



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 April 2013

8482/13

**INF 53
API 32**

NOTE

from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application made by Mr Foeke Noppert (No 07/c/01/13)

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 26 February 2013 and registered on 26 February 2013 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 12 April 2013 ([Annex 2](#))
- confirmatory application dated 12 April 2013 and registered on the same day ([Annex 3](#))

[E-mail message sent on 26 February 2013 - 09:43]

This e-mail has been sent to publicinfo@consilium.europa.eu using the electronic form available in the Register application

This electronic form has been submitted in **EN**

First Name: Foeke

Family Name: Noppert

Postal Address:

Street:

Town:

Country:

PostCode:

Gender:

Age:

Phone:

Email: **DELETED**

Economic Category:

Initial question:

5798/13

Handling of trilogues in the EP - Letter to the Secretary General of the EP



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

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Brussels, 12 April 2013

Mr Foeke Noppert

email: **DELETED**

Ref. 13/0322-mj/jj

Dear Mr Noppert,

We have registered your request of 26 February 2013 for access to document 5798/13. 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 specific provisions of the Council's Rules of Procedure². On 19 March 2013, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

Document **5798/13** is a Note of 25 February 2013 from General Secretariat of the Council to the Permanent Representatives Committee on handling of trilogues in the European Parliament. It contains a draft letter to the Secretary General of the European Parliament.

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.

The General Secretariat is of the opinion that the disclosure of the requested document could seriously undermine the institution's decision-making process.

Having carefully examined the context in which the document was drafted, the General Secretariat could not identify any evidence suggesting an overriding public interest in disclosure of the document in question, therefore, it is of the opinion that protection of the decision-making process outweighs the public interest in disclosure (pursuant to Article 4(3) second subparagraph, of the Regulation).

Accordingly, the General Secretariat has concluded that access to the document cannot be granted.

As the exception to the principle of transparency applies to the content of the entire document, the General Secretariat is unable to grant you partial access as provided for in Article 4(6) of 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

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 April 2013 - 16:59]

Subject: RE: Ref. 13/0322-mj/jj

Dear Sir, Madam,

Please find attached a confirmatory application requesting the Council re-considers its decision in this case. I have no objection to its publication in the Council Register of Documents.

I would be grateful for a notification of receipt.

Yours faithfully,

Foeke Noppert

London, 12 April 2013

Subject: Confirmatory application - Document access request: 13/0322-mj/jj

Dear Sir, Madam,

On 12 April 2013 the Council refused to disclose in part or in full a draft letter to the Secretary-General of the European Parliament on the handling of trilogues (document number 5798/13). The reason stated for this refusal is that disclosure "could seriously undermine the institution's decision-making process". I am writing to appeal this decision.

The Council's refusal is based on the exception to the transparency requirement contained in article 4(3), second sub-paragraph, of Regulation 1049/2001. This article states:

"Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

This confirmatory application contends that the Council erred in refusing to disclose the document, based on two arguments:

1. Unsubstantiated invocation of article 4(3) of Regulation 1049/2001

The Council did not specify how disclosure of the document could undermine the decision-making process. The application for disclosure was dismissed in a single sentence, in clear breach of the European Court of Justice's ruling in *Turco*:

"If the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned."

The Council manifestly did not provide this explanation as required by law, having failed to indicate entirely why the document could undermine the decision-making process.

2. Existence of an overriding public interest in disclosure

From the details publicly available of the document, it is reasonable to assume that there is an over-riding public interest in disclosure, based on the principle that citizens have a right to know how their laws are formulated. This notion is reinforced by the fact referred to above that the Council has failed to indicate in what way the contents of the document fall within article 4 of the Regulation.

Trilogues form an essential part of the EU's legislative process, and yet are shielded from scrutiny by citizens because they are conducted behind closed doors. Unlike the European Parliament, which at least publishes its negotiating mandate in the form of Committee Reports, the Council does not even publish the mandate conferred upon the Presidency for the informal negotiations. Frequently, even the dates of trilogue meetings are not announced in advance.

In its judgment in *Turco*, the European Court of Justice stated that the Council – when considering disclosure of documents - must take into account the "public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system." This is especially relevant given the fact that trilogue meetings by definition apply to instances where the Council (and Parliament) are acting in their capacity as legislators; the final legislative texts of virtually all EU laws are now decided in trilogue negotiations between the Council and Parliament, yet the process itself is intransparent and I ask the Council to justify more substantively why disclosure of this document would undermine that process. Referring back to the Council's failure to explain why the document in question could undermine the decision-making process, I also stress that the document appears to be applicable to the conduct of trilogue negotiations generally; it is difficult to see how citizens would not benefit from having more information at their disposal on the way EU law is formulated.

Yours sincerely,

Mr. Foeke Noppert

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