



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 January 2013

17775/12

**INF 205
API 113**

NOTE

from : General Secretariat of the Council
to : Working Party on Information

Subject : Public access to documents
- Confirmatory application made by Mr Marc Johnston (No 22/c/02/12)

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 27 October 2012 and registered on 29 October 2012 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 21 November 2012 ([Annex 2](#))
- confirmatory application dated 12 December 2012 and registered on 13 December 2012 ([Annex 3](#))

[E-mail message sent on 27 October 2012 - 12:47]

dear GSC,

On behalf of WWF, please may I obtain a copy of the opinion set-out in Council document 15018/12 in all of its available languages.

In accordance Article 4(2) of Regulation 1049/2001, WWF considers that there is an overriding public interest in the disclosure of this document, in particular in view of the upcoming UNFCCC negotiations on climate change in Doha, Qatar, from 26 November to 7 December 2012, and the broader situation as regards global climate change and the Union's response to - according to EC President J.M. Barroso - "this most existential of challenges".

In the Environment Council of 25 October 2012, the practice of adopting "conclusions" only by consensus (instead of according to the requirements of the Treaties) has again put the promotion of the Union's values (Article 2 TEU) and the attainment of the Union's objectives (Article 3 TEU), as well as its specific goals for the UNFCCC negotiations, at significant risk of failure. (See e.g. recent European Voice press article 26 October 2012 annexed below.)

Since the voting methods to be used for the adoption of Council conclusions is provided for neither in the Treaties nor in the Council's rules of procedure, there is an urgent need to clarify for all EU citizens, i.e. in public, the relevant procedures for this type of act, including on the use qualified majority voting where the Treaties so require this. Furthermore, in view of the fact that Article 10(3) TEU and Article 15(1) TFEU require the Union's institutions to "conduct their work as openly as possible", the present and on-going absence of transparency and accountability as regards the procedures for adopting conclusions is a serious omission of the Council.

For more argumentation as regards an overriding public interest in the disclose of the document 15018/12, please see the relevant section of WWF's confirmatory application in case 20/c/01/12 (doc 14524/12), which at the time of writing awaits the Council's reply.

Thank you for your kind consideration of all the matters raised in this application.

Yours sincerely,
Mark Johnston



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THE EUROPEAN UNION**

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Brussels, 21 November 2012

Mr Mark Johnston

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DELETED

Ref. 12/1635-mj/jj

Dear Sir,

We registered your request of 27 October 2012 for access to document 15018/12 in all available languages on 29 October 2012. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents¹ (hereafter the "Regulation") and on the basis of the specific provisions concerning public access to Council documents² and has come to the following conclusion:

Document **15018/12** contains a contribution of the Council's Legal Service on the adoption by the Council of conclusions and other documents not provided for in the Treaties. Thus, the requested document contains legal advice.

The legal advice has not been given in the context of any decision-making process. It examines in general terms the legal considerations relating to the adoption of Council conclusions and other documents not foreseen in the Treaties. The legal advice is therefore of a general nature and its scope is exceptionally broad. Moreover, both the subject-matter of such conclusions and documents and the issues relating to their adoption can be matters of great sensitivity. The requested legal advice is therefore very sensitive in nature.

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

Were legal advice of such a broad and sensitive nature, intended for the members of the Council, disclosed to the public, it would undermine the protection of legal advice as referred to in Article 4(2), second indent of the Regulation, since it would make known to the public internal legal advice of the Legal Service, intended for the members of the Council. The possibility that this legal advice be disclosed to the public may lead the Council to display caution when requesting similar broad and sensitive advice from its Legal Service, since it could risk finding itself in a situation where it would need to defend a future decision it has taken against – potentially critical – advice given by its Legal Service.

Moreover, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

Finally, there is a real and concrete risk that Council conclusions, including the basis on which they were adopted, could become subject to litigation before Union courts. The Legal Service's opinion could, if released, be invoked in such proceedings, thereby negatively affecting the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document, since disclosure of the document would prejudice an interest protected under Regulation (EC) No 1049/2001, notably under the second indent of Article 4(2) of the Regulation.

As regards the question of whether there is an overriding public interest in disclosure of the document it is underlined that the document does not bear any specific relation to the environmental issues which are invoked in the initial application, but rather examines issues relating to the adoption of Council conclusions and other documents not provided for in the Treaties from a very general perspective. Consequently, and in the light of the particular sensitivity of the document and its broad and general nature, the General Secretariat considers that, on balance, there is no evidence of an overriding public interest which would prevail over the interest protected under Article 4(2), second indent, so as to justify disclosure of the document.

However, in accordance with Article 4(6) of Regulation 1049/2001, you may have access to the first paragraph on page 1 of the document, which is not covered by any exceptions under the Regulation.

Statutory remedy notice

Pursuant to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply¹.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

¹ Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 12 December 2012 - 23:56]

dear Council & staff,

Public access to Council document 15018/12 containing a replacement contribution of the Council's legal service on the adoption by the Council of conclusions

On behalf of WWF, I hereby submit this confirmatory application for access to the above-mentioned document. This follows the refusal of the general secretariat to provide access on 7 November 2012¹. The application covers all 22 available language versions.

Overriding public interest

1. Inadequate environmental protection, in particular global climate protection, and the impact of this on the attainment of the values and objectives of the Union.

It is now well-established in numerous substantive reports both in the EU institutions and elsewhere that over the course of the current century the world is heading towards a dangerous rise in the concentration of greenhouse gas pollution in the atmosphere and consequently a significant increase in average surface temperatures. This in turn will trigger catastrophic breakdowns in natural systems, e.g. water, food, and energy, on which all European citizens and all other human societies depend.

In such a situation, the capacity of the Council of Ministers and other EU institutions to act adequately in ways that help sufficiently to avert such catastrophes is imperative, both for domestic mitigation efforts and in the context of international agreements for the same purpose. Any failure so to act places both the upholding the values of the Union and the attainment of the objectives of the Union, as provided for respectively in Articles 2 and 3 TEU, in serious jeopardy.

As is evidenced by the Council's recent failures in 2011 and 2012 to endorse European Commission's climate and energy '2050 roadmaps' (green papers) - in each case despite the support of 26 out of 27 Council delegations - and by the institution's failure to support adequate measures at a global level e.g. in UNFCCC negotiations, the Council has not acted in such a way as to ensure the fulfilment of the provisions of Article 2 & 3 TEU.

As it is clearly in the public interest to reverse this situation, so access to document 15018/12 - insofar as this aids clarification of the procedures followed and/or not followed by the Council - will aid public understanding of the Council procedures, in particular as this is not provided publicly anywhere else.

2. Due process of public administration, conduct of public institutions and public accountability for this.

Article 16(3) on the Treaty on European Union states that "the Council shall act by a qualified majority except where the Treaties provide otherwise."

¹ In fact, the reply was sent to the applicant on 21 November 2012.

Insofar as WWF is aware, the Council does not provided any explanation in any public document why its is not acting in accordance with this fundamental treaty provision, in particular e.g. in the cases of the climate and energy 2050 roadmaps referred to above.

Since the Union is a democracy founded on the basis of the rule of law, WWF considers that is it is imperative for the Council - somehow at least - to account for its actions including its internal procedures to its citizens. Public access to document 15018/12 would or could help significantly to provide such public accountability.

The legal service contribution of 2004

The motivation of this application is linked to the application for access to document 12130/04 (transparency case 20/c/01/12) to which the Council refused access to on 13 November 2012. Document 12130/04 contained advice stating that, for policy conclusions falling under Union (Community) competence, the Council should adopt conclusions according to a voting method equivalent to the corresponding legal basis in the treaties. This includes in many cases the possibility to use qualified majority voting.

The legal service contribution of 2012

The opinion contained in document 15018/12 “replaces” that contained in the document 12130/04 (cf. footnote 1) “following the entry into force of the Lisbon Treaty” (2nd paragraph of request document). However, no explanation is available of what if any relevant changes were introduced by the Lisbon Treaty, no explanation is available of why a view contrary to that held in 2004 is applicable today, and no explanation is available of why the legal service considers its 2004 contribution no longer applicable.

Taken altogether, this leads to the conclusion that the replacement of the 2004 legal opinion with that of (16 October) 2012 provide nothing more than a convenient cover for the Council to continue acting in a lazy manner or with bad habits outside of the treaties.

Potential solution to the general situation

A potential solution to the general situation regarding the adoption of Council conclusions could be via an amendment of the Council’s rules of procedure, for example by adding a provision or provisions specifically relating to the adoption of Council conclusions.

The Council’s rules of procedure do already refer to “conclusions” specifically, though they do not refer to the method or methods for their adoption. According to Article 240(3) TFEU, the Council may amend its rules of procedure by simple majority.

Such a solution would avoid and need to contest public access to legal advice (such as in these cases) and of course does not require any treaty amendment.

Transmission

WWF requests the general secretariat to transmit this application to delegations without delay. Transmitting a confirmatory application only in conjunction with a draft reply and (typically) only seven days or less before the corresponding working party meeting puts delegations at a disadvantage when preparing their positions.

Timing and deadlines

Since the issue raised in this application is in WWF's view of significant public interest, WWF indicates again an openness to flexibility with regard to the deadlines provided for in the law. It is preferable that the Council be transparent, and that its acts in accordance with the Treaties, even if such change(s) take a longer period to agree.

Disclosure

This application including the identity of the applicant may be disclosed publicly without prior recourse to WWF.

Thank you for your kind attention to these important matters.

Kind regards,

MARK JOHNSTON Senior Policy Adviser (Energy & Climate) WWF European Policy Office
Brussels
