



Council of the  
European Union

Brussels, 5 September 2016  
(OR. en)

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**NOTE**

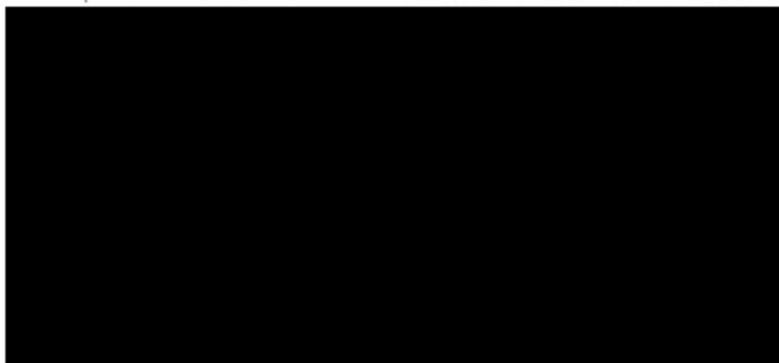
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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 18/c/01/16

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 8 June 2016 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 5 July 2016 ([Annex 2](#));
- confirmatory application dated 26 July 2016 and registered the same day ([Annex 3](#))



General Secretariat of the Council of the European Union  
DG F - Transparency  
rue de la Loi/Wetstraat 175  
B-1048 Bruxelles/Brussel

Brussels, 08 June 2016

Dear Sir/Madam,

Under the right of access to documents in the EU Treaties, as developed in Regulation 1049/2001, I hereby request full access to the following documents:

Legal Advice 14704/14

I would prefer for this information to be sent to me in machine-readable electronic format, to the email address provided below.

Thank you in advance.

Yours sincerely,





**Council of the European Union**

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

Brussels, 5 July 2016

**DELETED**

Email: **DELETED**

Ref. 16/1440-jb/mf

Request made on: 08.06.2016

Registered on: 14.06.2016

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

Please find attached a partially accessible version of document 14704/14.<sup>2</sup> However, I regret to inform you that full access cannot be given for the reasons set out below.

The requested document contains a contribution of the Legal Service of the Council concerning the possible Council participation to the Inter-Institutional Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation.

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<sup>1</sup> The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 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, OJ L 325, 11.12.2009, p. 35).

<sup>2</sup> Article 4(6) of Regulation (EC) No 1049/2001.

The decision-making process to which the requested document relates is currently ongoing. The Council has not yet taken a position on the issue dealt with by the legal contribution, which is complex and forms a fundamental part of the ongoing internal discussions. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence risk compromising the capacity of the Council to reach an agreement on the dossier. Moreover the Council's eventual participation in the Inter-Institutional Agreement will have to be negotiated with the other institutional actors involved. The disclosure of the document would make known to all interlocutors the Council's internal reflections and concerns and would therefore limit its options during possible upcoming interinstitutional negotiations. For those reasons, disclosure of the requested document would undermine the decision-making process.<sup>3</sup>

The legal advice covered by this opinion deals with issues which are contentious and which constitute critical elements in the negotiations. The legal advice is therefore sensitive. Disclosure of such a document would therefore undermine the protection of legal advice.<sup>4</sup> 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. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend the negotiating position of the Council in the possible upcoming interinstitutional negotiation or eventually its possible decision to participate in the Inter-institutional agreement. 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.

As regards the existence of an overriding public interest in disclosure the requested document in relation to the interests in protecting the ongoing decision making procedure and in having a frank, objective and comprehensive legal advice under Regulation (EC) No. 1049/2001, 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 indicated interests so as to justify disclosure of the documents.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested document. However, in accordance with Article 4 (6) of the Regulation (EC) No. 1049/2001, you may have access to paragraphs 1 - 15 of the legal contribution.

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<sup>3</sup> Article 4(3) of Regulation (EC) No 1049/2001.

<sup>4</sup> Article 4(2), second indent, of Regulation (EC) No 1049/2001.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).<sup>5</sup>

Yours sincerely,

Jakob THOMSEN

Enclosure

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<sup>5</sup> Article 7(2) of Regulation (EC) No 1049/2001.  
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 26 July 2016 - 11:52 ]

**From:** **DELETED**

**Sent:** Tuesday, July 26, 2016 11:52 AM

**To:** SECRETARIAT DGF Access; THOMSEN Jakob

**Cc:** **DELETED**

**Subject:** Confirmatory Application document 14704/14

Dear Mr. Thomsen,

In response to your letter of 5 July 2016, I would like to hereby ask the Council to review its decision by filing a confirmatory application, pursuant to Art. 7 (2) of (EC) 1049/2001. My request is to have full access to document 14704/14. Please find my confirmatory application attached.

Kind regards,

**DELETED**

## Confirmatory Application

### Full access to document 14704/14

The fundamental right of access to EU documents is enshrined in TFEU, Art. 15 (3), together with (EC) 1049/2001, Art. 2 (1). Furthermore, TEU Art.10 (3), Art.11 (2) and Art.11 (3), relate to the open decision-making process of the EU with the participation of citizens, an open and transparent dialogue with civil society and broad consultations with the parties concerned. In addition, the Charter of Fundamental Rights provides the right of access to personal files and a general access to documents.

### Exception based on decision making process: Art. 4 (3)

The refusal of full access to documents of 14704/14 violates the 'right of access to documents of the Union's institutions, bodies, offices and agencies' established in TFEU Art. 15 (3), as well as (EC) 1049/2001 Art.2 (1), which states that 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions'. Although the right of access is not unlimited, I maintain that the refusal of full access has not been well motivated and, in particular, does not demonstrate why in this particular case the exceptions to the right of full access would be applicable.

Case-law of CJEU rulings illustrate that refusal of (full) access to documents based on the exceptions in (EC) 1049/2001(4) has to be justified in detail.<sup>6</sup> A general reference to the fact that the internal deliberations of the Council have not been ended, will not suffice. In particular, it is difficult to understand from Mr. Thomsen's letter how disclosing a legal advice on the possible implications for the Council based on the current text of the inter-institutional arrangement on the transparency register could seriously undermine the institution's decision-making process. By its very nature, the advice will only provide the Council with information and is not reflecting the position of any particular Member State. Similarly, it is not made clear how in the context of the possible negotiations with the Parliament and the Commission on the Council's eventual participation in the Inter-Institutional Arrangement on the Transparency Register, the publication of the legal advice 'would make known to all interlocutors the Council's internal reflections and concerns and would therefore limit its options' during the possible inter-institutional negotiations. This might have held for detailed minutes of the internal deliberations of the Council, but the legal advice as such would not normally reveal Member States' positions.

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<sup>6</sup> CJEU, Judgement of 27 February 2014, Commission/Enbw Energie Baden Württemberg (365/12 P, no.64) with further proof.

Therefore, I would like to ask the Council to provide detailed information on the extent to which full disclosure of document 14704/14 would seriously undermine the decision-making process of the Council.

But even if the Council were able to demonstrate that disclosure of the legal advice would seriously undermine the Council's decision-making process, I still maintain that there is an overriding public interest in disclosure in accordance with Art. 4(3). I would like to ask the Council to demonstrate why the interest of the Council is substantial enough to seriously undermine the public interest by hampering EU citizens to participate closely in the EU decision-making process.

As I stated in the introduction, in accordance with the TFEU, the EU should strive towards an open decision-making process. This holds of course especially in the case of the Transparency Register, which itself serves to enhance transparency on the EU's decision-making process and is of direct importance for the public. Moreover, Members of the European Parliament take a direct interest in any legal implications for the Council of the current Inter-Institutional Agreement, as the European Parliament is together with the European Commission responsible for the management of the Joint Transparency Register. If such legal implications are known, it will help the Commission in drafting its proposals for a mandatory transparency register, and the European Parliament in its own thinking regarding the register. Instead of seeing the other European institutions as 'other parties', the Council should see the three institutions as partners working for the public interest in the field of transparency of the EU decision-making process. In my opinion, this certainly represents an overriding public interest in disclosure. In this respect too, I ask the Council for further clarifications.



## **Exception based on protection of legal advice**

I would like to ask the Council to demonstrate more specifically how and why publication of the information would harm a legitimate interest protected by the exceptions extracted from (EC) 1049/2001 Art. 4 (2). In its letter in reaction to my request for access to documents, the Council states that fully disclosing the legal advice 'would limit its options during possible upcoming inter institutional negotiations.' However, as the legal advice relates to the previous negotiations, this cannot be considered a valid argument. Regarding the implications of the current IIA, it is not clear how this would possibly harm the position of the legal service. The requested legal advice is a factual legal analysis of an existing situation. Against that background, I cannot understand that the disclosure of this analysis would undermine the options of the Council in the upcoming negotiations on a mandatory transparency register. Against this background, I ask the Council to demonstrate its considerations for invoking the exceptions to public access in accordance with Art. 4 (2).

## **Conclusion**

Based on these considerations, I request the Council to reconsider its refusal of full access to document 14704/14. If the Council persists in its refusal, I request at least further clarifications as mentioned above.