



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 3 June 2014**

**10075/14**

**INF 202  
API 61**

**NOTE**

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Subject:       Public access to documents  
              - Confirmatory application No 15/c/01/14

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Delegations will find attached:

- request for access to a document sent to the General Secretariat of the Council on 28 March 2014, registered on the same day ([Annex 1](#)).
- reply from the General Secretariat of the Council dated 16 May 2014 ([Annex 2](#))
- confirmatory application dated 20 May 2014 and registered the same day ([Annex 3](#)).

**[E-mail sent to Public Information using the electronic form available in the Register application on 28 March 2014 - 9:57 am]**

First Name: **DELETED**

Postal Address:

Family Name: **DELETED**

Email: **DELETED**

Subject:

Initial question: 6780/14 ADD1



## ANNEX 2

### COUNCIL OF THE EUROPEAN UNION

#### GENERAL SECRETARIAT

Directorate-General F  
Communication  
Transparency

- Access to Documents/  
Legislative transparency

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[access@consilium.europa.eu](mailto:access@consilium.europa.eu)

Brussels, 16 May 2014

DELETED

e-mail:

DELETED

Ref. 14/0582-mj/dm

Dear DELETED,

We have registered your request of 28 March 2014 for access to document 6780/14 ADD 1. 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>. On 23 April 2014, 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 6780/14 ADD 1 is a note of 27 March 2014 from General Secretariat of the Council to Delegations on a proposal for a Directive of the European Parliament and of the Council on the cloning of animals of the bovine, porcine, ovine, caprine and equine species kept and reproduced for farming purposes and on a proposal for a Council Directive on the placing on the market of food from animal clones.

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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.

These proposals were submitted by the Commission to the European Parliament and to the Council on 20 December 2013. The Working Party of Veterinary Experts started their examination on 26 February 2014.

These proposals are still under discussion within the preparatory bodies of the Council and the discussions within the Council are particularly sensitive. In addition, as one of the proposals has a legal basis which requires unanimity in the Council, the negotiations are particularly difficult.

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.

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 would 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 Directive 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 reply<sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

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<sup>1</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 e-mail on 20 May 2014 - 11:40 am]**

**From:** DELETED

Dear Sir, Madam,

In reply to the outcome of the below document access request, please find a confirmatory application attached. I would be very grateful for an acknowledgement of receipt.

Yours faithfully,

DELETED

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On 16 May 2014 I received a reply from the Council to my request for access to document 6780/14 ADD 1, which concerns the package of proposals on the cloning of animals for food production. In refusing access to the entirety of the document in question, the Council relied on the exception in the 1<sup>st</sup> sub-paragraph 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 proposals, 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. It states, without any evidence, that disclosure "would impede" the negotiations, but without concrete argumentation as to why this would be so in this specific case, this remains nothing but conjecture and thus "purely hypothetical".

## **2. The type of legislative procedure is irrelevant**

The Council adduces from the fact that the proposal is subject to a special legislative procedure (and thus requires unanimity) that the negotiations are “particularly difficult”. Aside from the fact that no evidence is presented in support of this supposition, it is irrelevant to the question as to whether the document should be disclosed. Regulation 1049/2001 does not differentiate between different types of legislative procedures. Indeed, the Regulation states that “documents drawn up or received in the course of a legislative procedure shall be made directly accessible”.

It is in any case difficult to accept this as a reasonable ground for refusing access as it is well-known the Council in most cases works on the basis of unanimity, even when not required by the Treaties.

## **3. 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. It is also difficult to see how the Council could rely simultaneously on the arguments that the negotiations are in their “early stages” *and* “particularly difficult”.

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).



**4. 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.

It should also be noted that Regulation 1049/2001 states that “documents drawn up or received in the course of a legislative procedure shall be made directly accessible” as a matter of principle.

**5. 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.