



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 17 June 2013

10742/13

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API 54**

NOTE

from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application No 13/c/01/13

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 3 April 2013 and registered on the same day ([Annex 1](#))
- reply from the General Secretariat of the Council dated 21 May 2013 ([Annex 2](#))
- confirmatory application dated 2 June 2013 and registered on 3 June 2013 ([Annex 3](#))

[E-mail message sent on 3 April 2013 - 16:17]

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 **DE**

First Name: **DELETED**

Family Name: **DELETED**

Postal Address: **DELETED**

Street: **DELETED**

Town: **DELETED**

Country: **DELETED**

PostCode: **DELETED**

Gender: M

Age: 18-24

Phone:

Email: **DELETED**

Economic Category:

Subject : Document

Initial question:

Dear Sir or Madam,

I hereby request, on the basis of Article 6 of Regulation (EC) No. 1049/2001 concerning public access to documents, to receive for the purpose of scientific research full access to the following document, i.e. to the un-shortened version:

Council of the European Union

Interinstitutional File: 2011/0361 (COD) Brussels, 16 March 2012

7801/12

LIMITE

JUR 152

Contribution of the Legal Service

Proposal for a regulation of the European Parliament and of the Council on amending Regulation (EG) No 1060/2009 on credit rating agencies - Civil liability regime

This should be a document of around 7 pages (in English).

Please send it/notify me by e-mail.

Thank you very much.

[Complimentary close]

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**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

RUE DE LA LOI, 175
B – 1048 BRUSSELS
Tel: (32 2) 281 67 10
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E-mail:

access@consilium.europa.eu

Brussels, 21 May 2013

DELETED

e-mail: DELETED

Ref. 13/0544-mj/mf

Dear Mr **DELETED**,

We have registered your request of 3 April 2013 for access to document 7801/12 . 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 24 April 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:

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. .

Document **7801/12** is an opinion of the Council Legal Service concerning the proposal for a regulation of the European Parliament and of the Council on amending Regulation (EC) No 1060/2009 on credit rating agencies. It analyses the proposed civil liability scheme for credit rating agencies set out in Article 35a of the proposal, hereunder whether that provision can be adopted on the basis of Article 114 TFEU. The document consequently contains legal advice except for paragraphs 1 – 5. The decision-making process in question is in its final stage.

The legal advice covered by the opinion deals with issues which have given rise to complex and sensitive discussions and which are likely to become subject to litigation before the courts. Furthermore, a number of the aspects analysed are very broad in scope. The legal advice is therefore particularly 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, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over that protected interest so as to justify disclosure of the document.

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 – 7 which are already publicly available.

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 reply³.

Yours sincerely,

For the General Secretariat

Enclosure

³ 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 2 June 2013 - 11:45]

To: SECRETARIAT DGF Access

Subject: Re: U.Z.: 13/0544-mj/mf

Dear Sir or Madam,

Here attached you will find my confirmatory application under Regulation 1049/2001 for access to Council document 7801/12.

[Complimentary close]

DELETED

Enclosure: **DELETED**_confirmatory application.pdf

Confirmatory application for Council document 7801/12
Initial request of 3 April 2013 - Ref: 13/0544-mj/mf

Dear Sir/Madam,

I hereby submit, within the time-limit and in the manner prescribed pursuant to Articles 6, 7(2) and 8(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereinafter: the Regulation), a confirmatory application for full access to Council document 7801/12 (hereinafter: "the document"), the Legal Service contribution concerning the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies – Civil liability regime.

I give permission for this confirmatory application to be made publicly accessible in the Council's register of documents, as long as my personal data (in particular my name and address) are removed.

My initial application of 3 April 2013 (filing reference: 13/0544-mj/mf) was rejected in full by the response dated 21 May 2013, after the response period had been extended. The document was not made further accessible beyond the part which had already been published (paragraphs 1-7 on pages 1-3 of 7), and was not made fully accessible to the public. While the paragraphs already published consist merely of a short introduction and information on the generally known legal background, the legal assessment – i.e. the actual content of the document – is not being made publicly available, apart from two introductory paragraphs only.

The decision to restrict access is based on Article 4(2) second indent of the Regulation, because making the document accessible would apparently conflict with the protection of legal advice, which is considered to be the overriding factor here. The document is indeed an opinion of the Legal Service. It addresses the new liability regime pursuant to Article 35a (as amended) to be introduced into Regulation (EC) No 1060/2009 through the issuing of an amendment to that Regulation. The legal opinion discusses in particular the European Union's legislative powers on the basis of Article 114 TFEU. The ordinary legislative procedure to amend the Regulation has meanwhile (virtually) been completed; the European Parliament and the Council have approved the amendment and only its publication in the Official Journal of the European Union is outstanding. The decision to restrict access is supposedly justified by the fact that making the document fully accessible would entail the risk that the new liability regime could be exposed to legal challenge as being contrary to EU law. Due to the complexity, difficulty and scope of the new regime, the information in the legal opinion is considered particularly sensitive. It is feared that the legal advice would be jeopardised, in particular as regards its independence and freedom from outside influence, if the opinion intended for the internal use of the Council were made fully accessible. The Council would have to exercise more restraint in seeking opinions from the Council Legal Service. The Legal Service would moreover not be able to defend Council decisions sufficiently effectively if opinions were made publicly accessible. As a whole, the interests of transparency are considered not to outweigh the interests of protecting legal advice.

With my confirmatory application I stand by my initial application for access to be granted. I feel that the decision to restrict access is not justified. The reasons put forward for restricting it are not convincing and the interests of transparency outweigh them in this instance.

There is a fundamental right to access (pursuant to Article 2 of the Regulation) that is specifically protected as the right of EU citizens by Article 42 of the EU Charter of Fundamental Rights and is to be observed by the EU pursuant to Article 6(1) TEU. This right to access can only be restricted in exceptional cases (Article 4 of the Regulation). The preconditions of Article 4(2) second indent should be examined critically in this regard.

The document concerns the right of access in the context of a legislative process. All parts of a legislative process must take place publicly, as stated substantially in the principle set out in the second subparagraph of Article 1 TEU: "decisions are taken as openly as possible and as closely as possible to the citizen"; this principle is stressed once again in the second sentence of Article 10(3) TEU. The document therefore contains information of relevance to all EU citizens, since the legislator (in)directly legitimated democratically by EU citizens takes decisions and enacts laws binding on everyone on the basis of this information. It is therefore not merely the "internal" deliberation of a body that is concerned. Neither does the deliberation take place "for" the body "against" somebody, but in the context of the legislation; the Legal Service does not, in this function, have to "defend" the Council and in that respect cannot itself enjoy protection of its effective defence either. In any case this would contradict democratic and constitutional principles which, however, the European Union is obliged to safeguard under the Treaties, particularly the second sentence of Article 2 and Article 10(1) TEU. Furthermore, the primary issue here is the Union's legislative competence, which matters most particularly in view of the principle of limited conferred powers, Article 5 TEU.

Neither is the Legal Service particularly worthy of protection for this reason, because its independence and freedom from external influence would be seriously prejudiced if it were to work in public. On the contrary: without its opinions being published, not everyone can determine whether the Legal Service deliberates independently and freely. However, despite non-publication, influence is conversely entirely possible in theory – and remains concealed.

A limitation of access – particularly in the context of a legislative process – shatters Union citizens' confidence in the legislator and jeopardises the latter's legitimacy. Precisely because certain questions – for instance, legal issues of legislative competence – are complex and difficult and have far-reaching implications, the person to whom the laws are addressed must be able to understand why the law was passed in this form. The documents on the basis of which the legislator has taken its decision are the most appropriate for that purpose. To conceal such documents is therefore harmful to the protection of the laws. However, the legislator must allow itself to be monitored by EU citizens and the general public; it serves the citizens, not its own ends.

Furthermore, no ongoing consultation process is jeopardised by publishing the document in full. The deliberations have been completed. The risk that the law soon due to enter into force could be contested exists irrespective of whether it is made more or fully accessible. At the latest by means of the partial publication, (professional circles, in any case) were made aware of the legislative powers pointed out as a problem in the document. At the latest in court proceedings the Council and/or the Legal Service should make comments completely in public. Furthermore, the fact that the legislator requires protection from the addressees of the law by keeping confidential his "own" concerns cannot be a reason for refusing to publish it in full. The legislator is more inclined to raise concerns among Union citizens that there should be such strong concerns against its laws that must be concealed at any price.

The above reasons for making the document accessible gain particular weight when the European Court of Justice also supports the same argument for the interpretation of the second indent of Article 4(2) of the Regulation. In this connection I would quote the ECJ's relevant pleadings in the Judgment of 1 July 2008 in Cases C-39/05 P and C-52/05 P, *Sweden and Turco v. Council*, paragraphs 59-68. The current ECJ decision in the Judgment of 4 May 2012 in Case T-529/09, *in 't Veld v. Council*, paragraphs 61 et seq. also takes these explanations as a basis.

"As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.

Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed.

Consequently, to submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and cannot, accordingly, provide a basis for a refusal to disclose such advice.

As regards, secondly, the Council's argument that the independence of its legal service would be compromised by possible disclosure of legal opinions issued in the course of legislative procedures, it must be pointed out that that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. As is apparent from [the above explanations], that exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.

However, in that regard, the Council relied before both the Court of First Instance and the Court on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined.

As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it.

As regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001.

In view of those considerations, there appears to be no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issued in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.

In any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. As was pointed out [above in] this judgment, such 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 and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.

It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process."

For all the reasons set out above, my confirmatory application should be granted. Please forward the complete document electronically.

As a precaution, I would point out that this is not an exceptional case as provided for in Article 8(2) of the Regulation, as my particular request is merely for access to one single document consisting of only seven pages.

(Complimentary close.)