



Council of the
European Union

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Eingelangt am 09/01/15

Brussels, 9 January 2015
(OR. en)

17089/14

INF 350
API 154

NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 40/c/01/14

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 13 November 2014 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 4 December 2014 ([Annex 2](#));
- confirmatory application (including an exchange of e-mails) dated 8 December 2014 and registered the same day ([Annex 3](#))

[E-mail message sent to access@consilium.europa.eu on 13 November 2014 - 8:39 am using the electronic form available in the Register application]

From: **DELETED**

Sent: Thursday, November 13, 2014, 8:39 am

To: SECRETARIAT DGF Access

Subject: Electronic Request for Access

Title/Gender: Ms **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: **DELETED**

Address: **DELETED**

Telephone: **DELETED**

Mobile: **DELETED**

Requested document(s):

ST 16603 2012 INIT
ST 16288 2012 INIT
ST 12979 2012 INIT
ST 9019 2012 COR 1
ST 9019 2012 INIT
ST 8647 2012 INIT
ST 6693 2012 INIT
ST 17714 2013 INIT
ST 15666 2012 INIT
ST 7623 2012 REV 1
ST 7623 2012 REV 1 ADD 1
ST 7622 2012 INIT
ST 7623 2012 INIT
ST 6693 2012 INIT
ST 5661 2012 INIT



Council of the European Union

General Secretariat

Directorate-General Communication and Document Management

Directorate Document Management

Transparency and Access to Documents Unit

DELETED

Brussels, 4 December 2014

Ref. 14/2105-mj/mf

Dear **DELETED**,

We have registered your request of 13 November 2014 for access to the following documents.

1. ST 16603 2012 INIT	2. ST 16288 2012 INIT	3. ST 12979 2012 INIT
4. ST 9019 2012 COR1	5. ST 9019 2012 INIT	6. ST 8647 2012 INIT
7. ST 17714 2013 INIT	8. ST 15666 2012 INIT	9. ST 7623 2012 REV1
10. ST 7623 2012 RE1AD1	11. ST 7622 2012 INIT	12. ST 7623 2012 INIT
13. ST 6693 2012 INIT	14. ST 5661 2012 INIT	

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 and has come to the following conclusion:

You may have full access to all these documents except for document **12979/12**.

Document **12979/12** concerns a written contribution of the Council Legal Service, which examined very sensitive legal issues (e.g. legal basis question or respect for *nebis in idem* principle issues etc.) with regard to the Commission legislative proposals on the one hand for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation as well as on the other hand for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation and other instruments regarding the harmonization of administrative sanctions in the framework of financial services. The document consequently contains legal advice except for paragraphs 1, 4 and 5 which are already publicly accessible.

Though the legislative procedures for both above-referred legal acts were finished in the first half of 2014³, the legal issues examined in document **12979/12** are still pertinent and of direct significance to a wide range of legislative files currently being under discussion in the Council. The legal advice is of a particularly wide scope. In the light of the sensitivity and the contentiousness of the legal issues covered by the document, there is thus a risk that they may become subject for litigation before courts in the future. The legal advice in question is therefore still particularly sensitive. Further disclosure of the requested document would, consequently, undermine the interests of the Council relating to 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 only for the members of the Council. The possibility that such broad, complex and sensitive legal advice be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service in the future. Moreover, further disclosure of the subject legal advice could also adversely affect the ability of the Legal Service to effectively defend the Council acts before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is normally drafted and hence prejudice the possibility of the Legal Service to express its views freely from external influences.

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.

³ See: Directive No. 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.06.2014, p. 179.; and Regulation No.596/2014/EU of the European Parliament and of the Council on market abuse (market abuse regulation), OJ L 173, 12.06.2014, p.1.

The legal advice contained in the document examines legal issues, which, as mentioned above, are still of direct relevance to a wide range of legislative files being currently under deliberations by the EU legislature. These on-going legislative negotiations are sensitive and complex and the legal issues analyzed in the legal advice are clearly controversial, constitute critical elements of those negotiations and form an important and integral part of the related inter-institutional discussions being underway. Further disclosure of the requested document could, therefore, negatively affect the legislative negotiations by impeding internal discussions of the Council on all the pending legislative proposals in the given field and would hence risk compromising the capacity of the institutions to reach an agreement on the dossiers and thus seriously undermine the decision-making process in the sense of Article 4(3), first subparagraph, of the Regulation.

Finally, it is to be noted that an earlier applicant has already turned to the General Court with regard to his request for full public access to the same document, which case, however, is still pending. Therefore, legally it should be said that the present new application and its object are currently "sub judice", and thus cannot be met until the final decision of the General Court in order to protect the Council's interest in this pending Court proceedings. (Article 4(2), second indent, of the Regulation).

As regards the existence of an overriding public interest in disclosure in relation to the protection of the subject legal advice, the pending court proceedings and of the institution's related on-going decision-making process under the Regulation, the General Secretariat considers that, on balance, the principle of transparency which underlines the Regulation would not, in the present case, prevail over the above indicated interests so as to justify further disclosure of the document.

In the view of the foregoing, the General Secretariat of the Council is at the moment unable to grant you further access to document 12979/12 as opposed to that part, which has already been disclosed since that part was not covered by any of the exceptions under the Regulation (namely paragraphs 1, 4 and 5).

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 reply⁴.

Yours sincerely,

For the General Secretariat

Jakob THOMSEN

Enclosures

⁴ 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.

From: **DELETED**
Sent: Tuesday, December 09, 2014 7:31 AM
To: SECRETARIAT DGF Access
Subject: Re: Ref. 14/2105-mj/mf (1/2)

Dear Transparency and Access to Documents,

Yes, my client wants to submit a confirmatory application.

Kind regards,

DELETED

From: SECRETARIAT DGF Acc
Sent: Monday, December 08, 2014 14:50
To: **DELETED**
Subject: Re: Ref. 14/2105-mj/mf (1/2)

Dear **DELETED**,

In reply to your message, we suppose that your client wants to submit a confirmatory application pursuant to Article 7 (2) of Regulation 1049/2001 requesting the Council to reconsider the position of the General Secretariat regarding access to document 12979/12.

If this is the case, we would be grateful if you could confirm this at your earliest convenience.

Yours sincerely,

Transparency and Access to Documents

From: **DELETED**
Sent: Monday, December 08, 2014 7:17 AM
To: SECRETARIAT DGF Access
Subject: Re: Ref. 14/2105-mj/mf (1/2)

Dear Transparency service,

My client (**DELETED**) would like to request again access to the document: 12979/12. Should he make another formal request (filling a form) or writing a letter to you or is this email enough?

Kind Regards,

DELETED