



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 May 2012

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NOTE

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

Subject : Public access to documents
- Confirmatory application made by Mr Tony Bunyan (No 12/c/01/12)

Delegations will find attached:

- requests for access to documents sent to the General Secretariat of the Council on 13 April 2012 and registered on the same day and 19 April 2012 and registered on the same day ([Annex 1](#))
- reply from the General Secretariat of the Council dated 7 May 2012 ([Annex 2](#))
- confirmatory application dated 11 May 2012 and registered on the same day ([Annex 3](#))

[E-mail message sent on 13 April 2012 - 14:57]

Subject: Request for documents - 13 April 2012

Dear Sir/Madam,

I would be grateful if you could send me a copy of:

Recast of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents - Examination of the note from the Presidency doc. DS 1264/12

Yours faithfully,

Tony Bunyan
(member International Federation of Journalists)

[E-mail message sent on 19 April 2012 - 11:51]

Subject: Request for documents - 19 April 2012

I would be grateful if you could send me a copies of:

Recast of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents - Examination of the note from the Presidency:

DS 1270/12

DS 1276/12

Yours faithfully,

Tony Bunyan
(member International Federation of Journalists)



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THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Press
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

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B - 1048 BRUSSELS
Tel: (32 2) 281 67 10
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E-MAIL:

access@consilium.europa.eu

Brussels, 7 May 2012

Mr Tony Bunyan

e-mail:

statewatch-off@geo2.poptel.org.uk

Ref. 12/0644-12/0691-mi/ns

Dear Mr Bunyan,

Your requests of 13 and 19 April 2012 for access to documents DS 1264/12, DS 1270/12 and DS 1276/12 have 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 DS 1264/12 is a meeting document from the Presidency to delegations and contains a draft compromise text for the recast of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

Document DS 1270/12 is a meeting document from the Presidency to delegations with a synoptic overview of the texts related to the recast of Regulation (EC) No 1049/2001.

Document DS 1276/12 is a meeting document from the Presidency to delegations containing an alternative drafting proposal regarding the recast of Regulation (EC) No 1049/2001.

On 7 May 2008, the Commission submitted a proposal to the Parliament and the Council for a recast of Regulation (EC) No 1049/2001 aimed at amending certain provisions of the Regulation, amongst others, to align the provisions of the Regulation with the "Aarhus Regulation" on access to information in environmental matters and of the case law on access to documents.

Moreover, following the entry into force of the Lisbon Treaty on 1 December 2009, it became necessary to bring the Regulation in line with the new Treaty provisions, notably to extend the public right of access to documents of all the Union's institutions, bodies, offices and agencies (Art. 15(3) of TFEU). The Commission therefore submitted a second proposal to that effect to the Council and the European Parliament on 21 March 2011.

The European Parliament adopted its position at first reading at its plenary session on 15 December 2011. This position incorporates the contents of the proposal for the alignment of Regulation (EC) No 1049/2001 with the Lisbon Treaty into the Parliament's report on the initial proposal for a Recast of that Regulation.

In the Council, the Working Party on Information has met several times to discuss both above mentioned Commission proposals. At present, there are still certain sensitive issues to be discussed within the Council's preparatory bodies before the opening of negotiations with the European Parliament.

The requested documents set out drafting suggestions for internal consideration for delegations at the Working Party on Information on a number of issues that may become part of an overall compromise. Disclosure of the documents to the public at this stage would prejudice the Council's capacity to conduct frank and candid internal discussions on certain highly sensitive issues, on which Member States still have divergent positions, and would therefore seriously affect the chances of finding a compromise on the legislative proposals within the Council. In addition, since the negotiations with the European Parliament are yet to take place, disclosure of internal drafting suggestions intended solely to facilitate discussions at the Council's preparatory body would risk having a significant impact on the Council's position in those negotiations.

In the absence of any element suggesting an overriding public interest to warrant disclosure of the documents 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), first subparagraph of the Regulation (protection of the institution's decision-making process), the General Secretariat is unable to accede to your request for public access at this stage. Furthermore, as the exception to the principle of transparency applies to the content of the entire documents, the General Secretariat is unable to grant you partial access as provided for in Article 4(6) of the Regulation.

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 Regulation in question will 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 Regulation (EC) No 1049/2001.

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

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 11 May 2012 - 13:41]

Subject: Tony Bunyan : Confirmatory application: Re: 12/0647-nh/jj

Dear Jacob Thomsen,

Thank you for you e-mail of 7 May.

Please find attached a confirmatory application.

Yours sincerely,

Tony Bunyan

Attachment

Statewatch

PO Box 1516, London N16 0EW, UK
office@statewatch.org

11 May 2012

Dear Jakob Thomsen,

Thank you for your letter of 7 May 2012.

I herewith lodge a confirmatory application and am happy for it to be made public.

First, by way of general grounds, I would like to make the following point. When considering its position on the proposal to revise Regulation 1049/2001 on the public's right of access to EU documents, the Council is acting in a legislative capacity, together with the European Parliament.

When acting in a legislative capacity the Council is obliged to meet the terms of the Lisbon Treaty - which includes so-called "internal" discussions which are part of the legislative process - in particular Articles 15.1 and 15.3 para 5. The latter states that the Council "shall ensure publication of the documents relating to legislative procedures". In my view this should cover all documents from the beginning to the end of the legislative process.

There is another Treaty-based reason why the above should apply. Under Articles 11.1 and 11.2 citizens, representative associations and civil society have to be given "the opportunity to make known and publicly exchange their views in all areas of Union action" and the institutions have to maintain an open, transparent and regular dialogue with them. How is this possible if they do not know what issues and alternatives are on the table?

Furthermore, Article 1 TEU states that the EU must act 'as openly as possible', and the right of access to documents is enshrined in the EU's Charter of Fundamental Rights, which has the 'same legal value' as the Treaties, according to Article 6 TEU.

The second general point I would like to make is that by assigning the three documents in question to the category of "Meetings documents" or DS documents it removed the obligation for the existence of the documents to be listed on the public register. This seems strange as documents 6439/12, 8410/12, 8698/12, 8884/12 and 9271/12 are listed in the register. From this it might be inferred that there has been a change of policy on the part of the Council in order to conceal the existence of documents concerning a legislative measure of concern to citizens and of fundamental importance in an open, democratic system. If documents relating to legislative

proceedings are not even listed on the register, this undercuts the effectiveness of the obligation of the Council to act in public and to publish documents as regards legislative proceedings, as well as the more general right of access to documents in the Charter and the obligation to act as openly as possible.

As to the complaints:

a) You claim at two points that the three documents concern “sensitive issues” and “highly sensitive issues”. As the General Court observed in *Access-Info v Council*, if this was really the case, why are these documents not classified under Article 9 of the Regulation? More important, however, is that you have not made any argument as to why and in what way these documents contain “highly sensitive” information.

This argument can not be maintained in the absence of valid reasons and reasoning in this regard.

b) You claim that:

“Disclosure of the documents to the public at this stage would prejudice the Council’s capacity to conduct frank and candid internal discussions on certain highly sensitive issues, on which Member States still have divergent positions, and would therefore seriously affect the chances of finding a compromise on the legislative proposals within the Council. In addition, since the negotiations with the European Parliament are yet to take place, disclosure of internal drafting suggestions intended solely to facilitate discussions at the Council’s preparatory body would risk having a significant impact on the Council’s position in those negotiations.”□

Again the view of the General Court in the *Access-Info v Council* case (para 76) supports my view 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 sub paragraph 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... the preliminary nature of the ongoing discussions and the fact that no agreement or compromise has yet been reached in the Council concerning those proposals do not therefore establish that the decision-making process has been seriously undermined.”

and further that:

“the principle, above all in the context of a procedure in which the institutions act in a legislative capacity, and the exceptions must be interpreted and applied strictly If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the

decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.”

It should be noted that the EU institutions are bound by judgments rendered by the EU courts and can not dis-apply the established Turco case law on the basis that an appeal has been lodged in Access Info Europe to try and reverse that case law. Appeals have no suspensatory effect and no interim measures have been granted by the Court of Justice as regards this appeal.

Moreover, the claim that the disclosure of the documents could have a “significant impact” on the Council positions in the negotiations with the European Parliament seems strange. The parliament’s working documents, draft reports and orientation votes are available to the public as are its meetings - this alone seems to indicate that this reason invoked by the Council is unfounded.

c) You claim, extraordinarily, that there is an:

“absence of any element suggesting an overriding public interest to warrant disclosure of the documents in question”

that the:

“protection of the decision-making process outweighs the public interest in disclosure”

The notion that the wish of a legislature to meet in secret (by failing to release the documents being discussed) outweighs the public interest of the citizens on such a fundamental issue, namely the right to know what is being discussed and proposed in a legislative process in order to know and allow for public debate, has no place in a democracy worthy of the name.

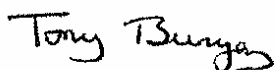
The Council dismisses the issue of overriding public interest without actually addressing it

d) On partial access the Council simply argues, without any reasoning, that:

“the exception to the principle of transparency applies to the content of the entire documents, the General Secretariat is unable to grant you partial access as provided for in Article 4(6) of the Regulation.”

e) In conclusion to suggest that access may be given “after the final adoption of the act”, but still subject to Article 4.3 para 2. again has no place in a democracy worthy of the name.

Yours sincerely,



Tony Bunyan