



Council of the
European Union

Brussels, 7 July 2014

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API 73

NOTE

From : General Secretariat of the Council
To : Working Party on Information
Subject: Public access to documents
- Confirmatory application No 18/c/01/14

Delegations will find attached:

- request for access to a document sent to the General Secretariat of the Council on 16 April 2014 and registered on 22 April 2014 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 4 June 2014 ([Annex 2](#))
- confirmatory application dated 16 June 2014 and registered the next day ([Annex 3](#)).

[E-mail sent to access@consilium.europa.eu using the electronic form available in the Register application on 16 April 2014 - 8:21 pm]

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone: **DELETED**

Mobile: **DELETED**

Fax: **DELETED**

Requested document(s): We request access to any documents (including internal documents and drafts) authored by officials at the Council's Legal Service that relate to the Legal Service's assessment of the legal basis of proposals for a new Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products ("TPD2") and that were drafted in preparation for, in response to, in consequence of, or that otherwise refer to, trilogue meetings relating to TPD2 in 2013.

As part of the Council's Legal Service's response to this request, we expect to receive (at least) documents (including internal documents and drafts) relating to the Legal Service's review or consideration of Article 24 of the proposed TPD2.



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

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B – 1048 BRUSSELS
Tel: (32 2) 281 67 10
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E-MAIL:
access@consilium.europa.eu

Brussels, 4 June 2014

DELETED

e-mail:

DELETED

Ref. 14/0710-ls/mi/ns

Dear **DELETED**,

We have registered your request of 16 April 2014 for access to the following documents on 22 April 2014:

"Any documents (including internal documents and drafts) authored by officials at the Council's Legal Service that relate to the Legal Service's assessment of the legal basis of proposals for a new Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products ("TPD2") and that were drafted in preparation for, in response to, in consequence of, or that otherwise refer to, trilogue meetings relating to TPD2 in 2013. As part of the Council's Legal Service's response to this request, we expect to receive (at least) documents (including internal documents and drafts) relating to the Legal Service's review or consideration of Article 24 of the proposed TPD2."

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 15 May 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:

The General Secretariat has considered your request for access to documents, including internal documents and drafts, authored by officials of the Council's Legal Service in relation to the legal basis of the proposal for a Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (hereafter "Tobacco Directive"). It is understood that your request also covers internal documents and drafts concerning Article 24 of the proposal.

The General Secretariat has examined your request for access to such documents linked to trilogues in 2013 and has identified a limited amount of correspondence from an official in the Council Legal Service to:

- officials in the Legal Services of the Commission and the European Parliament, some of which copies the relevant Commission DG;
- Member State delegates, some of which copies the relevant Council Directorate-General.

Some of the abovementioned correspondence contains, in annex, intermediate draft versions of Article 24 and related parts of the proposal.

No written opinion of the Council Legal Service was drawn up in respect of the aspects covered by your request.

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.

The correspondence with the Legal Services of the European Parliament and the Commission contains informal exchanges of preliminary legal views on issues relevant to your request. Intermediate drafts attached to those e-mails are informal drafts showing in track changes suggested modifications.

The correspondence with Member State delegates addresses questions raised in respect of the issues you refer to.

It is underlined that the documents identified do not contain official views of the Council Legal Service.

The documents falling within the subject-matter of your request relate to issues which are contentious and very likely to become subject to litigation. The Tobacco Directive was subject to heavy criticism and pressure from stakeholders. Moreover, the issues concerned were controversial within the Council and between the institutions. The likelihood of litigation is also demonstrated by the fact that a number of cases were brought against the existing Directive 2001/37/EC, hereunder one case concerning legal basis¹. Directive 2001/37/EC is repealed with effect from 20 May 2016 by the new Directive concerned by your request.

It is also noted that litigation has already been initiated by a tobacco company in respect of a refusal by the Commission to grant access to intermediate versions of an impact assessment. This demonstrates the readiness of the industry to initiate litigation over the Directive. It is reasonable to presume that such documents are sought to enable the industry to consider initiating proceedings targeting the Directive and to provide material which might be used in that respect. It follows from the above that the requested documents, which contain informal, frank exchanges of views on legal issues related to the subject-matter covered by the request, are particularly sensitive.

¹ Cf. Case C-491/01 (concerning validity and legal basis), C-432/02 (validity), C-210/03 (validity).

Disclosure of such documents would undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. It would make known to the public informal exchanges between an official of the Council Legal Service and officials of the Legal Services of the European Parliament and of the Commission and between an official of the Council Legal Service and Member State delegates, on sensitive and contentious legal aspects of the Tobacco Directive. Disclosure of the documents under circumstances where there is a very concrete risk of litigation covering the very aspects dealt with in the documents would affect the ability of the Legal Services concerned to effectively defend the Tobacco Directive before the Union courts. This would run counter to the principle of equality of arms by providing the adverse party with a clear advantage in such possible future proceedings. As regards the intermediate draft versions of Article 24 and other related parts of the proposal, disclosure of such drafts which have subsequently been superseded would be so as to reveal which parts of the relevant provisions were most difficult and controversial from a legal point of view. Such knowledge would equally give the adverse party in possible future proceedings an unfair advantage.

Finally, it is also noted that documents drawn up by individual officials of the Council Legal Service on an informal and preliminary basis deserve particular protection. If such preliminary views and assessments authored by individual legal advisors were to be made public, this would seriously undermine the functioning of the Council Legal Service as an institution with a direct impact on the ability of the Council to seek legal advice and receive frank objective and comprehensive advice.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under the Regulation, 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 question.

Moreover, on the basis of a thorough examination of the content of the requested documents the General Secretariat of the Council has concluded that documents are covered by the invoked exception in their entirety and that no partial access may therefore be granted under Article 4(6) of the Regulation.

Finally, it is noted that all the requested documents contain names and often contact details of officials of the Council Legal Service, of the Commission and/or of the European Parliament and/or of individual delegates. Such information constitutes personal data within the meaning of Article 2(a) of Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹. When a request based on Regulation 1049/2001 concerns public access to documents that include personal data, the provisions of Regulation 45/2001 become applicable in their entirety.

In relation to the personal data in question, the General Secretariat considers that the public interest in having access to information about the officials involved in the file does not, on balance, prevail over the interest of those individuals to protect their personal data. Accordingly, access to those personal data is refused pursuant to Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual).

In the view of the foregoing, the General Secretariat is unable to grant you access to the requested documents.

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 reply².

Yours sincerely,

For the General Secretariat

Jakob Thomsen

¹ OJ L 8, 12.1.2001, p. 1.

² 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 16 June 2014 - 6:09 pm]

From: **DELETED**

Sent: Monday, June 16, 2014 6:09 PM

To: SECRETARIAT DGF Access

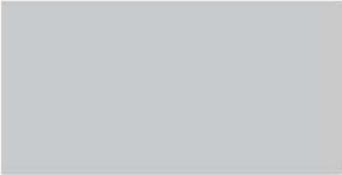
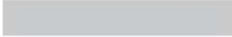
Subject: Confirmatory application - 14/0710-ls/mi/ns

Dear Madam, Sir,

Please find attached a letter with a confirmatory application in the abovementioned case.

Yours sincerely,

DELETED

Council of the European Union
General Secretariat
Directorate-General F
Communication Transparency
Access to Documents/Legislative transparency



By email

Our ref

Your ref

Date
16 June 2014

Dear General Secretariat

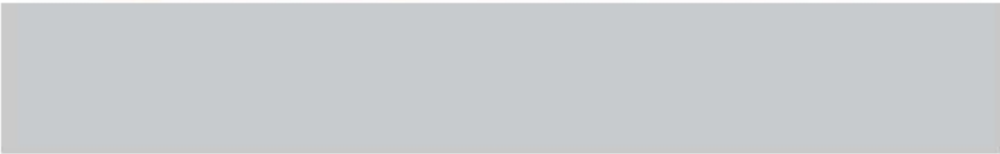
Council reference: 14/0710-ls/mi/ns

We refer to the letter from Mr Jakob Thomsen dated 4th June, responding to our written request for access to Council documents in accordance with Regulation 1049/2001 ("the Regulation"), which we had submitted on 16th April 2014. Pursuant to Article 7(2) of the Regulation (as referred to in the final paragraph of your letter), we hereby make a **confirmatory application** requesting that the Council reconsiders its refusal to grant our application.

In rejecting our request, your letter claims that disclosure of the requested documents would undermine the protection of legal advice under Article 4(2) of Regulation 1049/2001 and that this concern outweighs the public interest in disclosure. The European Court of Justice ("CJEU") has consistently held that all exceptions from the right of public access to documents "must be interpreted and applied strictly" (e.g. see Case C-64/05 P *Sweden v Commission*, paragraph 66). The Council therefore has to balance the claimed interest (here, protection of legal advice) against the overriding public interest in the document being made accessible.

The public interest in disclosure is particularly strong where the EU institutions are acting in a legislative capacity. Recital (6) of the Regulation states that "*Wider access must be granted to documents in cases where the institutions are acting in their legislative capacity... Such documents must be made directly assessable to the greatest extent possible.*"

Against this backdrop, the CJEU ruled in Joined Cases C-39/05 P and C-52/05 P *Maurizio Turco v EU Council* ("the *Turco* case") that the public interest in the disclosure of an internal Council legal opinion concerning proposed EU legislation outweighed the need for



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the protection of legal advice. In that case, the CJEU annulled a Council decision rejecting an application for access to an opinion of the Council's Legal Service regarding a proposed Directive laying down minimum standards for handling asylum seekers.

The CJEU stressed in *Turco* that openness as regards proposed EU legislative acts contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The CJEU therefore dismissed as incorrect a finding by the Court of First Instance that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters (paragraph 57 of the Judgment). The CJEU ruled that the opposite was true: "*Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*" (paragraph 68).


In the *Turco* case, the Council had argued that there was a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts. The Commission had also argued that such disclosure would make it difficult for an institution to defend the lawfulness of an act if it became publicly known that the legal service had initially expressed a negative opinion regarding that act. However, the CJEU dismissed these arguments as being mere assertions which were not supported by detailed arguments. For example, at paragraph 65, the Court stated that:

"as regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation 1049/2001."

Your letter 4th June seeks to justify the refusal to grant access by claiming that: (i) the documents are particularly sensitive as the adoption of TPD2 is likely to be litigated; (ii) knowledge by the other party of the content of the documents would affect the ability of the Legal Services to effectively defend the Directive which would run counter to the principle of equality of arms; and (iii) disclosure of such informal and preliminary documents would undermine the functioning of the Council Legal Service and the Council's ability to seek legal advice and receive frank, objective and comprehensive advice. However, these claims are merely general assertions which (like those rejected in the *Turco* case) are not substantiated by any detailed arguments or evidence. In particular, you have not explained precisely how or why knowledge of the content of the requested documents would prejudice the ability of the Legal Services to defend the Council effectively in any litigation regarding TPD2 or to give frank, objective and comprehensive advice in future.

Furthermore, it is not clear to us how the concept of "equality of arms" could play a role in a context in which the legality of a legislative measure may be questioned. Surely, the public interest requires that control of the legality of an EU legislative measure can take place in the best possible circumstances and with access to all relevant information. The prevailing public interest objective cannot be merely for the EU institutions to "win the case".

Finally, you have not explained why the above assertions mean that the requested documents must be withheld in their entirety. It is incumbent on the Council to consider whether any parts of the requested documents could be disclosed and to withhold only



Date
16 June 2014
Letter to

those parts which fall within an exemption and for which there is no overriding public interest in disclosure. We note, for example, that you have raised concerns about disclosing the names and contact details of officials of the Council Legal Service. Even if such data were sensitive (which we do not believe is the case), it would be straightforward for the Council to redact this data from the requested documents prior to their disclosure.

For all the above reasons, we believe that the Council is obliged to disclose the documents and correspondence that we have requested in respect of the TPD2 legislative process. We therefore request the Council to re-consider the position set out in your letter of 4th June. In accordance with Article 8 of the Regulation, you are required either to grant the requested access or to send us your reasoned refusal within 15 working days of this confirmatory application (i.e. by 9th July at the latest). If you fail to do so, we reserve our right to institute court proceedings against the Council and/or make a complaint to the Ombudsman, as foreseen by Article 8(3) of the Regulation.

Yours faithfully,

