



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 2 May 2013**

**8879/13**

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**NOTE**

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from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application made by Mr Samuli Miettinen (No 08/c/03/13)

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 18 March 2013 and registered on 18 March 2013 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 11 April 2013 ([Annex 2](#))
- confirmatory application dated 23 April 2013 and registered on the same day ([Annex 3](#))

[E-mail message sent on 18 March 2013 - 13:08]

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

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

Title/Gender: Mr - Mr

Family Name: Miettinen

First Name: Samuli

E-Mail: **DELETED**

Occupation: University Researcher

On behalf of:

Address: **DELETED**

Telephone: **DELETED**

Mobilephone:

Fax:

Council Document 11221/01

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French

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**COUNCIL OF  
THE EUROPEAN UNION**

**GENERAL SECRETARIAT**

*Directorate-General F  
Communication  
Transparency*

*- Access to Documents/  
Legislative transparency*

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Brussels, 11 April 2013

**Mr Samuli Miettinen**

**e-mail:** **DELETED**

**Ref. 13/0448-nh/jj**

Dear Mr Miettinen,

We have registered your request of 18 March 2013 for access to document 11221/01.

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 documents<sup>1</sup> (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

<sup>1</sup> Official Journal L 145, 31.5.2001, p. 43.

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

Document **11221/01** is an opinion of the Council Legal Service relating to the proposal for a Directive on the criminal-law protection of the Community's financial interests. The opinion analyses the question whether the abovementioned proposal for a directive falls within the competence of the European Community. The document consequently contains legal advice except for its paragraphs 1 and 2.

The legal advice covered by this opinion deals with an issue which still remains contentious and the legal advice is therefore sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, 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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of the Regulation, you may have access to paragraphs 1 and 2.

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 reply<sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosure

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<sup>1</sup> 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 23 April 2013 - 12:13]**

**Subject : Re: Ref. 13/0448-nh/jj**

Dear Sir or Madam,

Please find attached my confirmatory application regarding your decision of April 11, Ref. 13/0448/nh/jj . I look forward to hearing from you in due course.

Yours faithfully,

Samuli Miettinen

Mr. Samuli Miettinen

**DELETED**

April 23, 2013

Dear Mr Thomsen,

Thank you for your email of April 11 (13/0448-nh/jj), 2013, rejecting my application for greater public access to the Council Legal Service opinion on the 2001 proposal for a directive on the criminal-law protection of the Community's financial interests (COM (2001) 272, 2001/0115/COD). This confirmatory application requests that the General Secretariat's decision is reconsidered. I am happy for my application to be made public.

The relevant portion of the decision, justifying the partial refusal of access to document 11221/01, is quoted in full below:

‘Document **11221/01** is an opinion of the Council Legal Service relating to the proposal for a Directive on the criminal-law protection of the Community's financial interests. The opinion analyses the question whether the abovementioned proposal for a directive falls within the competence of the European Community. The document consequently contains legal advice except for its paragraphs 1 and 2.

The legal advice covered by this opinion deals with an issue which still remains contentious and the legal advice is therefore sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, 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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of the Regulation, you may have access to paragraphs 1 and 2.'

No claim is made in favour of continued secrecy other than the legal advice exception in article 4(2), second indent, of Regulation 1049/2001. This states:

'The institutions shall refuse access to a document where disclosure would undermine the protection of... [2<sup>nd</sup> indent:] court proceedings and legal advice... unless there is an overriding public interest in disclosure.'

The requested document does not contain advice in the context of court proceedings, but rather advice on the choice of a legal basis in the context of the legislative process. The legislative process has concluded, since the proposal was formally withdrawn 16.4.2013 by a notice published in the Official Journal (2013/C 109/08).

As the Court of Justice has noted in Joined cases C-39/05 and 52/05 *Turco and Sweden v Council*, disclosure of documents related to legislative processes is in the overriding public interest. The case concerns access to an opinion of the Council Legal Service on the choice of legal basis. According to the Court of Justice,

'...an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process...' (paragraph 67)

There is therefore' in principle, an obligation to disclose opinions of the Council's legal service relating to a legislative process' (paragraph 68). The requested document is such an opinion.

It is true the Court left open the possibility of restricting access to

'a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal'. (paragraph 69)



However, it is not clear, given

1. the age of the opinion, issued over eleven years ago
2. the formal withdrawal of the legislative proposal to which it is linked,
3. its context in the Treaty regime prior to the Lisbon Treaty, which has significantly altered the legal landscape for future proposals of a similar nature and
4. the lack of a sufficiently detailed statement of reasons in refusing access

that the undisclosed parts of this opinion remain particularly sensitive so as to allow reliance on the exception cited. It is also unclear that the entirety of the refused portion is sufficiently sensitive, as required under Article 4(6) of the Regulation, and that the reasons for continuing refusal are justified, as required under Article 4(7).

As to the ability of the Legal Service to effectively defend decisions taken by the Council, this reason is clearly inapplicable to the present case. The requested document relates to a legislative proposal which has been formally withdrawn. There is no risk whatsoever that the legal service could be called upon to defend legislation based on this proposal, since the legal basis of the 2001 proposal no longer exists. Even if certain similarities exist between the withdrawn 2001 proposal and the 2012 proposal ( COM 2012(363) / COD 2012/0193 ), the 2001 proposal is substantively distinct and issued in a significantly different Treaty context than the 2012 proposal. It is also unclear how the Council legal service would in this context become susceptible to external pressure, as suggested by the decision. The public scrutiny of legislative documents cannot in itself constitute undue external pressure so as to allow continued secrecy.

Even if some of the advice might still be considered sensitive, the question of choice of legal basis is of constitutional significance (e.g. Case T-529/09 *Int'l Veld*, paragraph 47). In *Int'l Veld*, the general court notes that even the credibility of international negotiations is not threatened by an underlying legal basis debate (at 52). The choice is based on objective factors amenable to review (at 47-48), not opinions of the legal service such as the subject of this request for public access. That constitutional choice should be subject to a transparent debate. It is for the Council to show how the public interest would be undermined by the disclosure of one opinion on this point, given the emphasis on the transparency of documents linked to legislative processes in case law of the Court of Justice.

I look forward to the Council's response on this matter.

Yours sincerely,

Samuli Miettinen

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