



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 15 May 2014**

**9567/14**

**INF 155  
API 55**

**NOTE**

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Subject: Public access to documents  
- Confirmatory application made by Mr Willem Geelhoed (No 13/c/01/14)

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 17 February 2014, registered the same day ([Annex 1](#)).
- replies from the General Secretariat of the Council dated 10 and 31 March 2014 ([Annex 2](#))
- confirmatory application dated 11 April 2014, registered on 16 April 2014 ([Annex 3](#)).

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[E-mail message sent on 17 February 2014 ]

**From:** Willem Geelhoed  
**Sent:** 17/02/2014 14:36  
**To:** Consilium InfoPublic

For purposes of academic research, I would like to have access to the following Council documents:

- nr. 17267/13 of 9 December 2013
- nr. 17739/13 of 12 December 2013
- nr. 6116/14 of 5 February 2014
- nr. 6267/14 of 7 February 2014



## ANNEX 2

### 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@consillium.europa.eu](mailto:access@consillium.europa.eu)

Brussels, 10 March 2014

**Mr Willem Geelhoed**

**e-mail:**  
**w.geelhoed@law.leidenuniv.nl**

**Ref. 14/0280-mi/jj**

Dear Mr Geelhoed,

We have registered your request of 17 February 2014 for access to documents 17267/13, 17739/13, 6116/14 and 6267/14. 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 documents<sup>1</sup> (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

You may have access to documents 17267/13, 17739/13 and 6116/14.

Consultations concerning document 6267/14 are still on-going. The General Secretariat will send you a reply relating to this document as soon as possible.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

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<sup>1</sup> Official Journal L 145, 31.5.2001, p. 43.

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



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Brussels, 31 March 2014

**Mr Willem Geelhoed**

**e-mail:  
w.geelhoed@law.leidenuniv.nl**

**Ref. 14/0280-mi/jj**

Dear Mr Geelhoed,

Further to your request dated 17 February 2014 and our letter of 10 March 2014, we would like to indicate as follows:

The General Secretariat of the Council has finalised the examination of 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 documents<sup>1</sup> (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

Document **6267/14** is a contribution of the Council Legal Service relating to the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. The document contains an analysis of the specific enhanced cooperation procedure provided for in the second and third subparagraphs of Article 86(1) TFEU. Document **6267/14 COR1** is a corrigendum related to this legal advice. The document consequently contains legal advice except for paragraphs 1-9.

The decision-making process in question is currently ongoing and the issues analysed in the legal contribution forms an important part of the basis of the discussions which are sensitive and complex. 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 and thus undermine the decision-making process pursuant to Article 4(3), first subparagraph of the Regulation.

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<sup>1</sup> Official Journal L 145, 31.5.2001, p. 43.

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

Moreover, the legal advice covered by this opinion deals with issues which are novel and broad in scope. The issues concerned by the legal advice constitutes critical elements in the negotiations. They are contentious and likely to be subject to litigation before the courts. The legal advice is therefore particularly sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. 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 decisions taken by the Council 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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of the decision-making process and the protection of 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 interest so as to justify disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to document 6267/14. However, in accordance with Article 4(6) of the Regulation, you may have access to paragraphs 1 to 10 of document 6267/14 which are not covered by the above-mentioned exceptions. In addition, you may have full access to document 6267/14 COR 1.

#### 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 reply<sup>3</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

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<sup>3</sup> Confirmatory applications are published in the Council's Register of documents. If you introduce a confirmatory application, your personal data will be published in the documents related to your confirmatory application only if you have given your explicit consent for this. Your reply relating to the publication of your personal data will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by letter on 11 April 2014]



Universiteit Leiden

Faculty of Law  
Department of Criminal Law and  
Criminal Procedure

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Directorate-General F  
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2300 RA Leiden  
The Netherlands

<i>Number</i>		<i>Date</i>	11 April 2014
<i>Your reference</i>	Ref. 14/0280-mi/jj	<i>Telephone</i>	+31 (0)71 527 8828
<i>Subject</i>	Confirmatory application	<i>Contact</i>	Dr. Willem Geelhoed

Dear Sir/madam,

In reply to your letter dated 31 March 2014, I hereby submit a confirmatory application pursuant to 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 (the Regulation).

In your letter of 31 March, you indicated that the Council is unable to grant me full access to document 6267/14, which is a contribution of the Council Legal Service relating to the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO). More specifically, the document contains an analysis on the enhanced cooperation procedure provided for in Article 86(1) TFEU. In accordance with Article 4(6) of the Regulation, you granted me access to paragraphs 1 to 10 of document 6267/14. I cannot agree with the limitation of the access to document 6267/14 that you offered me, and I request that you reconsider your position and grant me full access to document 6267/14.

In support of my request, I would like to bring forward four reasons why I do not concur with the reasons for not granting me full access, brought forward in your letter of 31 March 2014. These reasons should lead to a decision to grant me full access to document 6267/14.

The first reason for not granting me full access that was brought forward in your letter relates to the ongoing discussions on the legislative file. Disclosure 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 and thus undermine the decision-making process.' You refer to Article 4(3), first subparagraph of the Regulation for support of your position.

Article 4(3) of the Regulation should however not be interpreted in a way that it justifies not disclosing important documents regarding legislative procedures relating to this procedure. The Regulation (recital 1) refers to Article 1 of the Treaty on European Union,



which states that decisions in the Union are taken 'as openly as possible and as closely as possible to the citizen'. This openness, according to recital 2 of the Regulation, is meant to empower the citizens of the European Union, of which I am one, to participate more closely in the decision-making process. Moreover, openness enhances the legitimacy of the outcome of legislative proceedings. It also strengthens the effectiveness of the administration (recital 2 of the Regulation). The preliminary nature of the discussions relating to the Commission's proposal on the establishment of an EPPO does not in itself justify the application of the exception provided for in Article 4(3) of the Regulation (GC, Case T-233/09, *Access Info Europe v. Council*, [2011] ECR II-1073, par. 75).

Furthermore, recital 2 of the Regulation stresses that openness contributes to the enhancement of democracy and respect for fundamental rights. These principles obviously are narrowly connected to the prospect of setting up an EPPO. This institution can hardly be held democratically accountable, when it is set up in a fashion that resembles the current proposal of the European Commission. In these proposals, the European Parliament cannot execute judicial oversight over the functioning of the EPPO, because the European Commission has no power to instruct or dismiss the head of the EPPO. The only possibility for dismissal of the EPPO's primary official is to a request for his dismissal at the Court of Justice of the European Union. That type of procedure cannot convincingly be held to offer a good way to hold a supreme prosecutorial officer democratically to account. These shortcomings of the EPPO's functioning can be balanced by guaranteeing that the legislative process is characterized by as much openness as possible.

This viewpoint is also underlined in recital 6 of the Regulation, that stipulates that '[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.' A comparable point of departure is found in recital 4, which states that '[t]he purpose of this Regulation is to give the fullest possible effect to the right of public access to documents (...)'. No derogation of the Regulation is allowed in regard of documents within the field of police and judicial cooperation in criminal matters (recital 7 of the Regulation). Any exceptions to openness should specifically relate to the effectiveness of the work of the Institutions (recital 6), or 'their ability to carry out their tasks' (recital 11), when it concerns the protection of internal consultations and deliberations.

With regard to the effectiveness of the work of the Council, as well as the ability to carry out its tasks, I would like to point out that the Treaty on European Union confers on it the task of legislating in cooperation with the European Parliament. The co-legislative task of the European Parliament is however limited with respect to the EPPO, because Article 86(1) TFEU only requires the consent of the European Parliament. That means that carrying out its task of establishing democratically legitimated legislation places on the Council an obligation to involve the public in the decision-making process, to compensate for the limited involvement of the European Parliament in this particular field of setting up an EPPO. It is in the nature of democratic debate that a proposal for a regulation, binding in all its elements and directly applicable in all the Member States, can be subject to both positive and negative comments on the part of the public and media (GC, Case T-233/09, *Access Info Europe v. Council*, [2011] ECR II-1073, par. 78).

Any exception, including the exception laid down in Article 4(3), first subparagraph, of the Regulation, should be interpreted as narrowly as possible, 'to ensure the widest possible access to documents' (Article 1(a) of the Regulation) (CoJ EU, case C-266/05 P,



*Sison v. Council*, [2007] ECR I-1233, par. 63; CoJ EU, Case C-64/05 P, *Sweden v. Commission*, [2007] ECR I-11389, par. 66; CoJ EU, Case C-52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, par. 36; CoJ EU, Case C-280/11 P, *Council v. Access Info Europe*, nyr, par. 30). Therefore, and in light of the above-mentioned considerations, I cannot concur with your recourse to the exception of Article 4(3), first subparagraph, of the Regulation.

The second reason for not granting me full access that was brought forward in your letter relates to the possibility that the disclosure of legal advice would undermine the ability of the Council Legal Service to unhesitatingly offer legal advice to the Council, as well as its ability to defend decisions taken by the Council before the Union courts. For this reason you refer to Article 4(2), second indent, of the Regulation. This reason cannot offer grounds for a refusal of disclosure of document 6267/14.

The risk that the interest of legal advice is undermined must, in order to be capable of being relied upon, be reasonably foreseeable and not purely hypothetical (CoJ EU, Case C-52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, par. 43; CoJ EU, Case C-506/08 P, *Sweden v. Mytravel and Commission*, nyr, par. 76). In this case, I submit that the risk of undermining legal advice is purely hypothetical and that it may not be relied upon. There is not a specific reason why the Council could foresee that a Regulation setting up an EPPO would be the subject of proceedings before the Court of Justice. At least, these reasons have not been specified in your letter of 31 March. A potential risk of undermining legal advice therefore cannot justify the denial of disclosure of document 6267/14.

The exception relating to legal advice in Article 4(2) of the Regulation must be construed as aiming to protect the Council's interest in seeking legal advice and receiving frank, objective and comprehensive advice (CoJ EU, Case C-52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, par. 42). Disclosure of document 6267/14 could not possibly be understood as to endanger the Council's interest in seeking legal advice from the Council Legal Service. If the opinion of the Legal Service contained in this document can be characterized as frank, objective and comprehensive, disclosure could not lead to a decrease in interest of the Council in seeking legal advice in the future, because no interest that is to be legally respected can exist in not seeking frank, objective and comprehensive legal advice. If the opinion of the Legal service contained in document 6267/14 could not be characterized as frank, objective and comprehensive, the interest of the Council in being able to seek frank, objective and comprehensive legal advice in the future could not be harmed in disclosure of the document.

Furthermore, in your letter of 31 March you state that the legal advice is particularly sensitive and that it therefore should be possible to deny full access on the ground of Article 4(2), second indent, of the Regulation. However, document 6267/14 has not been classified as top secret, secret, or confidential in accordance with Article 9 of the Regulation. Accordingly, the purportedly sensitive nature cannot be a sufficient reason for denying full access to the public of document 6267/14, be it on the ground of Article 4(2), second indent, or Article 4(3), first subparagraph, of the Regulation (GC, Case T-233/09, *Access Info Europe v. Council*, [2011] ECR II-1073, par. 78).

The third reason for not granting me full access that was brought forward in your letter relates to the possibility of the existence of an overriding public interest in disclosure. Both exceptions of Article 4(3), first paragraph, and Article 4(2), second indent, of the Regulation





contain a provision that they may not be relied upon if there exists an overriding public interest in disclosure. In addition to the views expressed above, that both exceptions should not be relied upon, I would like to put forward that there does exist an overriding public interest in the disclosure of document 6267/14. Hence, even if it is held that one of these exceptions does apply, full access to document 6267/14 should be granted because of the public interest involved in the legislative deliberations related to this document.

Establishment of the EPPO undoubtedly introduces a European legal instrument with the highest possible impact for individuals in the history of the European Union. If an EPPO is established, a body of the European Union will be competent to decide on the instigation of criminal investigations, including the use of serious coercive measures, on the starting of prosecutions and the bringing to justice of private persons suspected of having committed a criminal offence falling within the competence of this EPPO. These decisions are incomparable to day-to-day decision-making in regulatory agencies, and even to the current competences in criminal law field which only involve coordinating or cooperating roles for European Union bodies such as Eurojust. Even Europol is not competent to execute actual investigating measures with a coercive nature. It therefore warrants severe scrutiny whether and which rules could come to apply to every citizen within the European Union and make a substantial impact on their lives in the execution of these intrusive competences.

Document 6267/14 concerns a major topic in this regard. The precise construction of the EPPO and the impact it potentially has, is only relevant for citizens within one of the participating Member States. However, one of the most important questions is, which Member States are interested in cooperating in this revolutionary body. Citizens of potentially participating Member States are therefore substantially affected by the way in which the Member States of the European Union, cooperating in the framework of the Council, decide to organize the procedure of enhanced cooperation available in Article 86 TFEU. These citizens have a marked interest in knowing how the deliberations on participating in the EPPO's structures are performed. If they do not know how enhanced cooperation is being put into practice in Council deliberations, they are unable to exercise their democratic rights of influencing public decision-making on legislation by which they later will be potentially severely affected. That is to say, if citizens are unaware of the procedures of enhanced cooperation they are also unable to effectively participate in public scrutiny of their government's decisions on whether or not to participate in enhanced cooperation in the setting up of an EPPO. There exists therefore a truly public interest in the disclosure of the document which contains an opinion of the legal service of the Council relating to the procedures for participating in the enhanced cooperation in the setting up of an EPPO. Whether a certain country participates or not, and how these decisions are being made, is of major impact and interest to all European citizens. Therefore, the Council cannot dismiss the existence of an overriding public interest as mentioned in Article 4(2) and Article 4(3) of the Regulation, and accordingly should grant me full access to document 6267/14.

The fourth reason why I request that you reconsider your position is that your letter of 31 March does not satisfy your obligation to state reasons. The reasons for any decision of the Council in respect of the exceptions set out in Article 4 of the Regulation must be stated (CoJ EU, Case C-52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, par. 48). Institutions that decide to refuse access to a document must explain how disclosure of that



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document could specifically and actually undermine the interest protected by the exception upon which it is relying (inter alia CoJ EU, Case C-576/12 P, *Jurasinovic v. Council*, nyr, par. 45; CoJ EU, Case C-365/12 P, *Commission v. EnBW*, nyr, par. 64). Specifically, your letter of 31 March does not offer any insight in the balancing of the interests mentioned in Article 4(2) and Article 4(3) of the Regulation against a possibly existing overriding public interest in disclosure. In your letter, you state the following: 'As regards the existence of an overriding public interest in disclosure in relation to the protection of the decision-making process and the protection of 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 interest so as to justify disclosure of the documents.' This statement does not give any indication on the seriousness of the interests found in Article 4 of the Regulation, nor any indication as to the public interest involved, nor any indication as to the balancing of these interests. Your statement is essentially limited to the outcome of the balancing of these interests, and only holds that there is no overriding public interest. Therefore, your decision does not satisfy the obligation to state reasons.

Based upon these reasons, I ask you to reconsider your position and grant me full access to document 6267/14. I give my consent to the publishing of my personal data in the documents related to my confirmatory application.

Yours sincerely,

Willem Geelhoed