



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 July 2013

11830/13

**INF 124
API 62**

NOTE

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

Subject : Public access to documents
- Confirmatory application made by Mr Hillebrandt (No 15/c/01/13)

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 8 May 2013 and registered on the same day ([Annex 1](#))
- reply from the General Secretariat of the Council dated 31 May 2013 ([Annex 2](#))
- confirmatory application dated 1 July 2013 and registered on 2 July 2013 ([Annex 3](#))

[E-mail message sent on 8 May 2013 - 15:38]

Dear Madam/Sir,

Under Regulation 1049/2001/ec, I would like to request access to documents held by the Council. A full list of requested documents is attached to this email. I kindly request you, where possible, to make these documents available in electronic form.

Sincerely,
Maarten Hillebrandt

DELETED

List of requested documents

Number/year	Content
6039/98	Unknown
5517/98	Unknown
5181/98	Unknown
9678/1/93 REV 1	Rapport Acces du public aux documents du Conseil
12088/99 LIMITE INF144, API130, JUR381	Presidency concept Council Decision on transparency
9692/95 LIMITE JUR221	Transparance des travaux du Conseil: declarations au proces-verbal et confiance legitime
8420/01 CODEC 373 INF 57 (7 May 2001)	Memo concerning regulation on base of Art 255 TEU
8937/06 LIMITE INF 89	Draft evaluation report on MS's information and communication activities during the reflection period
CONF/3943/96 (8 October 1996)	Presidency suggested approach IGC (transparency)
SN4470/96 (29 October 1996)	Non Paper – reexamen de la decision 93/731/CE
10263/94	Access to documents
	Council Conclusions of 9 June 1994
6853/94	Memo Council Legal Service
SN4484/92 (21 October 1992)	Non-paper – Transparency and Openness – follow-up from the European Council in Birmingham
10496/92 (26 November 1992)	Note from the presidency – Transparency
14495/05 POLGEN 39 INFO 184 JUR 462	From Presidency to Delegations: Transparency in the Council
15834/05 (15 Dec 2005)	Antici Group: improving openness and transparency of the Council
SN 2970/00 REV 2	WPI: proposal for a regulation
5267/01 INF 8 API 4 JUR 10	confirmatory request by Mr. A. Craig
5482/01 INF 13 API 8 JUR 19	confirmatory request by Ms L. JUNQUERA LARA
9447/01 INF 78 API 49 JUR 185	confirmatory request by Mr. Kools
8367/01 INF 53 API 31 JUR 139 and 8368/01 INF 54 API 32 JUR 140	confirmatory request by Mr. M. Bell
8687/01 INF 62 API 37 JUR 154 and 8688/01 INF 63 API 38 JUR 155	confirmatory request by Mr Jelle van Buuren
Doc.no. unknown	Response to confirmatory request of Ms M. Chatelard, of 17 July 2001
Doc.no. unknown	The first confirmatory request filed by Mr. S. Peers in 2001 (the Council online register only mentions his second confirmatory request)
10459/11	Confirmatory application No 15/c/01/11
11607/11	Confirmatory application No 16/c/01/11



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THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

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Brussels, 31 May 2013

Mr Maarten Hillebrandt

e-mail: DELETED

Ref. 13/0782-mi/jj

Dear Mr Hillebrandt,

We have registered your request of 8 May 2013 for access to the following documents:

1. 6039/98
2. 5517/98
3. 5181/98
4. 9678/1/93 REV 1
5. 12088/99
6. 9692/95
7. 8420/01
8. 8937/06
9. 3943/96
10. SN 4470/96
11. 10263/94
12. "Council conclusions of 9 June 1994"
13. 6853/94
14. SN 4484/92
15. 10496/92
16. 14495/05
17. 15834/05
18. SN 2970/1/00 REV 1
19. 5267/01
20. 5482/01

21. 9447/01
22. 8367/01
23. 8368/01
24. 8687/01
25. 8688/01
26. 11060/01
27. 9381/01
28. 9381/01 COR 1
29. 10459/11
30. 11607/11.

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 and has come to the following conclusion:

Following an email exchange between you and the General Secretariat, the item "Council conclusions of 9 June 1994" was withdrawn from the request.

Regarding document n° 7, the number of the document corresponding with the title you have indicated is **8430/01**, not 8420/01.

You may have full access to all requested documents, except for document **9692/95**. This document contains an opinion of the Council Legal Service, and the consultations regarding this document are still on-going. You will receive a reply concerning this document as soon as the consultations have been finalised.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

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.

[Confirmatory application - sent by e-mail on 1 July 2013 - 18:19]

Subject: FW: Ref. 13/0782-ADD-mi

Dear Madam, Sir,

Please find attached a confirmatory request following my initial request for documents under the Council's reference number 13/0782-ADD-mi.

I look forward to hearing the Council's response.

Yours sincerely,

Maarten Hillebrandt

Maarten Hillebrandt

DELETED

Confirmatory request concerning application for access to documents with reference 13/0728-ADD-mi

Dear Mr Thomsen,

Thank you for your letter of 13 June 2013, regarding my application of 8 May 2013 for a number of documents held by the Council. On 31 May, I received full access to all but one of the requested 29 documents, the consultation on the final document at that time still being under way. On 13 June, I was granted partial access to document 9692/95, containing a note from the Council's Legal Service submitted to the Antici Group on 8 September 1995.

By way of the confirmatory request procedure, I would like to contest the Council's refusal to grant full access to document 9692/95, which I consider runs counter to Regulation 1049/2001 and the established case law. In particular, the reasons given to refuse access to parts of the said documents must be considered insufficiently substantiated and therefore contrary to the procedures laid down in Regulation 1049/2001.

Reasons provided by the Council

In your letter of 13 June, the Council's refusal to disclose the parts of the document containing legal advice is motivated as follows:

“The legal advice covered by this opinion [contained in document 9692/95] deals with issues which are very broad in scope and relevant to a wide range of current and future dossiers. It therefore remains sensitive. Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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 Regulation (EC) No. 1049/2001, 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 interests so as to justify disclosure of the documents.”

Access to the requested documents was partially refused under Art. 4(2), second indent, of Regulation 1049/2001, which states that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice”. This exception ground should be read in light of the principle of the widest possible access to documents.¹ Recital 11 of Regulation 1049/2001 holds that “[i]n principle, all documents of the institutions should be accessible to the public”. Regulation 1049/2001 itself is adopted on the basis of Art. 255 EC, the substance of which was subsequently carried forward to Art. 15(3) TFEU, which states that “[a]ny citizen of the Union [...], shall have a right of access to documents of the Union institutions [...]”. Furthermore, the Court of Justice has held that any exceptions to access to documents must be interpreted and applied strictly.²

Legal framework and applicable disclosure tests

With particular reference to documents containing legal advice, the rules and established case law prescribe a number of tests that the Council must follow when access is requested. First, the Council must establish whether the document contains legal advice. Second, the risk entailed in disclosure cannot be purely hypothetical and must be reasonably foreseeable. Third, even where disclosure entails a reasonably foreseeable risk, this must be balanced against the public interest in disclosure.³ Finally, in Art. 4(6) and 4(7), Regulation 1049/2001 sets out a duty on the Council’s side to safeguard the proportionality of any decision to refuse disclosure, by considering whether partial access might be granted to the document, and by providing that exceptions “shall only apply for the period during which protection is justified on the basis of the content of the document”.

In the light of the established legal framework described above, the Council decision to grant only very limited partial access to the document in question must be considered insufficiently substantiated.

The Council’s first argument

With regard to the Council’s first argument that disclosure of the said document could cause the Legal Service to display caution in future written opinions, it must be observed that the assertion that the document “deals with issues which are very broad in scope and relevant to a wide range of current and future dossiers” is not linked to specific examples of dossiers. Furthermore, this argument does not provide any details on the specific nature of the document’s relevance to these “current and future dossiers”, or the risk entailed therein. This argument is therefore insufficiently substantiated as to be more than purely hypothetical. Besides the argument’s vague and abstract nature, it fails to explicitly balance reasons for non-disclosure with an overriding public interest (the public’s right to know the reasoning behind the Council’s position with regard to statements attached to Council minutes). In fact, the letter’s reference to several *documents* (see the final sentence quoted above) as opposed to the single *document* to which access is refused, undermines the Council claim to a careful and detailed consideration of both the document’s sensitive nature and the possibility of an overriding public interest.

¹ Joined Cases C-39/05 P and C-52/05 P, Kingdom of Sweden and Maurizio Turco v Council, para. 41.

² *Ibid.*, para. 36.

³ *Ibid.*, paras 42-43.

The Council's second argument

The second argument put forward by the Council runs that the Legal Service, when its legal opinions are disclosed, may be undermined in its ability to effectively defend decisions before the Court. This argument however has already been dismissed by the Court for being overtly general, and insufficiently substantiated.¹ Moreover, it is observed that, as with the first argument, only an implicit balancing with the public interest has been conducted which cannot be verified. In particular, it is here highlighted that the Council still considers the document's nature to be very sensitive, even more than 17 years after its drafting, and even when the legal opinion has not been explicitly linked to any particular decision or policy area. These facts, combined with the revision procedure that Regulation 1049/2001 is currently undergoing, warrants the expectation that the said document may contain relevant and necessary input in the democratic debate surrounding this revision procedure.

The Council's third argument

The Council's third argument that publication of this legal opinion may lead it to come under external pressure, affecting its future capacity to express its views freely, is unfounded, in the sense that there is no foreseeable risk of pressure beyond the free expression of opinion such as pertains to a democratic polity. It is observed that the risk of unacceptable pressure is not even substantiated in abstract or theoretical terms. As with the Council's first two arguments, a balancing of this risk with the public interest is only carried in an implicit manner that cannot be verified.

Finally, although the reasons for non-disclosure of the legal advice contained within the requested document are, counter to the tests established by the Court, phrased in general and hypothetical terms, it is noted that the decision to grant partial access is wholly premised on these reasons. Hence, only the first sentence of a 5-page document is disclosed, while the possibility of further partial access is not considered. Furthermore, the abstractly established relation to current and future decisions does not contain verifiable criteria as to the duration of the document's sensitive nature. This runs counter to the strict interpretation and application necessitated by Regulation 1049/2001, and undermines its legal certainty.

Considering the failure to state sufficient reasons as stipulated by Art. 4(2), the misapplication of the overriding public interest test, and the unsatisfactory treatment of proportionality as set out by Arts. 4(6) and 4(7), I request the Council to reconsider its refusal to grant access to the legal advice contained in document 9296/95.

Finally, please note that I do not object to the publication of this confirmatory request.

I look forward to the Council's response.

Yours sincerely,

Maarten Hillebrandt

¹ Case T-529/09, In 't Veld v Council, para. 78.