Council of the
European Union

Brussels, 8 June 2016
(OR. en)

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 13/c/01/16

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 19 February 2016 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 4 May 2016 (Annex 2);
- confirmatory application dated 24 May 2016 and registered on the same day (Annex 3)

[E-mail message sent to access@consilium.europa.eu on 19 February 2016 - 14:44]

From: Helen Darbishire [mailto:ask+request-2611-6f04a0b0@asktheeu.org]
Sent: Friday, February 19, 2016 2:44 PM
To: SECRETARIAT DGF Access
Subject: Freedom of Information request - Article 255 Panel Opinions on Judicial Appointments

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, on behalf of on behalf of Access Info Europe and the NYU-HEC Law Clinic,I hereby seek access to all the Article 255 Panel's opinions regarding all judicial candidates nominated for the CJEU and General Court since the Panel's establishment.

I note that, in the first instance, I am particularly interested in the options of receiving either the opinions on judges currently serving, and/or the positive panel opinions in their entirety, and/or the opinions excluding some aspects of the substantive evaluations.

Should the request be voluminous, particularly in light of the possible need to redact information from the documents, I am at your disposition to discuss narrowing the request.
Please do not hestiate to contact me should any further clarification be needed.

With best regards,

Helen Darbishire
Executive Director
Access Info Europe

Council of the European Union
General Secretariat
Directorate-General Communication and Document Management
Directorate Document Management
Transparency and Access to Documents Unit

Brussels, 4 May 2016

Ms Helen Darbishire
Email: ask+request-2611-6f04a0b0@asktheeu.org

Ref. 16/0414-mjb/dm

Request made on: 19.02.2016
Deadline extension: 11.03.2016

Dear Ms Darbishire,

Thank you for your request for access to documents of the Council of the European Union.

On 19 February 2016 you applied to the General Secretariat of the Council for access to all the opinions issued by the panel provided for by Article 255 of the Treaty on the Functioning of the European Union (TFEU), since its inception. This note is in response to that application for access.

1. Concerning the applicable legal framework:

The documents you are requesting pertain to the suitability of the candidates proposed by the Member States to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court of the European Union. As the panel provided for by Article 255 TFEU has pointed out in its various activity reports, its opinions consist of an assessment of the candidates' legal expertise, professional experience, ability to perform the duties of a judge, language skills and aptitude for working in an international environment in which a number of legal traditions are represented and, finally, an assessment of the guarantees of the candidates' independence and impartiality. The opinions of the panel are sent to the representatives of the governments of the Member States which appoint, by common accord, the Judges and Advocates-General of the European Courts.

1.1. Concerning the application of Regulation (EC) No 1049/2001

As stipulated in Article 255 TFEU, '[a] panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the Governments of the Member States make the appointments referred to in Articles 253 and 254 of the Treaty. (...) The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice'. In application of these provisions, Council Decision 2010/124/EU of 25 February 2010 relating to the operating rules of the panel stipulates that '[t]he General Secretariat of the Council shall be responsible for the panel's secretariat. It shall provide the administrative support necessary for the working of the panel, including the translation of documents'.

It follows from the functional link thus established between the General Secretariat of the Council and the secretariat of the panel provided for by Article 255 TFEU that the opinions issued on the candidates proposed to perform the duties of Judge and Advocate-General are prepared and drawn up by the members of that panel, with material assistance from the administrative departments which the Council oversees and for which it is responsible. The opinions are subsequently forwarded by those departments to the governments of the Member States; for the purposes of such transmission, therefore, the General Secretariat of the Council receives the opinions from the panel and enters into possession of them, even though it is not the final recipient of those opinions.

It follows from the above that the Council has received and is in possession of the documents you are requesting, which pertain to a sphere of activity of the European Union and concern an activity which partly, but only insofar as it involves the administrative tasks mentioned earlier, falls within the remit of the Council. Consequently, your application must be deemed to fall within the scope of Regulation (EC) No 1049/2001, in accordance with Articles 2 and 3 thereof.

Although there may be a functional link between the General Secretariat of the Council and the secretariat of the panel, the fact remains that the panel issues its opinions independently and without interference from the Council, and must be considered as the sole author of those opinions. The panel must therefore be considered as a 'third party' in relation to the Council, within the meaning of point (b) of Article 3 of Regulation (EC) No 1049/2001. Consequently, pursuant to Article 4 of that Regulation, the Council must take account of the position expressed by the panel - and if necessary must consult the panel - as to whether or not its opinions may be disclosed, given some of the exceptions provided for in the Regulation.

1.2. Concerning the application of Regulation (EC) No 45/2001

The Council would stress that, according to established case-law , where a request seeks to obtain access to documents including personal data, the provisions of Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies become applicable in their entirety.

Those provisions make it incumbent on the institution or body concerned to ensure that all the conditions laid down in the Regulation for the processing and transfer of personal data are fulfilled.

2. On the full disclosure of the panel's opinions:

The activity reports show that the panel has been clearly and consistently against disclosing its opinions to anyone other than the Member States, citing inter alia the exceptions provided for in Regulation (EC) No 1049/2001. Following your application for access, the Council nevertheless consulted the panel again; the latter confirmed that it refuses to allow full disclosure of its opinions.

After a thorough examination of your application, and in accordance with the opinion expressed by the panel, the Council considers that the opinions of the panel, regardless of whether they are in favour of or against the appointment of a candidate, cannot be fully disclosed to you for the reasons given above. These reasons provide justification for refusing full disclosure of the panel's opinions without considering each opinion individually, since they contain the same type of information and fall within the same document category .

2.1. Firstly, the panel's opinions contain personal data, including background data for assessing the suitability of candidates to perform the duties of the posts for which they are applying. Such data therefore come under the exception provided for in point (b) of Article 4(1) of Regulation (EC) No 1049/2001.

The Council notes, furthermore, that the applicant has not proved that the disclosure, and hence the transfer, of such personal data is lawful (Article 5 of Regulation (EC) No 45/2001), necessary and proportionate to the pursuit of a legitimate aim (Articles 4 and 8 of Regulation (EC) No 45/2001) or that the transfer of such data will not prejudice the legitimate interests of the data subjects (Article 8 of Regulation (EC) No 45/2001).

On the contrary, the Council considers that in view of the special nature of the personal data contained in the panel's opinions, their disclosure would necessarily undermine the protection of the privacy and integrity of the candidates, even if it occurs after they have been appointed, and even following a favourable opinion on their appointment.

Thus, full disclosure of the panel's opinions must be refused on the basis of the exception concerning the protection of personal data.

2.2. Secondly, the panel's opinions contribute to the quality of the process by which individuals are appointed to the highest judicial offices within the legal order of the European Union. The Council considers that full disclosure of the panel's opinions, and especially of information concerning the candidates' suitability to perform the duties of the post for which they are candidates, would seriously undermine the aims and quality of the consultation and appointment procedures provided for in Articles 253 to 255 TFEU.

Such disclosure would make it impossible to safeguard the secrecy of the internal deliberations of the panel provided for in Article 255 TFEU, or the secrecy of the deliberations of the intergovernmental conference at which the Judges and Advocates-General of the Court of Justice and of the General Court are appointed by the EU Member States. Full disclosure of the panel's opinions would therefore impair the chances of reaching agreement at the intergovernmental conference.

Moreover, full disclosure would in the future cause the panel to be more restrained and guarded when giving the reasons for its opinions, to the extent that it would no longer be able to provide the Member States with a relevant and useful explanation of the rationale for its opinions, whether favourable or unfavourable.

Finally, such disclosure might also dissuade certain qualified individuals from applying in the future because, even if the opinion is favourable, the panel's assessments contain detailed comments on the abilities of the candidates, some of whom might fear a negative impact on their reputation.

Consequently, the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001, concerning court proceedings and legal advice, as well as the exception provided for in Article 4(3) of that Regulation, concerning the risk of seriously undermining the decision-making process of the institution concerned, preclude full disclosure of the panel's opinions.

2.3. Thirdly, it cannot be ruled out that full disclosure of the panel's opinions could seriously undermine the protection of the candidates' commercial interests, in the event that they carry out or intend to carry out paid work as lawyers or legal advisers. The risk that the protection of the candidates' commercial interests could be undermined is even higher where disclosure relates to an unfavourable opinion on the appointment of a candidate.

Consequently, the exception provided for in the first indent of Article 4(2) of Regulation (EC) No 1049/2001 precludes full disclosure of the panel's opinions.

2.4. Nevertheless, as provided for in Article 4(2) and (3) of Regulation (EC) 1049/2001, the exceptions justifying a refusal to disclose personal data do not apply if there is an 'overriding public interest' in the requested disclosure.

After weighing up the various public and private interests at play, the Council considers in this case that the principle of transparency and the interest served by full disclosure of the panel's opinions to the public or to researchers in the field of European affairs do not take precedence over the protection of the quality and effectiveness of the process by which individuals are appointed to the highest judicial offices within the Union legal order, or over the protection of the commercial interests of those individuals.

The Council therefore considers that there is no overriding public interest that would preclude the application of the exceptions provided for in Article 4(2) and (3) of Regulation (EC) No 1049/2001.

2.5. It should also be noted that non-disclosure of the panel's opinions does not deprive the public of any information concerning its structure or functioning.

The composition of the panel and its operating rules have been established by Council decisions published in the Official Journal of the European Union.

Moreover, in its successive activity reports, the panel has made public the general principles governing the consideration and examination of applications, and has set out precise and specific details on the different ways in which applications are assessed, depending on whether the application is for a first term or a renewal, as well as the documents and information it needs to examine the applications.

Finally, through its activity reports the panel gives a regular and detailed account of its actual functioning. These reports contain statistical data on the number of meetings it holds, on the time taken to examine applications, and on the number of opinions issued, specifying the distribution of the opinions, whether they were favourable or unfavourable, and their outcome.

It follows from all of the above that the General Secretariat of the Council cannot agree to a request for full disclosure of the panel's opinions, on the grounds that such disclosure would mean disregarding the obligations incumbent on it under Article 4(1), (2) and (3) of Regulation (EC) No 1049/2001.

3. On the partial disclosure of the panel's opinions:

As invited to do in your request, the General Secretariat of the Council has examined the possibility of partially disclosing the panel's opinions.

In line with the opinion issued by the panel, such disclosure is possible only insofar as it does not concern the data or elements of the opinions which are protected by the exceptions provided for in Article 4 of Regulation (EC) 1049/2001, as discussed above.

In that respect, the General Secretariat of the Council has decided to agree to your request. Please note that the General Secretariat of the Council is aware that there is no real information value in having access to the parts of the opinions which are not covered by the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001. That is why you will find extracts from the first ten opinions issued by the panel in 2016 by way of a sample. If you believe it would be useful, the General Secretariat of the Council is prepared to give you similar partial access to other opinions, although in the light of the vast number of opinions issued by the panel since its establishment, this access would be limited to opinions issued as of 2015.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Jakob THOMSEN

Enclosures

ANNEX 3

[E-mail message sent to access@consilium.europa.eu on 24 May 2016 - 17:00]

Access Info Europe

Cava de San Miguel 8, 4C

28005, Madrid

General Secretariat of the Council of the European Union
DG F – Communication
Rue de la Loi 175
B-1048 Brussels

24 May 2016

Dear Sir/Madam,

Re: Council General Secretariat Ref. No. 16/0414-mjB/dm

Confirmatory application made by Access Info Europe and the NYU-HEC Law Clinic for access to Council documents in response to our request submitted on 19 February 2016 regarding the activity of the panel established by Article 255 TFEU.

The full request chain may be found on the AsktheEU.org website here:
www.asktheeu.org/en/request/article_255_panel_opinions_on_ju

Pursuant to Article 7(2) of Regulation (EC) 1049/2001, and having been refused our original request for access to Council documents dated on 19 February 2016, we hereby submit a confirmatory application for access to Council documents in response to your refusal to grant these documents dated 4 May 2016.
Under the right of access to documents in the EU Treaties, as enshrined in Regulation (EC) 1049/2001, we submitted our original application in order to request access to copies of the opinions given by the Panel provided for by Article 255 of TFEU for all judicial candidates for the Court of Justice and the General Court since its establishment.

Since the Council has refused our original request, we now file this confirmatory application pursuant to Section 2 of that Article. Specifically, we reaffirm our right of access to documents in the EU Treaties and hereby request of access to the following documents:
a. Opinions given by the Panel provided for by Article 255 of the TFEU for all judicial candidates for the Court of Justice and the General Court since its establishment.
Should you refuse to grant us access to documents under (a), we request access to:
b. Opinions given by the Panel provided for by Article 255 of the TFEU for all actual members of the Court of Justice and the General Court.

2. In response to the reasons stated in your letter dated 4 May 2016, denying our request for access, we submit the following:

A. Judges' privacy interest is not protected by non-disclosure of Panel Opinions (exception contained in Article 4 (1) let. b)) Regarding the statement in the 4 May 2016 rejection letter that granting us access to these opinions would 'necessarily undermine the protection of the privacy and integrity of the candidates…in view of the special nature of the personal data contained in the panel's opinion', we would like first to request a clarification as to the definition of "personal data" upon which you rely. We note that both Regulation (EC) 45/2001 and Directive 95/46/EC define "personal data" as "any information relating to an identified or identifiable natural person", which the European Commission has stated includes "any information relating to an individual, whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address... bank details...posts on social networking websites...medical information" [1] While we do seek the names and certain bibliographic information of candidates to the Courts, which we argue should be released for reasons of overriding public interest as laid out in section D of this confirmatory application, we do not seek information such as medical records or bank statements. Moreover, we note that, as written in the Panel's yearly activity reports, it appears that much of the information on which the Panel bases its opinions are the candidate's CV and capabilities, which we understand to be public credentials, not personal information.[2] Such credentials are the type of information that is usually accessible to the public via the Internet, and it is common for judges to make publicly available information such as the positions they have held, languages they speak, and the educational institutions they attended. We would argue that such credentials likely do not constitute "personal data." Without explanation as to what the Council includes in this term, we must assume that not all of the information about the candidates received by the Council qualifies as "personal data." Unfortunately the redacted versions of the panel opinions you granted us do not enable us to determine the nature of the personal data, as they contain none, not even the public credentials of the candidates.

If it can be shown that the information and documents used to assess the suitability of the judicial candidates contain "personal data" as defined by European legislation, we would like to clarify and emphasise that we request only the information related to the judicial candidates' qualification to serve on the Court of Justice and the General Court—their credentials and the reasoning employed by the Panel in accepting or rejecting these candidates—and therefore we are ready to accept justified redactions of other "personal data."

We note that the letter we received dated 4 May 2016 does not provide an explanation for the statement that "their disclosure would necessarily undermine the protection of privacy and the integrity of the candidates", "even if it occurs after they have been appointed". We believe that if even if it were appropriate for some such information to be protected, a redacted version of the opinions containing some information, such as public credentials, would not automatically lead to a breach of privacy.

Importantly, if the opinions themselves contain "personal data" as defined by European legislation, such "personal data" refers only to information about the candidate, and not to "an assessment of his suitability to the position he is proposed for", as you stated in your letter. The assessment itself is not "personal data", and therefore falls outside of the exception Article 4(1) let b) of Regulation (EC) 1049/2001. If for some reason the assessment does contain such personal data, a redacted version of the opinion can be provided.

Additionally, the argument that these opinions would be covered by the exception within Article 4(1) let. b) of Regulation (EC) 1049/2001, protection of privacy and integrity of the individual, does not address our argument that the EU's overriding policy interests of openness, transparency and legitimacy outweigh any potential privacy concerns. We would like to reemphasize that the

exception laid down in Article 4(1) let. b) of Regulation (EC) 1049/2001 should not be applied to our request. While the relevant opinions of the Panel, which include an assessment of the suitability of the candidates for the office of member of the Court of Justice or at the General Court of the European Union, likely contain some personal data within the meaning of Article 2(a) of Regulation (EC) 45/2001, this does not automatically imply that access to the opinion should be denied. Rather, as interpreted by the Court of Justice,[3] institutions should, in dealing with a request for access to documents containing personal data, apply the provisions of Regulation (EC) 45/2001. Under the provisions of Regulation (EC) 45/2001, publication of personal data could be justifiable if the disclosure is necessary in a democratic society for a legitimate public interest. In addition, personal data could be transferred under Article 8(b) of Regulation (EC) 45/2001 if the proponent of disclosure establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Where the Court of Justice has denied requests for access to documents containing personal data, it has focused on the lack of necessity and lack of a legitimate justification for the requested documents.[4] In contrast, we can demonstrate that, with respect to the Court of Justice, EU citizens have a legitimate interest in knowing the names of judicial candidates to the Courts and the reasons the Panel recommended for or against their election. The names and credentials of judges are essential to ensuring trust in EU institutions, and are in line with the EU's principles of transparency, openness, and democracy, as elaborated below of this confirmatory application. Moreover, the names and credentials of judges are intimately tied to the rights of European Citizens to access to documents under Article 42 of the EU Charter of Fundamental Rights.[5] Additionally, because almost all of the judicial candidates for whom we request access to the Panel's opinion have already been appointed to the post, none of his or her legitimate interests appear at stake. The judges of the Court of Justice "cannot demand the anonymity of earlier years, hiding behind literal or metaphorical wigs."[6] This reasoning applies equally to judges who were not recommended for appointment by the Panel; the public has a right to know the reasons for which a candidate is deemed unsuitable for the position. This increases the legitimacy of the Courts and does not necessarily harm the rejected candidate; for example, in countries in which judicial candidates for the highest court are confirmed by a public hearing, such as in the United States, it has been shown that making public the reasons for which a candidate was confirmed or rejected can increase both the independence and legitimacy of a court in the eyes of the public, without harming the reputation of rejected candidates, who were largely rejected based on legitimate factors such as partisanship, political philosophy, or insufficient experience.[7] This is in keeping with the fact that judges are beholden to internal and external pressures in they must maintain a strong judicial reputation within the judiciary and outside of it, and it has been shown repeatedly that both internal and external pressures are vital to the functioning and overall reputation of courts.[8] We understand that the Council is worried about potential reputational repercussions for judicial candidates following the release of opinions regarding their candidacies. However, the Panel's ultimate decision-making process is aimed at creating the most independent and legitimate CJEU possible and its strengths must be judged accordingly. Hiding behind alleged reputational repercussions overlooks the fact that a judge's integrity—and therefore his (and the Panel's) legitimacy—is likely to be affirmed by disclosing the reasons for which the Panel supported his or her appointment to the CJEU. Even in cases where a candidate is not recommended by the Panel, disclosing the reasons for which judicial candidates are rejected generally increases independence and legitimacy in the eyes of the public and allows citizens to ascertain whether the rejection of that candidate was fair or not.[9] This appears all the more true in those numerous Member States in which a public selection of the candidates is organised. The national candidates who have not been selected and put forward by their governments are entitled to know how the selected candidate has performed in front of the 255 panel.

Reputational issues should likewise not be problematic vis-à-vis Panel Opinions, which are not to contain degrading or demeaning elements concerning the candidate under any circumstances. Jean Marc Sauvé, Panel President since its creation, recently detailed the two potential causes for a negative opinion from the Panel:[10] a candidate's lack of professional experience in high-level judicial institutions, or his insufficient knowledge regarding the EU judicial or legal system. As such, a negative Panel Opinion does not undermine the candidate's ability to hold a national-level position; it should have no more than limited effects on his or her career.[11] A Nobel-Prize-winning economist, Peter Diamond, failed to qualify to join the US Federal Reserve board of governors[12].
Moreover, the same 255 panel provides in its annual report an extremely detailed analysis of the circumstances that led it to adopt a negative opinion. This significantly contributes to the identification of 'what went wrong' in relation to every single candidate, without however enabling the wide public to understand how the Panel assessed the candidate[13]. Once more, the Council bases its central privacy argument on protecting personal information that is already public. Ironically, the only information it effectively shields through non-disclosure of the Panel Opinions is a transparent, detailed understanding of the Panel's selection process. Indeed, the argument that disclosure of candidates' identities violates their privacy (point b of Article 4(1) of Regulation 1049/2011) does not seem convincing in the era of the Internet. All candidates are – by definition – public figures and their identity is disclosed when they are designated by their own country. More important, the private nature of the proceedings has not shielded unsuccessful candidates from public exposure. It is relatively easy to trace unsuccessful candidates online[14]. Passing comments by public officials regarding a rejected candidate, when coupled with a simple Internet search, reveal significant information regarding the name and circumstances of the candidate[15]. Scholars have also identified Member States that have proposed candidates who received negative Opinions[16].

B. Disclosure of the Panel Opinions would not jeopardize the candidates' commercial interests ((exception contained in Article 4 (2)) The Council argues in its letter of 4 May 2016 that "it cannot be ruled out that full disclosure of the panel's opinions could seriously undermine the protection of the candidates' commercial interests, in the event that they carry out or intend to carry out paid work as lawyers or legal advisers". Such a risk would be even more important, the Council argues, "where disclosure relates to an unfavourable opinion on the appointment of the candidate".
Here it suffices to note that the Council failed to explain how disclosure of the requested documents could 'specifically and actually undermine the interests protected by the exception among those provided for in Article 4 of Regulation 1049/2001"[17].
This argument, as reflected in the negative language used by the Council, does not appear convincing. This appears all the more true when one considers:
- first, the voluntary nature of the candidacy to become a member of the Court and,
- second when examined in the light of the requirements for EU judicial appointment, as enshrined in Article 254 TFEU and further elaborated by the 255 panel.
Anyone who put himself / herself forward for the Court of Justice of the EU and the General Court must accept that his / her suitability for the job will be scrutinised by the 255 panel TFEU in the light of the requirements enlisted by the Treaty. In so doing the panel is not asked to verify the general competences of the candidate as a lawyer of legal adviser but a narrower set of skills required to the performance of a very specific job. It is inherent to the choice of someone to become a member of the court and to the task of the 255 panel that the candidate's competences be publicly assessed for the reasons discussed under A supra. The 255 annual reports of activities state that candidates are evaluated based on two set of criteria—the legal capacities of the candidate and his professional experience (level, length, diversity). Should it be proven that disclosure might somehow affect the commercial interests of the candidate, this could only occur in relation to the

former set of criteria, certainly not the latter. Once more, the current stance adopted by the Council (full confidentiality of the contents of the 255 opinions) appear disproportionate to its declared goals.
We also note with concern that the Council has failed to do any more than make very general references to the lack of an overriding public interest test for the commercial interest exception. There is an onus on the Council to explain how, in this specific case, such interests would be prejudiced, something that it has failed to do and that, by way of this confirmatory, we urge it to review, taking into full consideration the various public interest arguments that we hereby present.

C. Disclosure of the Panel Opinions would not jeopardize the Panel's functioning ((exception contained in Article 4 (3)) The Council in its letter of 4 May 2016 rejects our request as "full disclosure of the panel's opinions… would seriously undermine the aims and quality of the consultation and appointment procedures provided for Articles 253 and 255". While this claim invokes verbatim the exception to disclosure set forth in Article 4(3) of Regulation 1049/2001, it does little to explain how disclosure of the Panel Opinions could foreseeably and more than hypothetically cause serious harm to the Panel's decision-making process. Simply put, the Council claims that disclosure would "make it impossible to safeguard the secrecy of the internal deliberations of the panel…or the secrecy of the deliberations of the intergovernmental conference at which the Judges and Advocates-General of the Court of Justice and General Court are appointed by the EU Member States", thus impairing "the chances of reaching agreement at the intergovernmental conference"[18].
On this point, it is sufficient to observe that the secrecy of a deliberation – which governs also the work of the Court of Justice – is not automatically compromised by the publication of a final decision. It is indeed possible to convey to the reader both the process and outcome of a given decision without automatically unveiling the positions taken by the various actors taking part to that decision. Moreover, it is not clear in what way the disclosure of the panel's opinions would affect "the chances to reach an agreement" by the Member States insofar as those have all access to those opinions and the full contents therein.
The Council also argues that disclosure would render the Panel more restrained and guarded with the result of drafting less detailed—and therefore less useful—Opinions[19]. Once again, we are faced with the argument that more transparency would actually lead to less transparency, an argument that was not persuasive before the European Court of Justice when put forward in the case Access Info v Council of the European Union.[20] The Council's argument seems in particular to be based on the fear that the disclosure of Panel Opinions would have a chilling effect on the willingness of qualified judicial actors to present themselves as candidates, were they to know that information about their selection (or not) would be made public - which would thwart the Panel's decision-making process ex ante[21]. However, this argument is flawed because "the [current] confidentiality policy is prone to speculation, chattering and manipulation" since the deliberation process is removed from public scrutiny.[22] Publicising the Panel Opinions could therefore actually mitigate the reputational risk involved for each candidate in practice.
The Panel's official activity reports highlight objectivity, neutrality and independence as Panel obligations.[23] The reports state that candidates are evaluated based on two criteria—the legal capacities of the candidate and his professional experience (level, length, diversity)—to be assessed in as impartial a manner as possible. Disclosure of such factual information would not force the Panel to change its decision-making process or render its Opinions devoid of substance. Instead, disclosure would likely streamline the Panel's functioning by deterring Member States from offering up candidates unlikely to meet the requirements of the office, improving efficiency of the selection process.

In the end, we are not claiming that the Panel Opinions will never contain information barred from public disclosure. If any portion of a given Opinion is legitimately deemed overly sensitive, it may be redacted from the disclosed version. However, the complete lack of transparency regarding the Panel's activities – as confirmed by your letter of 4 May 2016 – is more likely to undermine its ability to function than the publication of (parts of) the Panel Opinions.
The Panel itself recognises the need for greater transparency is in its reports[24]—and it should follow the criteria it champions, instead of arguing for non-disclosure.

D. The public has a legitimate, overriding interest in seeing all Panel Opinions Even if the Council's arguments against disclosure of Panel Opinions are deemed to be convincing (notably, Article 4 (2) and Article 4 (3)), the public interest in accessing the Panel Opinions overrides the exceptions upon which the Council bases its position. The Council's response letters fail to adequately address our arguments in this regard[25], which are relevant on three fronts.
Firstly, the CJEU has held that an overriding public interest may be found in Regulation 1049/2001's underlying principles: openness, democracy, and giving "the fullest possible effect to the right of public access to documents."[26] If there were ever a legitimate need for openness and democracy, it is vis-à-vis the composition of the CJEU—which functions as the EU's supreme court and plays a quasi-legislative role in giving meaning to EU legislation. The European public must have a way of establishing a check on the independence, qualifications, and experience of members of this supreme judicial body. This issue is especially time-sensitive given the ongoing implementation of the General Court's reform (entailing inter alia the doubling of its membership),[27] and the Panel is set to prepare Opinions on at least 14 new candidates in in 2016. And the stakes are as high as they have ever been: although non-binding, all Panel Opinions to date regarding CJEU judges have been followed.[28] Secondly, under Article 4(3) of Regulation 1049/2001, an overriding public interest compels disclosure of documents even where they seriously undermine an institution's decision-making process. Recital 2 of Regulation 1049/2001 declares:
"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. Openness contributes to strengthening the principles of democracy and respect for fundamental rights..."[29] It is then contradictory that the Panel (and, in turn, the Council) continue to justify opacity in the name of the Panel's functioning. The Panel itself is meant to increase the CJEU's legitimacy by ensuring its judges are of the highest standards. Surely, this mandate would be best served by increased openness—fostering accountability to citizens and respect for fundamental rights.
Limiting public oversight of Panel Opinions may have a long-term corrosive effect on public access to EU documents. Opaquely-appointed members of the CJEU will determine the extent of EU institutions' commitment to transparency as well as that of their appointing Member State. Operating rules written by the Panel itself will continue to serve to insulate its work from scrutiny instead of providing it guidance. The conflict of interest is too great, and we ask you to restore balance and transparency to the situation. Challenging your refusal in front of the EU Courts would inevitably result in the very same individuals whose suitability reports are at stake deciding upon the merit of their disclosure. We do not rule out such an avenue in case of lack of further disclosure.
Thirdly, Article 8(b) of Regulation No 45/2001 dictates that documents containing personal data must be disclosed if the requestor establishes the 'necessity' of having the data transferred, and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.[30] This means that even the Panel Opinions, which contain personal data within the meaning of Article 2(a) of Regulation 45/2001, may be disclosed if the disclosure is necessary in a democratic society for a legitimate public interest.[31] Especially for candidates already appointed to the courts—and therefore already public servants—the legitimate public interest logically overrides their right to

privacy. [32] An agent for the European Data Protection Supervisor (EDPS), tasked with ensuring that European Community institutions respect data protection, argued in court that professional data, such as that contained in the Panel Opinions, should tilt in the direction of disclosure.[33] The EDPS judged that professional data is of a different nature than personal data and does not deserve the same protection. A similar line of argument has recently been endorsed by Advocate General Cruz Villalon, who argued that 'the 'necessity' to which Regulation No 45/2001 refers cannot be understood with the same rigour or scope when access is sought to documents quite devoid of public interest as when the application concerns information of obvious public interest and relating to an individual's professional activities...'.[34] According to the Advocate General, the concept of 'necessity' must, therefore, be relaxed to a certain extent when the personal data is not, so to speak, the main object of the request for information, but the request relates instead to documents of a public nature that incidentally include information relating to individuals and, as such, contain 'personal data'. Admittedly, the data is 'personal' in so far as it contains 'information relating to an identified … natural person' (Article 2(a) of Regulation No 45/2001), but this is prima facie 'professional data' and therefore less sensitive than information falling within the ambit of privacy or private life sensu stricto'.[35] In its recent decision, the EU Ombudsman also noted that "personal data relating to the professional competence and activities of a public figure, especially a person actually appointed to a high level public post, may not require the same level of protection as might apply in other circumstances"[36].

It is in light of the above that we claim that, when weighed against democratic concerns, the CJEU simply "cannot demand the anonymity of earlier years, hiding behind literal or metaphorical wigs."[37] If the Council determines that full disclosure would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001, the Council should make the most minimally redacted versions possible of all Panel Opinions publicly available in the light of the indications provided for the EU Ombudsman[38].

We trust that this confirmatory application will be addressed expeditiously and within the time limits set forth in Regulation (EC) 1049/2001. We thank you in advance for your timely and complete response.

Yours faithfully,

Helen Darbishire, Executive Director, Access Info Europe
Also acting on behalf of the NYU-HEC Law Clinic

Madrid, 24 May 2016

Footnotes:
1 European Commission, Why Do We Need An EU Data Protection Reform?, available at ec.europa.eu/justice/data-protection/document/review2012/factsheets/1_en.pdf.
2 Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union, Third Activity Report, SN 1118/2014, p. 13 (2013).
3 See, e.g., Commission of the European Communities v. The Bavarian Lager Co. Ltd, Case C?28/08 P, 29 June 2010.
4 See id. (holding that the names of the attendees to a meeting are "personal data" under Article 2(a) of Regulation No 45/2001 and that Bavarian provided no "legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred.").
5 See Kate Malleston, Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom, 44 Osgoode Hall L. J. 557, 560-61 (2007), available at http://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss3/7/ ("Citizens have a right to be properly informed about the people who sit in their top courts and determine controversial issues of great moral and political sensitivity.")
6 Id.
7 The reasons a candidate was not appointed to the United States Supreme Court are openly discussed. See, e.g. eJournal, Issues of Democracy, Bureau of International Information Programs, U.S. Department of State (April 2005), available at photos.state.gov/libraries/amgov/30145/publications-english/EJ-courts-0405.pdf. See also William G. Ross, The Ratings Game: Factors that Influence Judicial Reputation, 79 Marq. L. Rev. 401 (1996).
8 See Nuno Garoupa & Tom Ginsburg, Judicial Audiences and Reputation: Perspectives from Comparative Law, 47 Colum. J. Transnat'l L. 451 (2009).
9 Id. at 14 (citing Issues of Democracy, Bureau of International Information Programs, U.S. Dept. of State).
10 See Jean-Marc Sauvé, Selecting Europe's Judges: A critical appraisal of appointment processes to the European courts (College of Europe, 4 November 2013, Bruges); see also Jean-Marc Sauvé, The role of the Advisory Panel of Article 255 TFEU in the separation of powers within the European Union at the occasion of the 130th anniversary of the French High Judiciary Council (Conseil supérieur de la magistrature, 24 October 2013, Paris).
11 For example, Joseph Filletti, a Maltese candidate for the General Court who received an unfavourable Opinion later became Malta's permanent representative on the Council of Europe. See Judge Rejected for EU Court, Times of Malta, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; http://www.coe.int/t/cm/PRs_en.asp; see also Jean-Marc Sauvé, Selecting European Union's Judges: The Practice of the Article 255 Panel in M. Bobek, Selecting Europe's Judges, OUP, 2015.
12 The Economist, The Right Kind of Reform, May 21 2016,
13 Alberto Alemanno, How Transparent is Transparent Enough?, in M. Bobek, Selecting Europe's Judges, OUP, 2015.
14 See, e.g., Judge Rejected for EU Court, Times of Malta, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; Stefan Strömberg anses ej lämplig som EU-domare, Realtid.com, http://www.realtid.se/ArticlePages/201208/03/20120803151050_Realtid881/20120803151050_Realtid881.dbp.asp; see generally Tomáš Dumbrovsky, Bilyana Petkova and Marijn Van Der Sluis, Judicial appointments : the Article 255 TFEU advisory panel and selection procedures in the Member States, Common Market L. R., 51: 455, 461 (2014).
15 For example, Dr. Niilo Jääskinen, an Advocate General of the CJEU, publicly stated that the Panel had rejected a candidate for the General Court from Sweden in his speech: Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape (15 February 2013). As a result, Internet sources such as Realtid have published articles disseminating the information. Stefan Strömberg anses ej lämplig som EU-domare, supra note 13.
16 See Tomáš Dumbrovsky et al., supra note 13, at 459.
17 See, e.g. Case T-115/13 Dennekamp v European Parliament, para 9.
18 Council letter 4 May 2016, para 2.2.
19 Ibidem.
20 Case C-280/11 P - Council v Access Info Europe.
21 Council letter 4 May 2016, para 2.2.
22 See Alemanno, supra note 17, at 14.
23 See, e.g., Activity Report of the Panel.
24 See id. at 3.
25 Letter by the Council, para 2.4.
26 Preamble, Regulation 1049/2001; see also Recital 2 of Regulation 1049/2001; see generally Joined Cases C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v Council of the European Union [2008] ECR I-04723.
27 Press Release, Court of Justice of the EU, Reform of the EU's Court System, 28 April 2015 available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150044en.pdf
28 Third Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union at p.10 (emphasis added), available at http://curia.europa.eu/jcms/jcms/P_119470/
29 Recital 2, Regulation 1049/2001.

30 See, e.g., Joined Cases C-92/09 and C-93/09 Schecke [2010] ECR I-11063; Case C-28/08 European Commission v. The Bavarian Lager Co. Ltd [2010] ECR I-6055, paras 75–79; Case T-190/10 Hackett v. European Parliament [2012] nyr.
31 Alemanno, supra note 17, at 13.
32 See Schecke (n 36), para 85 and European Commission v. The Bavarian Lager Co. Ltd (n 36), paras 75–79 ("[T]he institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognized by Articles 7 and 8 of the Charter.")
33 EDPS pleading before the General Court, Case T-115/13 Dennekamp v European Parliament, nyr. Available at https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Court/2014/14-11-17_EDPS_pleading_Dennekamp_II_EN.pdf
34 See Opinion of Advocate General Cruz Villalon, in Case C-615/13 P, ClientEarth et al. / European Food Safety Authority, nyr, para 53.
35 See id. para 55.
36 European Ombudsman, decision on complaint 1011/2015/TN, para 24.
37 See Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom', (2007) 44 OSGOODE HALL L J 557, ('Citizens have a right to be properly informed about the people who sit in their top courts and determine controversial issues of great moral and political sensitivity.').
38 European Ombudsman, decision on complaint 1011/2015/TN, para 24.