



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 13 January 2012

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COVER NOTE

from : General Secretariat of the Council
to : Working Party on Information
Subject : Public access to documents
- Confirmatory application No 26/c/01/11

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 10 November 2011 and registered on the same day (Annex 1)
- reply from the General Secretariat of the Council dated 21 November 2011 (Annex 2).
- confirmatory application dated 9 December 2011 and registered on 12 December 2011 (Annex 3).

[E-mail message sent on 11 November 2011 - 11:06]

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: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone: **DELETED**

Mobilephone: **DELETED**

Fax:

Requested document(s): dear Sir,
i would like to access the following doc: opinion of the Council legal service on the subsidiarity principle in COM (2011) 370, doc ref 15452/11.
thanks in advance

BR

DELETED

on behalf of **DELETED**

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

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Press
Communication
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*- Access to Documents/
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Brussels, 21 November 2011

DELETED

e-mail:

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Ref. -11/1885/ls/jj

Dear **DELETED**,

Your request of 10 November 2011 for access to document 15452/11 has been registered by the "Access to Documents" unit. 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 (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

Document **15452/11** is related to an ongoing decision-making process on a proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC. It contains an opinion of the Council Legal Service on the choice of the proposed legal basis and the draft Directive's conformity with the principle of subsidiarity. The document contains legal advice except for points 1 to 2.

As regards the choice of the legal basis, the opinion contains an analysis of the delimitation of Article 194(2) TFEU from other Treaty provisions, namely as regards the adoption of measures on spatial planning. Moreover, the opinion examines the compatibility of such Union measures with the principle of subsidiarity. Both aspects of the legal advice are subject to a politically and legally contentious debate both as regards deliberations among Member States and likely as regards future negotiations with other institutions. The legal advice is therefore particularly sensitive in nature.

Consequently and in view of the fact that the decision-making process is currently ongoing, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions within the Council and would compromise its capacity to find agreement on the dossier.

Besides, both aspects of the legal analysis are of a general nature. They risk to be invoked in other, future decision-making procedures involving the delineation of Article 194(2) TFEU on energy policy, in particular when aspects of spatial planning are concerned. The opinion is therefore also particularly broad in scope which goes beyond the context of the legislative procedure in question.

The European Court of Justice has explicitly recognised the possibility to withhold legal advice of such particularly sensitive and broad character. Divulcation of such a document would undermine the protection of legal advice, since 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, since it could find itself in a situation where it would need to defend a decision it has taken against a - potentially critical - advice given by its Legal Service. Moreover, disclosure of the legal advice would also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts, a scenario that is not merely hypothetical in view of the contentiousness of the above issues. 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.

In the view of the foregoing, the General Secretariat is unable to grant you full access to this document, since the disclosure of the document would continue to prejudice two protected interests under Regulation 1049/2001, notably the protection of legal advice under Article 4(2), second indent, and the protection of an ongoing decision making process under the first subparagraph of Article 4(3). As regards the existence of an overriding public interest in disclosure, 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 two interests so as to justify disclosure of the document.

However, pursuant to Article 4(6) of the Regulation, you may have access to points 1 and 2 of the document, which are not covered by any of the exceptions under the Regulation.

According 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

Enclosure

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 09 December 2011 - 20:28]

Dear Mr THOMSEN,

Please find attached a confirmatory application for reconsideration of the Council Secretary General's Decision to Deny **DELETED** Application made on behalf of **DELETED** Requesting Access to a Document Containing Legal Opinion of the Council legal service

Best regards.

DELETED

Brussels, 8 December 2011

GENERAL SECRETARIAT

Directorate-General F
Press, Communication, Transparency - Access to Documents/Archives
RUE DE LA LOI, 175
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Attention: Mr THOMSEN
By email: access@consilium.europa.eu

RE: 11/1885-ls/jj - Confirmatory Application for Reconsideration of the Council Secretary General's Decision to Deny **DELETED Application made on behalf of **DELETED** Requesting Access to a Document Containing Legal Opinion of the Council legal service**

1. **DELETED** submits this confirmatory application for reconsideration of the denial of **DELETED** application dated 11 October 2011 requesting access to a document. The original application requested a document containing the legal opinion of the Council's legal service 15452/11 on the subsidiarity principle in COM(2011)370.
2. On 21 November 2011, the General Secretariat of the Council ("SG") denied the request. Through this confirmatory application for reconsideration, **DELETED** respectfully requests that the SG reconsiders the denial and grants access to the requested document.
3. We consider the reply from the SG to be incompatible with Article 4(2) second indent, Article 4(3) first subparagraph and Article 4(6) of Regulation 1049/2001. The reply also fails to comply with the findings of the Court of Justice of the EU in joined cases C-39/05 P and C-52/05P (the "Turco case")¹.

¹ Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, [2008] ECR I-0000.

4. We will demonstrate in a first section that the reply from the SG violates Article 4(2) second indent.
5. We will demonstrate in a second section that the reply from the SG violates Article 4(3) first subparagraph.
6. We will in a third section demonstrate that the SG failed to assess whether there was any overriding public interest in disclosure.
7. We will in a final section demonstrate that the SG failed to comply with article 4(6) and the principle of proportionality.

VIOLATION OF ARTICLE 4(2) SECOND INDENT (LEGAL ADVICE) OF REGULATION 1049/2001

Compliance with the test set out by the Court in Joined cases C-39/05 P and C-52/05P

8. In Joined cases C-39/05 P and C-52/05P, the Court sets out the examination to be undertaken by the Council where disclosure of an opinion of its legal service relating to a legislative process is requested. This section will demonstrate that the SG did not fulfil the test set out by the Court.
9. The Court starts by stating that *“first, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception²”*.
10. The SG satisfied itself that the requested document related to legal advice since it stated that *“The document contains legal advice except for points 1 to 2”* and only granted access to these paragraphs. Yet, these paragraphs only contain the introduction to the opinion. Granting access only to the introductory parts of the opinion and keeping the entirety of the legal advice confidential does not demonstrate that the SG examined the opinion in question in a sufficiently detailed manner before refusing to disclose it or examined it in the light of its content. There is no evidence to suggest that the SG checked whether partial access could have been given to some of the arguments in the requested document which express the opinion of the legal service on the delimitation of Article 194(2) TFEU from other Treaty provisions. The SG thus did not complete the first stage of the examination described by the Court.
11. Second, the Court requires the Council to *“examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice ‘would undermine the protection’ of that advice”³*.

“In that regard, it must be pointed out that neither Regulation No 1049/2001 nor its travaux préparatoires throw any light on the meaning of ‘protection’ of legal advice. Therefore, that term must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

² Joined cases C-39/05 P and C-52/05P, Ibid, Paragraph 38.

³ Joined cases C-39/05 P and C-52/05P, Ibid, para. 40

Consequently, the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.

The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical⁴.

12. The Court also makes clear that *"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 ...⁵".*
13. The SG first states that document requested *"is related to an ongoing decision-making process on a proposal for a Directive..."*. Yet, there would be no sense in requesting such an opinion or, any other document, if the legislative procedure was terminated. On the contrary, Regulation 1049/2001 clearly aims at enabling citizens to participate in the decision-making process of the institutions which implies that documents must be disclosed while proceedings are still ongoing, particularly legislative proceedings. Recital 2 of the Regulation preamble provides that *"openness 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"*. Recital 6 adds that *"wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process"*.
14. Additionally, in the Turco case, the Court considered that there was no *"general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters⁶"* that was ongoing and that such advice had to be disclosed. The Council may thus not rely on the fact that a legislative process is ongoing to refuse disclosing the requested document.
15. The SG then argues that the document is of *"particularly sensitive nature"* since *"both aspects of the legal advice are subject to a politically and legally contentious debate both as regards deliberations among Member States and likely as regards future negotiations with other institutions."*
16. First, the fact that the questions examined in the opinion are questions raised in the context of the adoption of the Commission's proposal stresses the fact that the document should be public. As explained earlier, Regulation 1049/2001 makes clear that documents within these processes should be easily accessible. The Court also stresses this point in the Turco case. The Court draws from recital 2 and 6 of the Regulation's preamble to conclude that *"openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."*

⁴ Joined cases C-39/05 P and C-52/05P, *ibid*, paras. 41-43.

⁵ Joined cases C-39/05 P and C-52/05P, *Ibid*, para. 49.

⁶ *Ibid*, 57.

It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible⁷.”

17. It is thus clear that the Council may not rely on the fact that the questions analysed in the requested opinion will cause debate among Member States and with other institutions or that it would "affect the efficiency of negotiations by impeding internal discussions within the Council and compromise its capacity to find agreement on the dossier" to deny access to the said opinion.
18. Second, the choice of the legal basis of a piece of legislation is decisive as it determines the margin of manoeuvre of the EU institutions in adopting and shaping that law and the one of the Member States and has thus an impact on the content of the law at issue. It is thus crucial that the public be informed of the choice of the institutions at that stage of the procedure.
19. Third, the fact that the legal issues raised in the opinion are going to be the subject of discussions within the Council and between the Council and other institutions shows that these issues are constitutive of debate between the institutions and deserve therefore to be public. Discussions between institutions and within an institution on the future of a directive should not be confidential and led behind closed doors. On the contrary, to promote such privacy in proceedings, as the Council does, directly contravenes the principles of openness, transparency and accountability of the institutions underlying Regulation 1049/2001.
20. The SG further argues that "*both of the legal analysis are of a general nature. They risk to be invoked in other, future decision-making procedures involving the delineation of Article 194(2) TFEU on energy policy in particular when aspects of spatial planning are concerned. The opinion is therefore also particularly broad in scope which goes beyond the context of the legislative procedure in question*".
21. This is not correct as the legal advice applies specifically to the proposal for a directive which is being adopted on energy efficiency, namely as regards the adoption of measures on spatial planning and whether the choice of the proposed legal basis for that specific directive is in compliance with the principle of subsidiarity. Therefore, the scope of the advice does not go beyond the context of the legislature procedure in question.
22. Moreover, legal opinions from an institution's legal services will more than often have aspects and elements that will be useful for future decision-making procedures involving the same or similar issues or legal questions, that should not imply that they should be stamped as confidential. On the contrary, also the public would know for future cases, whether the opinion of the Council Legal Service was shared by the Council itself.
23. The SG further argues that "*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, since it could find itself in a situation where it would need to defend a decision it has taken against a - potentially critical- advice given by its Legal Service.*"

⁷ Ibid, paras. 46-47.

24. This line of reasoning has clearly been rejected by the Court:
25. *"...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.*
26. *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.*
27. *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.⁸"*
28. The SG could not rely on that argument to deny access to the requested document.
29. In the Turco case, the Council also argued that the independence of its legal service would be compromised by possible disclosure of legal opinions. However, the Court also rejected that plea in stating 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 paragraph 42 of this judgment, 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 it⁹".*
30. The same reasoning must be applied here. The Council cannot therefore argue that *"external pressure 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"*.
31. Moreover, the adoption of a negative opinion by the Council legal service on a proposed legislative act under discussion subsequently adopted does not either constitute a reason to

⁸ Ibid, paras 59-60.

⁹ Ibid, paras 62-64.

refuse disclosing the legal opinion. The Court in the Turco case held that “*as regards the Commission’s argument that it could be difficult for an institution’s legal service which has 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*¹⁰.”

32. It follows that the SG submits in a general and abstract way that there is a risk that disclosure of legal advice relating to legislative processes would undermine the protection of legal advice. The SG hence does not demonstrate that there is a real risk that is *reasonably foreseeable* and not *purely hypothetical* that the protection of the legal advice would be undermined.

It does not either establish that public access to the opinion would *specifically* and *effectively* undermine the protection of legal advice. The SG thus fails to provide detailed reasons for withholding the requested document as it only gives a general reason which could apply to all legal opinions from the Council legal service.

33. Yet, “*it is, in principle, open to the Council to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose*”¹¹.
34. However, the SG does not in any way examine whether the general reasons invoked are applicable to the specific legal opinion on the choice of the legal basis for the adoption of the Directive. As explained above, the difficulty of the questions raised and the fact that they are subject of discussions within the Council and between the Council and other institutions and among Member States are not reasons to justify confidentiality under Article 4(2) second indent. Indeed, these arguments apply to most of legal opinions drafted by the Council Legal Service within a legislative process. The examination of the Council is thus not carried out in respect of the document requested as it does not explain how the disclosure of the legal arguments according to which the choice Article 194(2) TFEU as a legal basis would undermine the protection of the legal advice provided to the Council and would thus prevent it from seeking frank, objective and comprehensive advice.
35. The arguments of the SG thus do not suffice to establish that the disclosure of the requested document would undermine the protection of legal advice for the purposes of the second indent of article 4(2) of Regulation 1049/2001.

VIOLATION OF ARTICLE 4(3) FIRST SUBPARAGRAPH (INTERNAL DOCUMENTS) OF REGULATION 1049/2001

The public accessibility of the opinion would not seriously undermine the Council’s decision-making process

36. The SG does not demonstrate how disclosure would seriously undermine its decision-making process for the purposes of Article 4(3) first subparagraph.

¹⁰ Ibid, para 65.

¹¹ Ibid, para 50.

37. The arguments set out above also apply here. The fact that the decision-making process is ongoing is specifically the reason why the public should have access to the opinion of the Council Legal Service. Granting access to the legal opinion only once the decision-making process is terminated would not allow the public to participate in this process and would thus directly contravene the principles underlying Regulation 1049/2001 and provided in recitals 2 and 6 of the Regulation's preamble already referred to above.
38. The fact that the opinion has been drawn up in the course of a procedure for the adoption of a legislative act also stresses the need for its public accessibility.
39. The public accessibility of the requested advice would thus in no way "*adversely affect the efficiency of negotiations by impeding internal discussions within the Council and would compromise its capacity to find agreement on the dossier*".
40. Making the legal advice accessible to the other institutions and Member States would not undermine the decision-making process of the Council either. On the contrary, providing these with the reasons why the Council considers the choice of the legal basis appropriate or not would lay down the right basis for a sound discussion between the different interested stakeholders. Furthermore, provisions of legal texts may be subject to different interpretations and interpretations should be debatable.
41. The SG thus does not demonstrate that its decision-making process would be undermined, let alone that it would be *seriously* undermined as required by Article 4(3) first subparagraph, by the disclosure of the requested opinion. Provided the requested legal opinion was public, the Council could still adopt its decisions without any serious obstacles or difficulty. And according to the Court "*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 to the Council to take the necessary measures to put a stop to it*¹²." The SG cannot thus refer to a potential external pressure on its legal service to refuse access.
42. It follows that the SG did not carry out an examination which is specific in nature nor did it assess whether access to the requested document would specifically and effectively undermine the Council's decision-making process. The risk of the Council's decision-making process being undermined was thus purely hypothetical and not reasonably foreseeable.

VIOLATION OF ARTICLE 4(2) LAST INDENT AND ARTICLE 4(3): THE EXISTENCE OF AN OVERRIDING PUBLIC INTEREST

43. The Court, in the Turco case, outlines the arguments the Council has to take into account when assessing whether there is a public interest in disclosure under Article 4(2) second indent of Regulation 1049/2001. The Council also has to assess whether there is such an overriding public interest under Article 4(3).

¹² Ibid, para. 64.

44. The Court provides that *“if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.*

In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, 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.

Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible¹³.

45. It is clear that the SG does not fulfil the test set out by the Court. The SG did not ascertain whether there was an overriding public interest in disclosure, justifying disclosure, despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined. The SG did not balance the protection of legal advice against the public interest in the document being made accessible in the light of the advantages stemming from increased openness.
46. The SG only stated that *“As regards the existence of an overriding public interest in disclosure, 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 two interests so as to justify disclosure of the document”*.
47. The SG thus does not explain why or how the protection of its legal service opinion prevailed over transparency, openness and increasing democracy and its accountability to the citizens.
48. The SG did not either explain how Article 12(2) of Regulation 1049/2001 applies in this case.
49. Yet, because the Council legal service opinion will form one of the legal bases of Regulation 1049/2001 and enshrine considerations underpinning legislative actions, wider access must be afforded.

¹³ Ibid, paras. 44-47

50. The Court further argued that *“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. 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 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.

That finding does not preclude a refusal, on account of the protection of legal advice, to disclose 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.”¹⁴

51. However, as demonstrated above, the legal advice is neither of a particular sensitive nature or of a wide scope that goes beyond the context of the legislative process in question.
52. Moreover, even if the legal opinion was *“of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question,”* it would *“be incumbent on the [council] .. to give a detailed statement of reasons for such a refusal.”* Yet, it follows from all the above considerations that the SG did not give such a detailed statement of reasons for its refusal.
53. Given that the legal opinion of the Council concerns the competence of the European Union to adopt a Directive on energy efficiency (EED) under Article 194 TFEU, there is clearly an overriding public interest in disclosing the document. Disclosure of the requested legal opinion would enable the public to be part of the discussion on the opportunity and legal requirement to adopt the directive on energy efficiency. The Commission's proposal for an EED follows the commitment taken by the European Union to increase its energy savings by 20% in 2020. If the competence of the EU to adopt this piece of legislation was put into question, it would seriously undermine the ability to achieve the 2020 target. The way to achieve this target should be in the public domain.
54. In addition, certain specific provisions relating to the promotion of efficient cogeneration might be specifically concerned by the legal opinion of the Council. The issue of whether the exception laid down in Article 194, paragraph 2, second indent, TFEU is applicable here could affect greatly the future of cogeneration in Europe.
55. It follows from all the foregoing that there is an overriding public interest in disclosing the requested legal opinion for the purposes of Article 4(2) second indent and Article 4(3) of Regulation 1049/2001.

¹⁴ Ibid, paras 67-69.

3. VIOLATION OF ARTICLE 4(6) OF REGULATION 1049/2001: PARTIAL ACCESS

56. Article 4(6) of Regulation provides that “*if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*”.
57. The SG decided to grant access only to the introductory parts of the document and to keep the whole reasoning of the legal service confidential.
58. The SG thus failed to comply with the principle of proportionality and Article 4(6) of Regulation 1049/2001 by refusing partial access to the legal opinion.

59. CONCLUSION

60. With this confirmatory application for reconsideration, the applicant respectfully requests that the General Secretariat grant access to the requested document.
