Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	11555/17
Subject:	Public access to documents - Confirmatory application No 16/c/01/17

Delegations will find enclosed a draft reply from the Council to confirmatory application No 16/c/01/17, as adopted by the Council by written procedure which ended on 18 August 2017 with Poland abstaining and with the Netherlands, Slovenia, Finland and Sweden voting against.

The following statements were made:

NL: *"The Netherlands is of the view that the ground for dismissal in Article 7 (2) of Regulation 1049/2001 should be applied in a consistent manner and should thus lead to the dismissal of an application if it is received after the deadline mentioned in this Article. If in this case a substantial reply is given, this should not be seen as a precedent. With regard to the content of the draft reply, the Netherlands is of the opinion that, in line with the Turco-case (C-39/05 P and C-52/05 P) further partial release could be considered, specifically with regard to paragraphs 22 – 24".*

PL*:* *"Poland supports the content of the Council draft reply. Nevertheless, Article 7 (2) of Regulation 1049/2001 should be applied in a consistent manner and should thus lead to the dismissal of an application if it is received after the deadline mentioned in this Article. Poland would like to underline, that a substantial reply in this case should not be seen as a precedent".*

SI and FI: *"Slovenia and Finland cannot concur with the reasoning of the draft reply, especially in light of the judgment in the Turco-case (C-39/05 P and C-52/05 P) and taking into consideration the importance of openness in legislative procedures emphasized by the Lisbon Treaty".*

SE: *"Sweden is of the view that the ground for dismissal in Article 7 (2) should be applied in a consistent manner and thus lead to the dismissal of the application. The application in annex 3 of document 11554/17 can be processed as a new application and a first reply from the General Secretariat can be given. Sweden expects to be given an opportunity to give comments in the occasion of a confirmatory application.*

In case the General Secretariat, despite the comments above, chooses to answer according to the draft reply, Sweden does not support the decision, in particular as regards the proposed interpretation of the secrecy exception in the second indent of article 4 (2) (paragraphs 15-19 of the draft reply). This interpretation is not in line with the Turco judgement. There is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of the requested document might undermine the protection of legal advice. Sweden is of the view that article 4 (3) is not applicable in this case. Full access to the document can therefore be granted".

The majority of the delegations agreed to publish the result of the vote.

It is suggested that the Council, by written procedure, record its agreement on the draft reply annexed to this document.

The annex is available in English only.

ANNEX

REPLY ADOPTED BY THE COUNCIL ON …
TO CONFIRMATORY APPLICATION 16/c/01/17,
made by email on 18 July 2017,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 15655/16

The Council has considered this new confirmatory application for the subject document under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant asked for public access to Council document No. 15655/16 on 19 May 2017.

2. Document No. 15655/16 is an opinion of the Legal Service of the Council relating to 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 document contains an analysis of the compatibility questions of the proposed new provisions in the proposal on public access to beneficial ownership information with the applicable data protection rules and guarantees under EU law. More specifically, it addresses legal issues concerning the protection of the fundamental rights to private life and to personal data and, in particular, the proportionality aspect of the publication of personal details of a specific type of physical and legal persons (namely the beneficial owners of companies and trusts). The document consequently contains legal advice except for its points 1-14., which were already made publicly accessible on 17 January 2017.

3. In its reply of 26 June 2017 to the above-referred initial application, the General Secretariat of the Council first of all recalled that certain paragraphs of the requested document, as precisely indicated in point 2., were already made publicly available. It refused, however, any further public access to the remaining parts of the requested document pursuant to the second indent of Article 4(2) (protection of legal advice) and to the first sub-paragraph of Article 4(3) (protection of the Council's decision-making process) of the Regulation.

4. In a confirmatory application, dated 18 July 2017, the applicant contests the assessment made by the General Secretariat of the Council and insists that the totality of the requested document must be disclosed. The applicant recalls that, based on settled case law of the Court[1] the Council is under obligation to disclose its documents when it acts in its legislative capacity and to provide Union citizens with the "widest possible access to its documents" as well as that the exceptions under Article 4 of the Regulation must be interpreted restrictively. She also contends that the Council cannot prove in the present case that full disclosure would/could really "seriously" undermine its internal decision-making process or that there would be any real and concrete litigation risk concerning the subject legislative proposal in the future (in her view the Council's presumptions are just "hypothetical" in this respect). The applicant also argues that in the legislative procedure in question there is, indeed, an overriding public interest in favour of full disclosure, since the prevailing legal controversies, relating to the proposal, and the legal issues, touched upon in the requested document thus could be put under the transparent control of and the forward-looking discussion by the Union citizens, which is even in the interests of the EU legislature. The applicant also questioned that the protected legal advice would be really sensitive, controversial and complex or that full disclosure would in any way hamper the independence of the Council Legal Service. Finally, she expressed her dissatisfaction that no further partial access to the document was provided to her during the initial application phase.

[1] See: Cases C-39/05 P and C-52/05 P *Sweden and Turco v. Council*, EU: C:2008:374, paragraphs 38-46., or Case C-280/11 P *Council v. Access Info Europe*, EU:C:2013:671, paras 32 et seq.

5. The Council has considered the subject confirmatory application in the light of the applicant's reconfirmed request and has concluded as indicated below.

I. Admissibility of the confirmatory application

6. The Council first of all examined whether the confirmatory application was submitted to it within the time limit established by Article 7(2) of the Regulation (which is 15 working days from the receipt of the GSC reply). It is a fact that the reply of the GSC to the initial application was sent by the GSC via e-mail to the e-mail address, given by the applicant herself, on 26 June 2017, on which day it was also published at the "Ask the EU page". The GSC received no notification of any "non-delivery" problem (which is normally generated automatically by the recipient IT system if the sent e-mail cannot be delivered for whatever reason) concerning the fact whether the applicant duly received its reply. Since the last day from the 15 days' deadline was 17 July 2017, while the applicant sent her confirmatory application only on 18 July 2017, her confirmatory application must be declared as inadmissible based on missing the statutory deadline in this respect. However, the Council- taking also into account that the applicant was late just with one day- has decided to answer the confirmatory application in substance as well.

II. Assessment of the requested document

7. First of all, it is to be stressed that the Council decision-making process relating to the above-mentioned legislative proposal is still on-going. In the requested document, the opinion of the Council Legal Service analyses the protection of the fundamental right to privacy and data protection in the light of Articles 7 and 8 of the EU Charter of Fundamental Rights and the related case law of the Court of Justice, but also of Directive 56/46/EC on the protection of individuals with regard to the processing of their personal data etc. within the EU as well as of the principle of proportionate interference in those rights (Article 52(1) of the Charter) by virtue of the subject legislative deliberations. Special attention is given by the legal analysis to the sensitive, controversial and complex notion of the "legitimate interests" criterion and of the corporate transparency justification aspects in this respect. Finally, the opinion also analyses the role of the European Data Protection Supervisor in the context of the new proposed access regime. It is still to be added that at the moment there is a fundamental disagreement in the on-going negotiations between the European Parliament and the Council concerning the scope of the persons that should have access to the beneficial ownership information to be provided under the future Directive. The negotiations will continue in the framework of informal trialogues in mid September 2017 in order to find a compromise on this crucial and critical point of the draft legislative act.

8. The Council has carefully assessed the request for access in the light of the above facts and in full consideration of the principles underlying Regulation (EC) No 1049/2001 and the aim of ensuring the widest possible public access to the document.

9. Regulation (EC) No 1049/2001 equally provides, in its Article 4, for exceptions to the right of public access to documents in cases where such public access would undermine the protection of legal advice (second indent of Article 4(2)) and the institution's decision-making process (first and second sub-paragraph of Article 4(3)), unless there is an overriding public interest in disclosure. These two exceptions, in the view of the Council, are, indeed, engaged in this case.

III. As regards the exception under Article 4(3), first subparagraph of Regulation No. 1049/2001 (protection of the Council's decision-making process)

10. As mentioned above, the subject legislative proposal is still under discussion by the competent EU legislative actors. Contrary to the applicant's arguments above, the Council considers that full disclosure of the requested document now would, indeed, seriously undermine the Council's decision-making process for the following reasons: first of all it must be stressed that the subject legislative file and its negotiations with the European Parliament are in practice at present in a critical stage, especially with regard to the scope of application ratione personae of the draft act in terms of the persons who should have access to the beneficial ownership information, since there is fundamental disagreement between the co-legislators in this respect.

11. Secondly, in the view of the Council and contrary to the applicant's views, the requested document contains, indeed, very complex and sensitive legal issues (protection of privacy or protection of personal data in corporate business transparency) in relation to which the Council Legal Service took a very careful and prudent legal approach, fully respecting the EU fundamental rights acquis[2] and the principle of proportionality, but thus going against certain interests of other actors.

12. It follows that further disclosure of the requested document would, indeed, seriously undermine the Council's negotiating powers vis-à-vis the EP as concerns the draft legislative proposal as well as the Council's effective internal decision-making process with regard to the draft Directive, since the Member States' positions might still be diverging in this legislative process, depending also on the EP's position, and including still some of the legal issues, analysed in the requested Council document on that proposal.

[2] See, in this respect, also Opinion No 1/15, handed down on 26 July 2017, by the CJEU (Grand Chamber) insofar as it reconfirms the absolute values and the full respect for Articles 7 and 8 of the EU Charter of Fundamental Rights etc.

13. It must also be recalled that it is required that any legislative position of the Council is, as a rule, taken after careful assessment of all relevant legal elements, including the legal considerations, contained, for example, in the requested document. In this respect, full disclosure of the requested document now could prevent a genuine debate on the still prevailing legal issues, by shifting the focus of the discussions within the Council to the content of certain specific elements of the decision-making process, thereby seriously undermining and adversely affecting the good conduct of the latter.

14. This would be even more prejudicial, given the fact that the subject legislative proposal is currently subject to delicate negotiations with the European Parliament, during which each co-legislator should be afforded access to impartial legal advice. Full disclosure now of the requested document, which gives legal advice as regards elements of key importance (e.g. on the scope of persons who should have access to the beneficial ownership information etc.) to the on-going negotiations would therefore involve a concrete and actual risk of seriously undermining the capacity of the Council to reach a final agreement on the legislative proposal.

IV. As for the exception under Article 4(2), second indent, of Regulation No 1049/2001 (protection of legal advice)

15. The requested document contains legal advice on sensitive, complex and controversial legal issues as described in point 7. As a consequence, the issues dealt with by the legal advice in question are particularly delicate and contentious, since they relate to serious business interests in the internal market; thus the risk of future litigation is not just realistic, but also extremely high and certainly not purely hypothetical.

16. If released now, the Legal Service's opinion could therefore be invoked in future court proceedings. In such a case, contrary to the applicant's views, there is, indeed, a genuine and reasonably foreseeable risk that public release of the requested document could seriously affect the Council's ability to defend its position in Court, upsetting the principle of equality of arms, and preventing an impartial and objective judicial review of the legal act concerned. This would also create a particular and real risk that Member States and the Council would be deterred from requesting legal advice in the future, if now the requested document were released in its entirety, containing an internal legal advice of the Council Legal Service, intended at this stage only for the members of the Council.

17. It is recalled that, while in the *Turco* case[3] the Court of Justice held that the Institutions cannot rely on a general need for confidentiality in respect of legal advice relating to legislative matters, it also recognized, however, the possibility for an institution to refuse public access to a specific legal opinion given in the context of a legislative process, *"being of a particularly sensitive nature or having particularly wide scope that goes beyond the context of the legislative process in question"*.[4] In view of the particular characteristics of the legal opinion in question the Council concludes that it must be protected against public disclosure on account of its particularly sensitive nature and wide scope.[5]

18. The assessment carried out in relation to this exception revolves around an assessment of whether disclosure of the document would specifically and effectively undermine the protection of legal advice. In the present case the Council confirms the initial assessment that the legal opinion is, indeed, particularly sensitive and that its disclosure might have an impact on the institution's interest in receiving frank, objective and comprehensive legal advice in similar situations in the future or even in the still on-going legislative process in question.

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3 Cases C-39/05 P and C-52/05 P, *Sweden and Turco vs Council*, [2008] ECR I-4723, § 57.

4 Ibid., § 69. (emphasis added).

5 See: Case C-506/08 P *Sweden v. My Travel and Commission*, EU:C:2011:496, para 74 and Case C-280/11 P *Council v. Access Info Europe*, EU:C:2013:671, para 29.

19. The protection of the legal advice is concretely justified also because of its extremely wide scope. There are other on-going legislative files, in which the same legal issues are raised, and in which the legislative negotiations are still on-going.[6]

V. As for the argument of overriding public interest

20. In the light of the above, the Council considers that, on balance, all possible factors which would, at the present stage, plead in favour of releasing document 15655/16 in its entirety are still outweighed by the need to protect the Council's decision-making process and its legal advice, taking into account the particular sensitivity of the questions raised and the wide scope of the advice. The Council has therefore concluded that full public access to the above-mentioned document has to be refused pursuant to the second indent of Article 4(2) (protection of the public interest as regards legal advice) and the first sub-paragraph of Article 4(3) of Regulation 1049/2001 (protection of the Council's decision-making process).

21. In this respect the Council still notes that the applicant in her confirmatory application made just very general and vague considerations (see points 4-6.) in order to support the overriding public interest argument, which are, however, based on the settled case law of the Court[7] not enough to uphold her request for full disclosure of the requested document.

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6 See, for example, proposal for a Regulation establishing a common framework for European statistics relating to persons and households, based on data at individual level collected from samples (COM(2016)551final); or proposal for a Directive on certain aspects concerning contracts for the supply of digital content (COM(2015)0634 and 0635final); or proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on privacy and electronic communications)- (COM(2017)10final) etc.

7 See Joined Cases C-517/07 P, C-528/07 P and C-532/07 P Sweden and Others v. API and Commission, EU:C:2010:541; paras 157-158.

VI. As for the aspect of possible further extended partial access

22. The Council has carefully reviewed, pursuant to Article 4(6) of the Regulation and as it was specifically asked by the applicant, the possibility of granting further extended partial access to the document under scrutiny in addition to the concrete elements, referred to above in point 2., and which are already publicly accessible. It has come to the conclusion that, based on their descriptive nature, it can still provide further partial access to points 15-21. of the requested document.

VII. Conclusion

23. The Council declares the confirmatory application inadmissible, as the applicant submitted it after the time limit defined under Article 7(2) of the Regulation.

    Secondly, for the above-mentioned reasons, the Council concludes that in any case full public access to document 15655/16, with the exception of the concrete elements, precisely referred to above in point 2 and which are already publicly accessible by anyone as well as in addition to points 15-21., has to be refused pursuant to the second indent of Article 4(2) (protection of the public interest as regards legal advice) and to the first sub-paragraph of Article 4(3) (protection of the Council's decision-making process)."