



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 September 2013

13111/13

**INF 145
API 73**

NOTE

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

Subject : Public access to documents
- Confirmatory application No 17/c/01/13

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 17 June 2013 and registered the same day ([Annex 1](#))
- 1st reply from the General Secretariat of the Council dated 8 July 2013 ([Annex 2](#))
- additional reply from the General Secretariat of the Council dated 7 August 2013 ([Annex 3](#))
- confirmatory application dated 16 August 2013 and registered on the same day ([Annex 4](#))

[E-mail message sent on 17 June 2013 - 10:19]

From: Anaïs Berthier [mailto:aberthier@clientearth.org]
Sent: Monday, June 17, 2013 10:19 AM
To: SECRETARIAT DGF Access
Subject: RE: ClientEarth - Access to documents request

Dear Madam, Sir,

We hereby request to have access to the documents listed in the Council's public register with regard to the adoption of the 7th Environment Action Programme, the proposal for a decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet". These are the following:

- Preparation for the informal trilogue, 31/05/2013 (10381/13), 28/05/2013 (9708/13), 21/05/2013 (9689/13), 08/05/2013 (9192/13).
- Comments from Member States, 13/05/2013 (8844/13) ADD 2 full access, 06/05/2013 (8844/13) ADD1, 26/04/2013, 22/04/2013 (8533/13) ADD 4 (full access), 19/04/2013 (8533/13) ADD 2 (full access), 18/04/2013 58533/13) ADD 1, 11/04/2013 (8154/13) ADD1, 05/04/2013 full access (8154/13), 02/04/2013 (7426/13) ADD 1, 05/03/2013 (6965/13) ADD1, 04/03/2013 (6965/13) COR1, 04/03/2013(6965/13).
- Examination of the ENVI Committee amendments, 03/05/2013 (8810/1/13), 25/04/2013 (8810/13).
- Revised Presidency text, 17/04/2013 (8544/13), 26/03/2013 (7849/13) full access.

We would also like to have access to the documents with regard to the trilogue meetings that took place since the one mentioned in the register of 31/05.

Yours sincerely,

Anaïs Berthier

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**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
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*- Access to Documents/
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Brussels, 8 July 2013

Ms Anaïs Berthier

e-mail: aberthier@clientearth.org

Ref. 13/1038-mj/ns

Dear Ms Berthier,

We have registered your request of 17 June 2013 for access to the following documents:

10381/13	8533/13 ADD2	6965/13
9708/13	8533/13 ADD1 (your reference 58533/13)	8810/1/13 REV1
9689/13	8154/13 ADD1	8810/13
9192/13	8154/13	8554/13 (your reference 8544/13)
8844/13 ADD2	7426/13 ADD1	7849/13
8844/13 ADD1	6965/13 ADD1	
8533/13 ADD4	6965/13 COR1	

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:

The following documents have been identified as corresponding to the last part of your request:

10507/13, 11071/13 and 11237/13.

You may have access to the following documents:

10381/13, 9708/13, 9689/13, 9192/13, 8810/13, 8810/1/13 REV 1, 8554/13, 7849/13, 10507/13, 11071/13 and 11237/13.

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 necessary consultations concerning the other documents are still in progress and you will be notified of a decision as soon as possible.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures



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Brussels, 7 August 2013

Ms Anaïs Berthier

e-mail: aberthier@clientearth.org

Ref. 13/1038-ADD-mj/ns

Dear Ms Berthier,

Further to the letter sent to you on 8 July 2013 regarding your request for access to some documents regarding the proposal for a decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet", the General Secretariat of the Council has now finished the examination of this 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:

Documents **8844/13 ADD 1**, **8844/13 ADD 2**, **8533/13 ADD 1**, **8533/13 ADD 2**, **8533/13 ADD 4**, **7426/13 ADD 1** are addenda to some Notes from General Secretariat to Delegations on a proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet". They contain comments from some Member States.

Document **8154/13** is a Note of 5 April 2013 from General Secretariat to Delegations on the same proposal. It contains comments from some Member States.

Document **8154/13 ADD 1** is an addendum of 11 April 2013 to this Note. It also contains comments from some Member States.

Document **6965/13 (+ COR 1)** is a Note of 4 March 2013 from General Secretariat to Delegations on the same proposal. It contains comments from some Member States.

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 **6965/13 ADD 1** is an addendum of 5 March 2013 to this Note also containing comments from some Member States.

This proposal was submitted by the European Commission to the European Parliament and the Council on 29 November 2012. Since that date, it has been examined by the Working Party on the Environment several times.

No decision has yet been taken on the matter.

You may have access to the content of these documents, including delegations' positions, but excluding those parts which enable the delegations concerned to be identified.

The General Secretariat considers this to be a good compromise between protection of the decision-making process of the Council, on the one hand, and public interest in disclosure, on the other. This allows you to be informed of the arguments raised during discussion concerning an issue on which the institution has not yet taken a decision.

Nevertheless, the General Secretariat considers that protection of the institution's decision-making process outweighs possible public interest in identifying the delegations whose positions are set out in the documents. In the framework of preliminary discussions and negotiations within the Council's preparatory bodies, it is essential that delegations are able to express their views freely so that the Council can find compromise solutions and achieve progress on delicate questions.

Disclosure at this stage of those parts of the documents which allow identification of the delegations that have adopted positions on the subject still under discussion, would jeopardise this process, since it could seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion. The General Secretariat is of the opinion that disclosure of these parts of the documents could seriously undermine the Council's decision-making process. Accordingly, pursuant to Article 4(3), first subparagraph of the Regulation (protection of the Council's decision-making process), the General Secretariat is at present unable to grant you access to these parts of the documents.

Nevertheless, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure, these documents and any other legislative document relating to this decision shall be made available to the public in full after the final adoption of the act, unless their content is covered by Article 4(1), (2) or (3), second subparagraph, 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

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 16 August 2013 - 11:08]

Subject: Re: Ref. 13/1038-ADD-mj/ns

Please find attached ClientEarth's confirmatory application concerning our request under Regulation 1049/2001.

Yours sincerely,

Anaïs Berthier

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Ref. 13/1038-mj/ns – Confirmatory Application

Brussels, 16 August 2013

GENERAL SECRETARIAT

Directorate-General F

Transparency Service- Access to documents

By email: Access@consilium.europa.eu

RE: Ref. 13/1038-ADD+mj/ns - Confirmatory application for reconsideration of the Council's decision to deny ClientEarth's access to the names of the delegations mentioned in the requested documents

We welcome the fact that you have provided us access with all the documents we requested, however, in conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the refusal to disclose the names of the delegations mentioned in the provided documents.

Facts

On 14 June 2013, ClientEarth requested to have access to the documents listed in the Council's public register with regard to the adoption of the 7th Environment Action Programme (Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet") as well as the documents relating to the trilogue meetings that had taken place since the last one mentioned in the register.

On 8 July 2013, the Council disclosed 11 documents and stated that more time was needed to carry out consultations to decide whether to disclose the remaining requested documents.

On 7 August 2013, the Council partially disclosed the remaining documents deleting the parts of the documents that enabled the delegations which had made comments to be identified.

All the documents that were provided on the 7th of August are notes from the General Secretariat to Delegations on the Commission's proposal for the new programme. They all contain comments from some Member States. In fact, the actual content of all these documents is constituted by the comments and proposals made by the Member States.

The decision to keep the identity of the delegations confidential infringes the first subparagraph of Article 4(3) of the Regulation as well as the case-law of the General Court.

Breach of Article 4(3) first subparagraph of Regulation (EC) 1049/2001 and of the case law of the General Court

The Council bases its decision on Article 4(3) of the Regulation and argues that "*in the framework of preliminary discussions and negotiations within the Council's preparatory bodies, it is essential that delegations are able to express their views freely so that the Council can find compromise solutions and achieve progress on delicate questions*".

It also argues that disclosure of "*the parts of the documents which would allow identification of the delegations that have adopted positions would jeopardise this process, since it could seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion...disclosure of these parts of documents could seriously undermine the Council's decision-making process*."

No real explanation is put forward to substantiate these contentions by the Council. On the contrary, public access to those positions makes it possible for those Member States and the institutions to be accountable to citizens. Even if the identification of the delegations were to expose them to a risk of external pressure, that risk is not sufficient to justify the application of the exception provided in Article 4(3) of the Regulation, since it is inherent on the requirement of accountability and in the principle of citizen participation on which the Regulation is based. The only reason why these parts of the documents are kept confidential is to allow the Member States to speak with two tongues, at national level to the citizens and in Brussels within Council meetings when negotiating EU law.

The facts of this case are similar to the ones in case T-233/09. In this case, the Council also refused to provide access to the parts of the requested documents which would enable to identify the delegations having positions on a Commission's proposal. The document requested was a note from the Secretariat General of the Council containing proposals for amendments or for re-drafting from the Member States addressed to the working party on Information set up by the Council concerning a Commission's proposal. This document is thus similar to the ones requested in the present case since the latter contain comments from Member States enshrining proposals for re-drafting and amendments to the proposal discussed. Moreover, as in case T-233/09, the Council was in accordance with the first paragraph of Article 7 of the Rules of Procedure and Article 289 TFEU acting in a legislative capacity as he was in the process of adopting a decision. The reasoning of the Court can thus apply in extenso.

In case T-233/09, the General Court annulled the Council's decision and rejected all the arguments of the Council which were the same ones than the ones used in the present case, namely the preliminary stage of the discussion and the narrowing of the delegations' room for manoeuvre.

The Court recalled that *"the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (Case C-39/05P Sweden and Turco v Council [2008] ECR I-4723, paragraph 46)"*.¹

The Court then considered that the arguments of the Council were too abstract² and *"not sufficiently substantiated to justify, in themselves, the refusal to disclose the identity of those responsible for the various proposals, who must, in a system based on the principle of democratic legitimacy, be publicly accountable for their actions"*.³

As regards the arguments put forward by the Council in support of its contention alleging that the ongoing legislative process could be undermined because the delegations' room for manoeuvre would be reduced, the Court held that *"it should be noted that those arguments do not establish that there is a sufficiently serious and reasonably foreseeable risk justifying the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001."*⁴

The Court further insisted on the fact that *"the identification of the Member States delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently."*⁵

On the preliminary stage of the procedure, the Court held that *"the preliminary nature of the discussions relating to the Commission's proposal for a regulation does not, in itself, justify the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. that provision does not make a distinction according to the state of progress of the discussions."*⁶

Moreover, discussions on the adoption of the programme are not at a preliminary stage but on the contrary, as evidenced by some of the documents provided, have been going for months.

It follows that according to the Court, the identity of the delegations making comments within a legislative procedure must not be kept confidential. It is worth noting that this ruling has been supported by the Advocate General in the pending appeal case C-280/11P⁷.

¹ Case T-233/09, *Access-Info-Europe v Council*, [2011] ECR II-1073, paragraph 57.

² Case T-233/09, *ibid*, paragraph 70.

³ Case T-233/09, *ibid*, paragraph 69.

⁴ Case T-233/09, *ibid*, paragraph 67.

⁵ Case T-233/09, *ibid*, paragraph 69.

⁶ Case T-233/09, *ibid*, paragraph 76.

⁷ Opinion of Advocate General C. Villalon, delivered on 16 May 2013 in case C-280/11P.

In any event, even if disclosure would seriously undermine the decision-making process of the Council, that interest would be outweighed by the public interest in identifying the delegations whose positions are set out in the documents. Not only this interest is justified to scrutinise the actions of the Member States and of the Council within legislative processes but also to allow the citizens to genuinely participate in the decision-making process.

For all these reasons, ClientEarth hereby requests that the Council grants full access to the requested documents.

We finally draw the attention of the Council on the fact that had these documents been placed in the register of documents, some time would have been saved on both ends. We thus recommend that in the future, similar documents used as basis for discussion in legislative processes be systematically and automatically directly accessible in accordance with Article 12 of the Regulation.

Yours sincerely,

Contact:

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