



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 8 March 2012**

**6762/12**

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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 Martin Andersson (No 04/c/01/12)

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 19 December 2011 and registered on 20 December 2011 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 9 February 2012 ([Annex 2](#))
- confirmatory application dated 20 February 2012 and registered on 21 February 2012 ([Annex 3](#))

[E-mail message sent on 19 December 2011 - 20:23]

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:

Family Name: Andersson

First Name: Martin

E-Mail: martanden@gmail.com

Occupation:

On behalf of:

Address: n/a

Telephone:

Mobilephone:

Fax:

Requested document(s): Please provide the following documents:

18771/11

18770/11

18713/11

18673/11

18646/1/11

18646/11

Thanks in advance

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  
Press  
Communication  
Transparency*

*- Access to Documents/  
Legislative transparency*

RUE DE LA LOI, 175  
B – 1048 BRUSSELS  
Tel: (32 2) 281 67 10  
Fax: (32 2) 281 63 61  
E-MAIL:

[access@consilium.europa.eu](mailto:access@consilium.europa.eu)

Brussels, 9 February 2012

**Mr Martin Andersson**

**e-mail:  
martanden@gmail.com**

**Ref. 11/2158-mj/ns**

Dear Mr Andersson,

Your request of 19 December 2011 for access to documents 18771/11, 18770/11, 18713/11, 18673/11, 18646/11 and 18646/1/11 was registered on 20 December 2011 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). On 19 January 2012, 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:

You may have access to documents 18770/11, 18646/11 and 18646/1/11 REV 1.

We are also enclosing document 18646/2/11 REV 2 which contains the final version of the Council Decision concerning the Commission's proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto.

Documents 18770/11 COR 1 and 18770/11 COR 1 REV 1 are corrigenda to the "A" Item Note from COREPER to Council regarding the Council decision concerning the Commission's proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto.

Document 18771/11 (+ COR 1) is a "A" Item Note from COREPER to Council on a Report from the Commission to the Council on the exception clause submitted to the Council on 13 July 2011 - Supplementary information on the Commission report on the exception clause of 13 July 2011 submitted to the Council on 25 November 2011 - Action before the Court of Justice.

You may have access to the content of these documents, excluding those parts which contain opinions for internal use as part of deliberations and preliminary consultations within the Council and the parts which contain either a legal advice or information about court proceedings which are currently pending. As there is no evidence suggesting an overriding public interest to warrant disclosure of the parts in question, the General Secretariat has concluded that protection of the decision-making process and protection of the court proceedings and legal advice outweighs the public interest in disclosure. Accordingly, pursuant to Article 4(3), second subparagraph, of the Regulation (protection of the Council's decision-making process), and also pursuant to Article 4 (2), second indent (protection of court proceedings and legal advice), the General Secretariat is unable to grant access to the parts in question.

Document 18713/11 is a Presidency Note to COREPER on a Proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto.

You may have access to the content of this document, excluding those parts which contain opinions for internal use as part of deliberations and preliminary consultations within the Council. As there is no evidence suggesting an overriding public interest to warrant disclosure of the parts in question, the General Secretariat has concluded that protection of the decision-making process outweighs the public interest in disclosure. Accordingly, pursuant to Article 4(3), second subparagraph, of the Regulation (protection of the Council's decision-making process), the General Secretariat is unable to grant access to the parts in question.

Document 18673/11 contains an opinion of the Council Legal Service on a Proposal for a Council Regulation adjusting, from 1 July 2011, the rate of contribution to the pension scheme of officials and other servants of the European Union. The requested document contains legal advice, except for its introductory paragraph and paragraphs 1 to 4.

The opinion relates to an ongoing legislative procedure which is currently at a critical stage. Divulgence of the content of the legal advice would therefore risk to adversely affect the efficiency of negotiations by impeding internal discussions within the Council, and could compromise its capacity to find agreement on the dossier and conduct negotiations with other institutions involved. The requested document is therefore protected under the exception of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 (protection of an ongoing decision-making process).

Furthermore, the legal advice primarily deals with the question of the Council's margin of appreciation under the provisions of the Staff Regulations for adjusting the pension contribution rate, which is very similar to the question of the Council's margin as regards the annual adaptation of salaries, which will be the subject of litigation before the ECJ shortly. The advice must therefore be classified as particularly sensitive in nature. Moreover, the legal advice has wide implications, as it is also pertinent for the negotiations on the reform of the Staff Regulations which have just begun.

Divulgence of such legal advice could also affect the ability of the Legal Service to effectively defend a future decision taken by the Council before the Union courts. Since the subject-matter of the legal advice in question is, both legally and politically speaking, complex and sensitive, the Council has, in addition, an increased interest in relying on the opinion of its Legal Service for an effective and correct decision-making process. The Council must be able to trust that such legal advice remain confidential.

Otherwise it could be incited to take into account the risk of a possible disclosure and decide not to request written opinions from its Legal Service on such issues any more. Simultaneously, were the Council obliged to make public such sensitive legal advice, the Legal Service itself might consider it more prudent to refrain from putting in writing - potentially controversial - views which might jeopardize the Council's interests. For all these reasons, divulgence of the contents of this document would undermine the protection of legal advice, an exception contained in the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

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 prejudice two of the protected interests under Regulation 1049/2001, notably the exceptions of the protection of legal advice under Article 4(2), second indent, and of the institution's ongoing decision-making process under Article 4(3), first subparagraph, of the Regulation. 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 the introductory paragraph and paragraphs 1 to 4 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 reply<sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

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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 20 February 2012 - 22:48]**

Dear Mr Thomsen,

I hereby lodge a confirmatory application under Article 7(2) of the Regulation 1049/2001 for the documents that were not released entirely by your decision (Ref. 11/2158-mj/ns) of the 9 February 2012 (docs nr 18771/11, 18713/11, and 18673/11).

I have the following additional remarks in relation to the refusal to provide all of the document 18673/11.

Initially, I wish to recall that the exceptions from the principle of the widest possible public access to documents enshrined in Regulation 1049/2001 are to be interpreted and applied restrictively. As the opinion in question is related to a legislative procedure, this applies *a fortiori*.

As for the reasons provided to justify the decision not to release the documents, you state first that the opinion relates to an ongoing legislative procedure which is currently at a critical stage, and that consequently any divulgence of the content of the legal advice would

- risk to adversely affect the efficiency of negotiations by impeding internal discussions within the Council, and
- could compromise its capacity to find agreement on the dossier and conduct negotiations with other institutions involved.

In order to refuse access to a requested document, it is necessary to explain how access to that document would **specifically** and **effectively** undermine the interest protected by the exception. Your scenario, however, is hypothetical. It doesn't advance any reason, based on the content of the document, why the effect on individual Council members of the documents being released would harm negotiations, rather than e.g. **facilitate** them and **increase** the possibilities to find an agreement.

You state further that the divulgence of such legal advice **could** affect the ability of the Legal Service to effectively defend a future decision taken by the Council before the Union courts. This assertion, however, cannot be considered as a sufficient basis to claim that a specific and effective undermining of the interest protected will occur. Furthermore I wish to draw your attention to the joined Court cases C-39/05 P and C-52/05 P, in whose paragraphs 65 and 66 the Court has already ruled out an analogous argumentation.

The argument that the Council might abstain from asking advice from the Legal Service, or that the Legal Service itself might display reticence and caution in case its advice would be rendered public, is based solely on general and abstract considerations. Similar arguments have already been disqualified by the Court (cf. C-506/08 P, pg 115).

I also grant the Council permission to make my confirmatory application fully public in the Council's document register.

Thanks in advance.

Martin Andersson

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