectives of this operation and the issues dealt within the requested non-paper, the Council considers that release to the public of this information which sets out in detail appreciations and analysis related to the AWE surplus in BiH would affect the effectiveness of the proposed lines to take and would thus jeopardise the realisation of the objectives of the military mission. It would also undermine the collective work of BiH and international counterparts and negatively affect the political, diplomatic and technical efforts to resolve the situation.
10. The Council therefore confirms the approach taken by the General Secretariat in its reply to the applicant's initial request. Accordingly, pursuant to Article 4(1)(a), second and third indents, of the Regulation (protection of the public interest with regard to defence and military matters and with regard to international relations), the Council is unable to grant public access to these documents.

11. Moreover, it should be noted that Article 4(1)(a) of the Regulation provides for mandatory exceptions, in this specific case for the protection of the public interest as regards defence and military matters and international relations. Once it is established that the requested document falls within the sphere of these exceptions and that the protection of the invoked interests would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interests against other interests.

Exception pursuant to Article 4(3) first paragraph

12. Document 7613/13 and its revised version are meeting documents drafted with the aim of supporting the discussions on the Operation ALTHEA six-monthly review process. The review process is still ongoing and disclosure of information containing important elements still to be considered in the framework of complex discussions would involve a concrete risk of undermining the decision-making process, thereby seriously undermining the good conduct of the latter.
13. The applicant claims that the requested documents were produced three months ago and refers to documents 8488/13 and 8603/13 which were submitted to the Foreign Affairs Council on 27-28 May 2013. He also adds that the exception on the protection of the Council's ongoing decision-making process was not alleged in the initial reply.
14. Document 8488/13 is a "I/A" note from the General Secretariat of the Council to Coreper and Council on the procedure to adopt the "High Representative's Report on the Seventeenth Operation ALTHEA Six-Monthly Review" and document 8603/13 is a classified document containing the Military Advice on the same report.
15. The Council would like to draw the applicant's attention to the fact that the approval by the Council of the Report related to the six-monthly review submitted in May does not imply that all other documents related to the ongoing review process have been endorsed. The content of the non-paper will still be examined in future discussions on the review process.

16. The Council considers that release of the information containing assessments and analyses on an issue of high importance with regard to a safe and secure environment in BiH would prejudice the discussions in progress. The Council therefore confirms, in reply to the applicant's remark, that this non-paper is still subject to discussions and that, in the absence of any evidence of an overriding public interest in release, it also falls under the exception pursuant to Article 4(3), first subparagraph, of the Regulation (protection of the Council's ongoing decision-making process).

Disclosure in the public interest and for the purpose of public-interest journalism

17. As for the applicant's request that disclosure should be considered in line with public interest, the Council recalls the mandatory exception referred to in paragraph 10.
18. Furthermore, the Council would like to point out that the applicant's specific interest in gaining knowledge of the requested documents for journalism purposes cannot be taken into account by the institution when assessing a request for public access to documents, given that the purpose of Regulation 1049/2001 is to give the general public a right to access to documents of the institutions and not to establish rules on privileged access. When the Council releases a document pursuant to Regulation 1049/2001, it is obliged to do so *erga omnes*.¹ Privileged access, such as suggested by the applicant, is therefore not possible.

The argument on partial access

19. The Council has carefully revised, pursuant to Article 4(6) of the Regulation, the possibility of granting partial access to the documents under scrutiny. However, since the exceptions mentioned above apply to most parts of these documents and any remaining information cannot be practically separated from those parts, the information contained in the documents forms an inseparable whole. Partial access therefore cannot be granted either.

¹ Article 10(2) of Annex II to the Council's Rules of Procedure, OJ L 285 of 16.10.2006, p. 63.