Council of the
European Union

Brussels, 28 July 2017
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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 16/c/01/17

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 19 May 2017 and registered on 22 May 2017 (Annex 1);
- reply from the General Secretariat of the Council dated 26 June 2017 (Annex 2);
- confirmatory application dated 18 July 2017 and registered on 19 July 2017 (Annex 3)

ANNEX 1

[E-mail message sent to access@consilium.europa.eu on 19 May 2017- 18:11]

From: Helen Darbishire [mailto:ask+request-4315-ad08b635@asktheeu.org]
Sent: vendredi 19 mai 2017 18:11
To: SECRETARIAT DGF Access
Subject: access to documents request - Legal Opinion Beneficial Ownership - Document 15655/16

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am hereby requesting access to Council Document 15655/16, being the Opinion of the Legal Service on the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC.

This document refers to the compatibility of the provisions on public access to beneficial ownership information with the applicable data protection guarantees.

The document has been made partially available in the Consilium register of documents.

According to footnote 1 of the document (Page 1), the document is only partially available as it contains legal advice protected under Article 4(2) of Regulation 1049/2001.

In order to obtain full access to the document, I am taking the unusual step of putting in this initial request the arguments as to why it should be available, with a particular emphasis on why the application of Article 4(2) of Regulation 1049/2001 should not result in the document being withheld from public access.

In the first instance, not all legal advice can be automatically excluded from access. The Council has to make the case as to why the information contained in this Opinion would actually and specifically undermine the protection of legal advice. Any harm must be foreseeable and not purely hypothetical. This is something that it should now do.

Then, even if some identifiable and potential harm were to be identified, this has to be properly weighed against the public interest in having access to the documents and the full information contained therein. In this case the documents relate to an ongoing legislative procedure. For that reason, the Council must take into consideration TFEU Article 15 which places a particular emphasis on legislative transparency, as well as recital 6 of Regulation 1049/2001 which requires that "Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity …".

In addition to the general principle of legislative transparency, this is particularly important when the legislative process is one of great public importance. In this case the legislative process relates to the fight against money laundering and financing of terrorism, issues which are priority concerns for the European Union institutions, national governments and parliaments across Europe and for the European public.

In this context, it is essential that in order to arrive at the optimum regulation for combatting organised crime and terrorism, there be an open public debate on the options under consideration and the relevant legal analysis and evidence being used by the European institution that are engaged in the development of this future legislation.

This is particularly the case given that we understand that Document 15655/16 is being referred to by Member States in discussions with civil society in order to argue against the need for transparency of a future beneficial ownership register.
Indeed we understand that it has been claimed:

- That according to the Council Legal Services, there is no link between public access to information on beneficial owners and effective suppression of money laundering and indeed that to consider that the public has any role in combatting corruption and organised crime is contrary to the values of democracy and rule of law, where only law enforcement and competent authorities can undertake such activities.
- That the Council Legal Services have concluded that access of general public to information on beneficial ownership of all business and legal entities and trusts, as an instrument in supressing money laundering and tax evasion, is disproportionate and inappropriate.

It is imperative that the European public is provided with such evidence in order to be able to participate in the debate on the future regulation, particularly as such a conclusion is at odds with both the jurisprudence of the European Court of Justice and with assertions contained in other European regulations and with experience in practice.

With respect to the European Court of Justice, the ruling in Case C-398/15 Manni (9 March 2017) found that making publicly available via the Company Register the personal data of someone, even when (as in this case), it was old information about a company that had gone bankrupt, “does not … result in disproportionate interference with the fundamental rights of the persons concerned, and particularly their right to respect for private life and their right to protection of personal data.” This is highly relevant because the case underscores both the legitimacy and value of putting ownership information into the public domain.

When it comes to analogous requirements in other fields, we can point to, for instance, Regulation 1306/2013 of the European Parliament and the Council on the financing, management and monitoring of the common agricultural policy, recognises in the preamble at paragraph 76 that “the role played by civil society, including by the media and non-governmental organisations and their contribution to reinforcing the administrations' control framework against fraud and any misuse of public funds, should be properly recognised.” [1]

Furthermore, and in the specific context of transparency of the beneficial owners of companies, there has been a clear demonstration through the Panama Papers leaks (2016) of the need for greater transparency in order to ensure public oversight of wrongdoing, particularly when public figures (precisely those who should be the guarantors of probity) are involved. Thanks to the disclosure of these documents there were multiple resignations of high level political figures, at least 150 criminal, civil, or regulatory investigations in 79 countries.[2] Indeed, Europe’s premier crime-fighting unit, Europol, found that almost 3,500 individuals and companies in the Panama Papers were probable matches for suspected criminals including terrorists, cybercriminals, and smugglers.[3]

It is for reasons such as these that numerous European governments have concluded that transparency of beneficial ownership brings numerous benefits. As a result a number of countries have made commitments to ensure that their company ownership registries are open, and to open up future beneficial ownership registers. Such commitments have been made, inter alia, in fora such as the G20, London Anti-Corruption Conference, and Open Government Partnership Paris Declaration [4].

To the extent that that Council Legal Services has amassed some kind of quantitative or qualitative evidence and/or has arrived at a legal analysis that leads to a conclusion different from that reached by many international organisations, governments and civil society organisations after the latter have assessed the large quantity of empirical data available to them as well as the conclusion arrived at by some governments that transparency of these registers can be achieved.

The importance of this directive is underscored by the ongoing public debate on the best way to configure the transparency in which I and the organisation I direct are involved and in order to participate in this debate, both at the EU and national levels, we need to know the position that is being taken by the Council in this respect and its legal analysis of the alternatives available for legislation.

Yours faithfully,

Helen Darbishire
Access Info Europe

Council of the European Union
General Secretariat
Directorate-General Communication and Information
Knowledge Management
Transparency
Head of Unit

Brussels, 26 June 2017

Ms Helen Darbishire
Email: ask+request-4315-ad08b635@asktheeu.org

Ref. 17/1265-ld/jg

Request made on: 19.05.2017
Registered on: 22.05.2017
Deadline extension: 15.06.2017

Dear Ms Darbishire,

Thank you for your request for access to documents of the Council of the European Union.[1]

Document **15655/16** is an opinion of the Council Legal Service, which comprises a note of the Council Legal Service to the Council on "the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC". The opinion, dated 16 December 2016, examines the question of the compatibility of the proposed new provisions on public access to beneficial ownership information with the applicable data protection rules and guarantees under EU law. It also analyses the role of the European Data Protection Supervisor in the context of the proposed new access regime. The document consequently contains legal advice in its entirety.

[1] 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).

The legal advice covered by the requested document deals with issues which are very complex, controversial, and particularly sensitive, since it relates to the on-going legislative negotiations on a Commission proposal aiming at establishing a new public access regime concerning access to information on the beneficial ownership and legal entities of corporate businesses, where the protection of the fundamental right to privacy and the personal data protection is crucial in the view of the EU Charter of Fundamental Rights and the related settled case law of the Court.

Disclosure of this document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service, intended only 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 in the future to effectively defend related decisions taken by the Council in this pending legislative dossier before the Union courts. 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.

The legal advice is also relevant for other files which are currently being examined within the Council or will be discussed in the future. Thus, the legal advice has clearly a wide scope.

Moreover, the proposal to which the legal advice pertains is currently being negotiated with the European Parliament under the ordinary legislative procedure. Thus, the disclosure of the legal advice at this stage could seriously prejudice the standing of the Council during this very sensitive negotiation process with the EP. Consequently, the legal advice must be protected by Article 4(3) first subparagraph of Regulation 1049/2001 as well, since, for the above reasons, disclosure of the requested document would seriously undermine the Council's related on-going decision-making processes.

As regards the existence of an overriding public interest in disclosure in relation to the protection of the legal advice and of the on-going decision-making processes 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 full disclosure of the document.

Pursuant to Article 4(6) of the Regulation, the General Secretariat of the Council has examined whether any further partial access to the requested document could be granted, and it has concluded that that is not possible at this stage of the negotiations between the EP and the Council.

In the view of the foregoing, the General Secretariat of the Council is, therefore, unable to grant you full access to the requested document. However, you can get public access to points 1-14. of the requested document, which part is already anyway publicly accessible.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).[2]

Yours sincerely,

Fernando PAULINO PEREIRA

Enclosure: 1

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[2] 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 on 18 July 2017 - 23:34]

From: Helen Darbishire [mailto:ask+request-4315-ad08b635@asktheeu.org]
Sent: mardi 18 juillet 2017 23:34
To: SECRETARIAT DGF Access
Subject: Internal review of access to documents request - Legal Opinion Beneficial Ownership - Document 15655/16

Dear Fernando Paulino Pereira / Secretatiat General of the Council of the EU,

The following is a confirmatory application in response to your decision of 26 June 2017, your reference: 17/1265-ld/jg, as regards to my access to documents request 'Legal Opinion Beneficial Ownership - Document 15655/16'.
A full history of my request and all correspondence is available on the Internet at this address: https://www.asktheeu.org/en/request/legal_opinion_beneficial_ownersh

In addition to the arguments set out in my original application as to why the Council Document 15655/16, being the Opinion of the Legal Service on the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC should be made public – arguments that I ask you to review again carefully and in detail as part of this confirmatory process – I add the following observations in response to your reply of 26 June 2017 and the reasoning contained therein.

1. Ongoing legislative process regarding fundamental human rights argues in favour of transparency.

The Council's decision emphasises that the legal advice at issue relates to "on-going legislative negotiations … where the protection of the fundamental right to privacy and the personal data protection is crucial in the view of the EU Charter of Fundamental Rights and the related settled case law of the Court" and hence that: "Disclosure of this document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001."
The conclusion here lacks logic. In the first instance, there is a special priority that should be given to the transparency of ongoing legislative proposals, as required by TFEU Article 15 which places a particular emphasis on legislative transparency, as well as recital 6 of Regulation 1049/2001 which requires that "Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity …". This has been confirmed in various cases, including Sweden and Turco v Council and Council of the European Union v Access Info Europe.
In the second instance, this should be particularly strong when those proposals relate to human rights because of the clear importance of the public being able to know and assess how fundamental human rights are being interpreted in advance of any legislation that may affect those rights being adopted.

2. Beneficial ownership is not especially complex, controversial or sensitive.

The Council's decision asserts that disclosure of this document would therefore undermine the protection of legal advice because "the requested document deals with issues which are very complex, controversial, and particularly sensitive."
Yet the Council has provided no evidence as to why the issue of beneficial ownership is especially complex, controversial, nor particularly sensitive.
As to complex: While any discussion of balancing the rights of access to information and data protection may have a certain level of complexity, and while the balancing act often needs to be addressed on a case-by-case basis, there is nothing particularly complex about the beneficial ownership debate.

Indeed, the average person is likely to be able to comprehend the essential arguments. There are arguments such as, on the one hand: “There is a public value in knowing who the real owners of companies are for various reasons. It allows us to know who is running the companies, which is of value for other companies doing business with them. Such information is also useful to know whether those companies are owned by other companies, particularly in other countries, in ways that permit tax evasion or money laundering.”

After all, in many European countries, the mass media has explained to the public many times how such systems work, given that there is not a country in the EU that had not, in recent years, been touched in some way by cases of illegal activity in this regard.

The counter argument is also relatively easy for the average person to grasp: “On the other hand, if we put the names of the owners and beneficial owners of all companies up on the internet, along with full personal details, some honest and law-abiding business people might find that an invasion of their privacy and could argue that just because they are doing business, it doesn’t mean that their fundamental right to privacy can be taken away by these rules.”

Given that these are the two positions at issue here, it is patronising to assert that the complexity is a reason for not making this information public.

As to controversial: It is certainly true that leaks such as the Panama Papers cause scandals, but the scandals were nothing to do with the legal technicalities of laws and regulations; rather the scandals to flagrant cases of tax evasion and money laundering, including by some senior politicians and other public figures. To somehow imply that, because issues around company ownership has caused some controversies in the past, this makes the legal regulation in order to prevent that happening again in the controversial is a wrongheaded logic.

It also does not represent reality because the debate about what the right solution on levels of transparency of the beneficial ownership is taking place via pretty civilised and well-argued discussions where various actors present differing perspectives. This debate is generally taking place at a legal and technical level, with evidence being presented as to why this information should be public as well as counter arguments in favour of data protection.

As such, this is a long way from being a raging controversy where every statement is likely to be taken out of context and manipulated. In this respect the beneficial ownership debate is unlike many issues that are truly controversial (think about debates over issues such as abortion rights, refugees, gay marriage, trade deals, copyright regulation, or many other hotly debated issues of recent times).

And even if it were controversial, this would make it all the more necessary to contribute to the debate what should be, one hopes, the cool, level-headed, legal analysis from the CLS.

As to sensitive: The arguments about this not being controversial also underline why it is not particularly sensitive.

Although the Court has stated that refusal to disclose a particularly sensitive legal opinion, in the context of a legislative process, may be justified, "in such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal." In the Council's reply, there is no such 'detailed' statement of reasons, firstly, as to why the issue is 'sensitive' as compared to other issues that the institution deals with, or, secondly, precisely how the disclosure of the opinion would undermine the protection of legal advice. We note that, while beneficial ownership registers are a matter of high importance in terms of advancing the fight against money laundering and terrorist financing, there is nothing about the arguments in favour of or against transparency – the balancing of the right of access to documents and the right to privacy and data protection – that is particularly sensitive. This would be different of course if the legal advice were about, for example, matters of public security or the detailed activities related to fight against terrorism, but it is not. (And, to the extent that the document contained such truly sensitive detail, that would have to be specifically explained and partial access granted, something that has not been done; see point 7 below).

Consequently, the Commission has not established that access to each of the three documents at issue could specifically and effectively undermine the protection of legal advice.

3. CLS not hampered in providing legal advice

The CLS is well aware of the jurisprudence of the Court with respect to legal advice and hence it is disingenuous to argue that “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.” The CLS as a professional body should be ready to provide legal advice in any circumstances. An objective analysis of legal options, particularly those relating to the technical and human rights aspects of an ongoing legislative proposal, should not be anything that it would feel particularly uncomfortable about making public. Indeed, such legal opinions should be prepared knowing that they will be thoroughly scrutinized, including by the Commission and Parliament during the trilogue process. In any case, the Council has given a blanket argument about not providing any legal advice to the public and failed to explained why, in this particular case, the effect of publicity would be particularly likely to dissuade the CLS from providing legal advice in the future.

As to the argument that “disclosure of the legal advice could also affect the ability of the Legal Service in the future to effectively defend related decisions taken by the Council in this pending legislative dossier before the Union courts,” this is also an unacceptably general argument, whose logic is that no legal advice could ever be made public in case there is future litigation relating to the legislative proposal under consideration. This again runs counter to the requirements in the treaties for openness on legislative processes as well as against the jurisprudence of the Court.

4. Participation is not pressure

The argument that “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” is somewhat odd in this context.

What is actually being stated here? The first question is what kind of “external pressure” might the CLS come under? Is it possible that some specialist civil society organisations will comment on the legal advice in public statements, to the media, or in discussions with national politicians or MEPs? Or is it possible that there would be pressure of the type practiced by rather more nefarious criminal organisations who engage in things like threats of violence, attempts at bribery and blackmail, or other serious forms of intimidation? If the latter, clearly this is illegal activity which would need to be alerted to the police immediately and which should be investigated and prosecuted, but which, experience to date indicates, is not going to happen as a result of the release of this particular legal opinion. If the former, then it is called ‘participation in decision making’ and it is one of the founding principles of the European Union, underpins Europe’s democratic edifice, and is a directly tied to the fundamental right in the EU treaties: “In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.”

Strong and vibrant debate may sometimes be uncomfortable, but it is an essential part of the democratic process. Indeed, the European Court of Human Rights has noted on various occasions that there is a right to express opinions that “shock, offend or disturb” even though, in this case, it is most improbably that the debate would reach that level. Nevertheless, even if there were to be criticism of or commenting on the legal advice as drawn up in this instance, this should never prevent the professional and highly skilled lawyers in the CLS from doing their job in the same independent and objective manner. Most lawyers are well trained in having their arguments picked over and debated: this part of the schooling of lawyers across Europe and any lawyer who has been trained to go to court is ready for this kind of back and forth, and knows not to take it personally nor to let it influence his or her judgement.

Furthermore, if a vigorous debate were to arise about this legal opinion, that should be seen as something positive in the democratic process as it will help ensure that, once a final conclusion on the appropriate level of transparency of the beneficial ownership register is arrived at, all actors involved will know that their views have been aired and heard and that decisions were taken the legislators in Brussels only after they had had the opportunity to consider all relevant perspectives. As Regulation 1049/2001 states in recital 2 of the preamble: “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.” The Council has brought no evidence to even begin to point to the conclusion that this principle does not apply in this particular case.

5. Harm to Decision-Making Process will occur if the document is not released

The Council fails in its decision to establish precisely how disclosure of this legal advice would harm the decision-making process. It merely states that “disclosure of the legal advice at this stage could seriously prejudice the standing of the Council during this very sensitive negotiation process with the EP (sic)” and that: “Consequently, the legal advice must be protected by Article 4(3) first subparagraph of Regulation 1049/2001 as well, since, for the above reasons, disclosure of the requested document would seriously undermine the Council's related on-going decision-making processes.”

Given that, as we understand, the legal opinion at issue has been shared with various MEPs – at the very least those involved in the negotiations -- as well as distributed to national capitals and – in at least some Member States – is available to national MPs (this is the case in Germany where we have been told that it is in the closed database available to all German MPs), we cannot see how disclosing it to the public would harm negotiations with the European Parliament. The relevant actors in the negotiation have the information.

The harm here it different: there is a harm to the credibility and legitimacy of the European Union’s decision-making process in the eyes of the European public when decisions are taken behind closed with the public denied access to the legal analysis being used as the basis of decisions.

The harm is to the participatory principles of the EU as preventing the public from discussing with those actors the pros and cons of different options under consideration. Civil society actors working in this field are unable to formulate and present arguments in favour of transparency if they cannot know precisely which arguments are being used to limit it.
As noted in the application, the refusal to make this legal opinion public is having a more direct and specific harm in some countries, where civil society representatives have been discussing future transposition of the beneficial ownership register rules with government officials and have been at a significant disadvantage because Council's legal analysis was referred to and it has been stated that the opinion concludes that transparency is not necessary, and hence CSOs are stymied their possibility to engage fully in the debate.
Based on an analysis which is not vague and is not merely hypothetical, there is a demonstrable harm in not releasing this document.

6. Public interest argues in favour in disclosure

We have argued above that the potential harm to provision of legal advice is, in this instance, minimal, even negligible. Indeed, we have demonstrated that some harm will arise – is already occurring – due to non-publication of this document.
In the application we provided the arguments -- noted again above -- of the public interest in having this document in order to be able to participate fully in the debate about whether and precisely how to open beneficial ownership registers.
We noted that transparency of this document would serve the goals of the access to documents right in the TFEU and Regulation 1049/2001, particularly that of permitting participation and trust in the EU decision-making process.

We also noted that there is a significant public interest in getting levels of transparency in the future directive right, as there are important interests at stake. In addition to the examples given in our application of the concrete benefits of transparency of company ownership, we note that the European Commission has argued specifically that “complex ownership structures have been used to hide links to criminal activities and tax obligations” and hence that there is a “need for enhanced transparency on the ultimate beneficial ownership of certain legal entities” (ref: http://europa.eu/rapid/press-release_MEMO-16-2381_en.htm). The Commission has also stated that tax evasion costs the EU an estimated €1 trillion (ref: https://ec.europa.eu/taxation_customs/fight-against-tax-fraud-tax-evasion/a-huge-problem_en).
The importance to all of Europe’s 505 million citizens and residents in ensuring an appropriate regulation is evident.

And yet, rather than address these specific participation and accountability arguments or providing countervailing evidence, the Council has simply stated: “As regards the existence of an overriding public interest in disclosure in relation to the protection of the legal advice and of the on-going decision-making processes 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 full disclosure of the document.” This is far too general a statement and I urge that it be reviewed.

7. Greater Partial Access to the Document Is Possible

The rather swift and general dismissal of the possibility of partial access in The Council’s reply requires revision which we hereby respectfully ask that you do, given that no serious arguments are provided to explain why there are not parts of the document – particularly all those parts related to pure legal analysis (which might well be the majority of the document) – which could be made public.

The Council's decision simply states that "Pursuant to Article 4(6) of the Regulation, the General Secretariat of the Council has examined whether any further partial access to the requested document could be granted, and it has concluded that that is not possible at this stage of the negotiations between the EP and the Council" without explaining exactly why the negotiations imply that the document cannot be released at least in part.
Again, we note that in fact those engaged in the negotiations have this document so it is not logical that the negotiations would be affected. What is being affected are the rights of the wider European public to follow decision-making processes, to engaged and participate fully in the debate should they so wish, and to be able to hold their representatives (governments, MEPs) accountable for the decisions that they are taking in this regard.

Yours sincerely,
Helen Darbishire
Access Info Europe
