



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 14 November 2013

15829/13

**INF 194
API 101**

NOTE

from :	General Secretariat of the Council
to :	Working Party on Information
Subject :	Public access to documents
	- Confirmatory application No 22/c/02/13

Delegations will find attached:

- a request for access to documents sent to the General Secretariat of the Council on 25 September 2013 and registered on the same day ([Annex 1](#))
- the reply from the General Secretariat of the Council dated 5 November 2013 ([Annex 2](#));
- a confirmatory application dated 5 November 2013 and registered on the same day ([Annex 3](#)).

[E-mail message sent on 25 September 2013 - 10:29]

Question submitted on : 25/09/2013 10:29:17

Status : NEW

First Name: **DELETED**

Family Name: **DELETED**

Email: **DELETED**

Postal Address:

Street:

Town:

PostCode:

Residence Country:

Gender:

Country:

Age:

Phone:

Economic Category:

Subject:

Initial question:

13646/13



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

RUE DE LA LOI, 175
B - 1048 BRUSSELS
Tel: (32 2) 281 67 10
Fax: (32 2) 281 63 61

E-MAIL:

access@consilium.europa.eu

Brussels, 5 November 2013

DELETED

e-mail:

DELETED

Ref. 13/1611-mj/jj

Dear **DELETED**,

We have registered your request of 25 September 2013 for access to document 13646/13. 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 16 October 2013, 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:

Document **13646/13** is a Working Document of 24 September 2013 from General Secretariat of the Council to Delegations on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air.

This proposal was submitted by the Commission to the European Parliament and to the Council on 13 March 2013. The Working Party on Aviation started the examination of this proposal on 19 June 2013.

This issue is still under discussion within the preparatory bodies of the Council.

The General Secretariat has weighed your interest in being informed of progress in this area against the general interest that progress be made in an area that is still the subject of negotiations.

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.

It considers that, at this early stage, disclosure of this document which contains opinions for internal use as part of deliberations and preliminary consultations within the Council would be premature in that it could impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this subject. As there is no evidence suggesting an overriding public interest to warrant disclosure of the document 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 unable to accede to your request for access at this stage.

However, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure, this document and any other legislative document relating to this Regulation 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 reply³.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

³ 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 5 November 2013 - 11:02]

From: DELETED

Sent: Tuesday, November 05, 2013 11:02 AM

To: SECRETARIAT DGF Access

Subject: RE: Ref. 13/1611-mj/jj

Dear Sir, Madam,

Please find below a confirmatory application challenging the Council's refusal to grant access to document 13646/13.

Yours faithfully,

DELETED

Confirmatory Application

Document access request: 13/1611-mj/jj

On 5 November I received a reply from the Council to my request for access to document 13646/13, which concerns the draft Regulation on the rights of air passengers (COD/2013/0072). In refusing access to the entirety of the document in question, the Council relied on the exception in the 1st subparagraph of article 4(3) of Regulation 1049/2001. The use of this article by the Council to restrict access to documents was recently subject to a ruling by the Court of Justice (C-280/11), which upheld a ruling by the General Court (T-233/09).

Given that the Council's dismissal of my request for the document was dismissed using a standardised formula without any reference to *how* disclosure could "impede the proper conduct of the negotiations and compromise the conclusion of an agreement" on the proposed Regulation, I would like to draw your attention to the following deficiencies in the Council's response, which relate largely to the complete absence of substantiated justification of the foreseen impediment to the "proper conduct" of the negotiations.

1. The risk invoked by the Council is not "reasonably foreseeable" but "purely hypothetical"

Use of the exception to the right of access under article 4(3) is "justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest" and the risk of a protected interest being undermined must, in order to be capable of being relied on, be "reasonably foreseeable and not purely hypothetical". (T-233/09, para. 59). This narrow interpretation of the article was upheld explicitly on appeal, with the Court of Justice saying that "the General Court rightly stated that application of the exceptions to the right of access is justified only if there is a risk that one of the protected interests might be undermined; and that risk must be reasonably foreseeable and must not be purely hypothetical". The Council in its reply to my request did not even attempt to establish exactly what impediment to the negotiations might result from publication of the document. Indeed, it specifically notes that disclosure "could impede" rather than "*would* impede", in itself an admission that the negative consequences invoked are "purely hypothetical" as no concrete argumentation has been forthcoming.

2. The “early stage” of the negotiations is irrelevant to the request for access to the document

Similarly, the Council also specifically states that it invokes the exception because of “the early stage” of the negotiations, but provides no justification that would underpin its assessment that the stage of the negotiations has any bearing on the impact of disclosure of the document. Again, I refer to the Court: “The preliminary nature of the discussions relating to the Commission’s proposal for a regulation does not, in itself, justify the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. That provision does not make a distinction according to the state of progress of the discussions”. (C-280/11, para. 76). Accordingly, in absence of any attempt by the Council to justify this exception using anything more than a hypothetical harm, I would submit that – in line with the case law of the Court – “the preliminary nature of the on-going discussions and the fact that no agreement or compromise has yet been reached in the Council concerning those proposals do not therefore establish that the decision-making process has been seriously undermined”. (C-280/11, para. 76).

3. The Council has reversed the burden of proof by simply denying there is a public interest in the publication of preparatory documents for EU legislative acts

The Council also stated that there was “no evidence suggesting an overriding public interest to warrant disclosure of the document in question”. In this regard, I would point to the binding judgments of the Courts which have repeatedly held that full access to Council documents should be the norm, in particular “where the Council is acting in its legislative capacity” (T-233/09, para. 57). It is not up to the general public to argue why it should have access to this document; rather, it is incumbent on the Council to argue precisely why access should be refused.

4. Proper democratic scrutiny requires Governments to be accountable for the positions they take within the Council

The rulings of the Courts in the above-mentioned cases also make clear that the Council cannot refuse access to amendments submitted by or summaries of the positions of individual Member States. In this regard I would like to quote the General Court: “The identification of the Member State delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently”.

Having relied on a formulaic refusal to grant access, in clear breach of Regulation 1049/2001 as interpreted definitively by both the General Court and the European Court of Justice, I would like you to re-assess my application and grant access to the document.