



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 28 February 2014

6491/14

**INF 33
API 24**

NOTE

Subject: Public access to documents
 - Confirmatory application No 07/c/01/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 10 December 2013, registered on the same day ([Annex 1](#)).
- reply from the General Secretariat of the Council dated 22 January 2014 ([Annex 2](#))
- confirmatory application dated 12 February 2014 and registered the same day ([Annex 3](#)).

[E-mail message sent on 10 December 2013 - 16:17]

From: **DELETED**
Sent: Tuesday, December 10, 2013 16:17
To: SECRETARIAT DGF Access
Subject: Clientearth access to documents request

Dear Madam, Sir,

Please find attached ClientEarth request for access to documents.

Best regards,

DELETED

Jakob Thomsen
Council of the EU
General Secretariat - Directorate-General F
Communication-Transparency

Access@consilium.europa.eu

10 December 2013

Dear Mr Thomsen,

Subject: Access to information on trilogue meetings within the review of EIA Directive

We would like to have access to the reports/minutes adopted following the last trilogue meetings (5, 26 November and 10 December) and technical meetings (11 and 15 November) that have taken place with regard to the review of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. These documents include the preparatory documents for the meetings as well as the documents received by the Council in relation to the matter discussed.

Yours sincerely,

DELETED



ANNEX 2

COUNCIL OF THE EUROPEAN UNION

GENERAL SECRETARIAT

Directorate-General F
Communication
Transparency

- Access to Documents/
Legislative transparency

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access@consilium.europa.eu

Brussels, 22 January 2014

DELETED

e-mail:

DELETED

Ref. 13/2167-mj/ns

Dear **DELETED**,

We have registered your request of 10 December 2013 for access to "*the reports/minutes adopted following the last trilogue meetings (5, 26 November and 10 December) and technical meetings (11 and 15 November) that have taken place with regard to the review of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. These documents include the preparatory documents for the meetings as well as the documents received by the Council in relation to the matter discussed*". 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 documents¹ (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure². On 10 January 2014, 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:

The following Council documents have been identified as corresponding to your request : **15235/13, 15235/13 COR 1, 15590/13, 15973/13, 16765/13, 16965/13, 17514/13, DS 2061/13 and 17991/13.**

In addition to these Council documents, an informal table prepared by the European Parliament regarding the outcome of the first two technical meetings of 11 and 15 November 2013 was also identified as corresponding to your request.

As this document was drawn up by the European Parliament, the General Secretariat of the Council has considered that this document is covered by the request for access you addressed directly to the European Parliament on the same issue.

¹ Official Journal L 145, 31.5.2001, p. 43.

² Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

Document **15235/13** (+ **COR 1**) is a Note of 25 October 2013 from General Secretariat of the Council to the Permanent Representatives Committee on a *proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*. It concerns the preparation for the informal trilogue.

Documents **15590/13**, **16765/13** and **17514/13** are Notes of 30 October 2013, 22 November 2013 and 6 December 2013 from General Secretariat of the Council to Delegations on the same proposal. They concern the preparation for the informal trilogue.

Documents **15973/13** and **16995/13** are Notes of 19 November 2013 and 4 December 2013 from the General Secretariat of the Council to the Permanent Representatives Committee on the said proposal. They also concern the preparation for the informal trilogue.

DS 2061/13 is a meeting document from the General Secretariat of the Council to the Permanent Representatives Committee on 13 December 2013 on the same proposal. It contains a Presidency defriefing on the outcome of the informal trilogue of 11 December 2013.

Document **17991/13** is a note of 19 December 2013 from the General Secretariat of the Council to the Permanent Representatives Committee on the same proposal. It contains an analysis of the final compromise text with a view to an agreement.

The proposal referred to in the requested documents was submitted by the Commission to the European Parliament and to the Council on 26 October 2012. The **Working Party on the Environment** started its examination on 20 November 2012. Since then, it has been examined several times by the Working Party. On 30 October 2013, the Permanent Representatives Committee agreed on a mandate for the Presidency to enter into negotiations with the European Parliament with a view to reaching a first-reading agreement on this proposal. Four informal trilogues took place on 5 and 26 November 2013 and 11 and 18 December 2013. These trilogues were prepared by several tripartite meetings at technical level.

The European Parliament and the Council reached an *informal* agreement on this file on 18 December 2013. The positions expressed by the negotiators of each institution during the trialogue meetings have yet to be sanctioned, in a formal manner, by the respective institutions.

The General Secretariat of the Council therefore considers that at this stage, when no formal agreement exists, full disclosure of the preparatory Council documents, in particular the positions suggested by the Presidency and the agreed mandate for the Presidency for the purpose of the informal trilogue meetings would be premature. These positions were taken strictly with the aim and in the context of achieving a first reading agreement on a very sensitive file. The General Secretariat of the Council is of the opinion that full disclosure of the information contained in the documents could cause one or the other institution to backtrack from any tentative compromises reached and thereby seriously compromise the conclusion of a final agreement on this subject.

As there is no evidence suggesting an overriding public interest to warrant full 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 Council's decision-making process), the General Secretariat is, until the formal adoption of the act by the two co-legislators, unable to accede to your request for full access.

However, pursuant to Article 4(6) of the Regulation, you may have access to those parts of documents **15235/13**, **15590/13**, **15973/13**, **16765/13**, **16995/13** and **17514/13** which are not covered by this exception.

You may have access to document **15235/13 COR 1**.

The General Secretariat has also looked into the possibility of disclosing parts of documents **DS 2061/13** and **17991/13** pursuant to Article 4(6) of the Regulation. However, as the information contained in these documents forms an inseparable whole, partial access cannot be granted at present.

Pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure, the abovementioned documents and any other legislative document relating to this Directive shall 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 the Regulation.

Statutory remedy notice

Pursuant 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

Enclosures

¹ Confirmatory applications are published in the Council's Register of documents. Please indicate whether you would like your personal data to be removed from Council documents related to your confirmatory application. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 12 February 2014 - 12:53]

From: **DELETED**
Sent: Wednesday, February 12, 2014 10:44 AM
To: SECRETARIAT DGF Access
Subject: Re: Ref. 13/2167-mj/ns

Please find attached ClientEarth's confirmatory application.

Best regards,

DELETED

Brussels, 12 February 2014

GENERAL SECRETARIAT

Council of the EU
Directorate-General F
Communication
Transparency

RE: GestDem 2013/3238 - Confirmatory application for reconsideration of the Council's decision to deny ClientEarth's full access to the documents adopted within trilogue meetings relating to the review of the EIA Directive

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), ClientEarth hereby submits a confirmatory application with regard to the partial refusal to disclose the requested documents.

- (1) The Council in its reply of 22 January 2014 refused to provide access to two requested documents, one (DS 2061/13) containing a Presidency debriefing on the outcome of the informal trilogue of 11 December 2013 and another one (17991/13) containing an analysis of the final compromise text with a view to an agreement. Partial access was provided to the remaining requested documents. The information withheld is the Council's position in the discussion in view of the second and third trilogue meetings as well as the comments and compromise proposals made in the four columns table. The Presidency proposals to the delegations in view of the first, second and third trilogues are also kept confidential. As a result, the Council's and Presidency's respective positions within the negotiations are not made public during the whole trilogue process which aim is to achieve a first reading agreement on a very important file.
- (2) The positions of the different institutions, including the Council's and Presidency's, as well as the discussion that took place between the Council, the European Parliament and the Commission during the trilogue meetings that is kept confidential is an information that the public should have access to. The Council refuses to provide access until no formal agreement is reached since full disclosure "could cause one of the other institution to backtrack from any tentative compromises reached and thereby seriously compromise the conclusion of a final agreement on this subject". However, this is purely hypothetical, the use of the word "could" demonstrate that the Council is purporting allegations that cannot justify the use of Article 4(3) of Regulation 1049/2001. The internal decision-making process of the Council would not be seriously undermined by disclosure of documents containing the discussions between the EU institutions

on the adoption of an EU directive that will affect the lives of every single person living in the EU and possibly abroad.

- (3) The fact that the file discussed is a very sensitive one is not an argument either to keep the Council's position confidential. The adoption and review of any directive and regulation imply high stakes and constitute a sensitive file, this one no more than any other. Moreover, the "sensitivity" of a file pleads more in favour of a transparent process than a confidential one.
- (4) The process leading to the adoption of the review of the EIA Directive is a legislative process. Article 12 (2) of Regulation 1049/2001, stresses the fact that "legislative documents" should be made directly accessible through the public registers.
- (5) In Cases C-39/05 and C-52/05, 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."*

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 it falls under the scope of an exception in accordance with Article 4 of Regulation 1049/2001. The only fact that the information reveals the positions of the other institutions is not a reason allowed by the regulation and the Aarhus Convention not to disclose information. 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 accessible¹."

- (6) This is confirmed by Article 4 of Regulation 1367/2006 in environmental matters.
- (7) The Council as the other EU institutions must therefore act openly and transparently within these trilogue meetings in which the three institutions decide what EU law will provide.
- (8) The trilogue procedure is not provided by the EU Treaties and is kept completely confidential. It is now commonplace and increasingly occurs before the EP has held a plenary vote on the piece of legislation, as it is the case for the review of the EIA Directive. This procedure runs contrary to Article 1, 6(1) and 11 TEU and 15 TFEU as well as Article 42 of the Charter of Fundamental Rights and Freedoms which make clear that the institutions must act openly and transparently and as closely as possible to the citizens as well as Regulation 1049/2001 which stresses on the fact that the rule is access and confidentiality the exception.

¹ Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, [2008] ECR I-0000, paras. 46-47.

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- (9) It is therefore not clear to what stage of the decision-making process the Council refers to in its reply to justify not disclosing its and the Presidency's positions which must be provided while the process is ongoing to allow transparency and public participation, requirements which cannot be fulfilled if the information is only provided once the discussions are over and the directive adopted.
- (10) It is common practice at national level in democratic states that the adoption of laws is discussed in public. The position of each institution is publicly debated. There is no reason justifying a difference at EU institutional level. On the contrary, EU directives and regulations apply to 28 Member States, their adoption should therefore be subject to full transparency and openness.
- (11) Keeping the Council and Presidency's positions confidential prevents the organization of a democratic debate. The positions of the Member States, national governments, on the proposal of the Commission simply cannot be kept confidential as they are accountable to the EU citizens with regard to the decisions they adopt in "Brussels" in EU law. These discussions may not take place behind closed doors. It is not understandable why the Council is so heavily opposed to transparency and openness. The upcoming elections to the European Parliament and the discussions which started on these elections, very clearly demonstrate that citizens all over the EU need and require greater transparency and more democratic behaviour, in order to keep confidence in the EU institutions and their activities. The secrecy which the Council maintains with regard to the content of trilogue meetings, will just increase the anti-EU attitudes of parts of the public, and neither help the Council nor Member States nor the EU as a whole.
- (12) The Council therefore breached Article 4(3) of Regulation 1049/2001.
- (13) For all these reasons, ClientEarth hereby requests that the Council grants full access to the requested documents.

Yours sincerely,

DELETED
