



**COUNCIL OF
THE EUROPEAN UNION**

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INFORMATION NOTE

From: Legal Service
To: Permanent Representatives Committee (Part 2)
Subject: **Judgment of the Court of Justice in Case C-280/11 P (Council v. Access Info Europe)**

1. By judgment of 17 October 2013, the Court of Justice (First Chamber) rejected the Council's appeal against the judgment of the General Court in Case T-233/09 (Access Info Europe v. Council). The General Court had annulled the Council's confirmatory decision of 26 February 2009 refusing public access to certain parts of a note from the General Secretariat of the Council (16338/08) concerning a proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, namely those parts which enabled the delegations which submitted proposals for amendments to be identified.
2. The case concerned the application of the exception to the right of public access set out in the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001¹ as regards documents relating to legislative acts on which discussions are still ongoing and which contain delegations' positions.

¹ 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 of 31.5.2001, p. 43)

3. The Council relied on three grounds of appeal.
4. First, the Council argued that the General Court’s reasoning upset the balance between wider access to legislative documents and the protection of the effectiveness of the Council’s decision-making process as laid down in primary law. Article 207(3) EC and recital (6) of Regulation 1049/2001 provided on the one hand for a wider right of access to documents relating to the legislative activity of the institutions and, on the other, the need to preserve the effectiveness of the decision-making process. In the view of the Council, Article 4(3), first subparagraph, had to be interpreted against this background and in its construction of that provision the General Court had ignored the need to preserve the effectiveness of the decision-making process. By not allowing for any negotiation space at all the General Court had misconstrued the balance provided for in primary law.
5. Following a recapitulation of the general principles underlying Regulation 1049/2001 the Court held (point 36) that the General Court:

“did take account of the needs associated with the effectiveness of the decision-making process: in paragraphs 69 to 83 of the judgment under appeal, it carried out a detailed examination of the arguments adduced by the Council to justify the application, in the circumstances, of the exception concerning the protection of the Council’s decision-making process”.
6. The Court concluded that the General Court examined *“the substance of all the arguments put forward by the Council to justify the application, in the circumstances, of the exception”* (point 37).
7. With its second ground of appeal the Council argued that the General Court should have accepted that the Council relied on general consideration. The Council pointed out that the Court had itself recognised the possibility to rely on general considerations in a legislative context in its *Turco* judgment (at point 50). The Council had, in fact, explained in the contested decision why the general considerations were justified.

8. The Court reasoned that the institution, when relying on general considerations, must specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 (point 73). The Court noted that the *General Court* had examined the considerations on which the Council relied and considered them insufficient. The Court thus found that the Council's arguments concerning general considerations must fail on appeal (point 74).
9. With its third ground of appeal the Council contested the General Court's ruling for having required proof that the interest protected by the exception had actually been seriously undermined. It further argued that the General Court took insufficiently due account of the importance of the state of progress of discussions when assessing the risk posed to the decision-making process by disclosure of the identities of the delegations. The Council also argued that the document was sensitive within the meaning of paragraph 69 of the *Turco* judgment, given the fact that the proposals in question concerned the provision to be made in the new regulation on access to documents regarding exceptions from the principle of transparency.
10. The Court considered (points 53 et seq.) as regards the first part of the plea that the General Court had, in fact, applied the law correctly and that the Council had not demonstrated the accuracy of the premise that the public pressure generated by disclosure of the identity of the delegations would be so great that it would no longer be possible for those delegations to submit a proposal tending towards the restriction of openness. As to the second point, the Court limited itself to concluding that the General Court ruled on the issue and rightfully found that the mere fact that the request for disclosure was made at a very early stage in the legislative process was not sufficient to allow the application of the exception (point 60). As regards the third point, the Court held that paragraph 69 of the *Turco* judgment, on which this part of the ground of appeal is based, concerned only specific documents, namely, legal opinions. The requested document did not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions.
11. For the remainder the Court rejected the Council's arguments on the basis that these would require a reassessment of the facts, which falls outside its jurisdiction (points 65-67).