



Council of the  
European Union

Brussels, 30 January 2015  
(OR. en)

5671/15

INF 16  
API 14

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 03/c/01/15

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 24 December 2014 and registered on 5 January 2015 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 26 January 2015 ([Annex 2](#));
- confirmatory application dated 26 January 2015 and registered on 27 January 2015 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 24 December 2014 - 01:37 AM using the electronic form available in the Register application]

**From:** **DELETED**

**Sent:** Monday 24 December 2014 - 01:37 am

**To:** SECRETARIAT DGF Access

**Subject:** Electronic Request for Access

**Title/Gender:** **DELETED**

**Family Name:** **DELETED**

**First Name:** **DELETED**

**E-Mail:** **DELETED**

**Address:** **DELETED**

**Telephone:** **DELETED**

**Mobile:** **DELETED**

**Requested document(s):**

ST 16983 2014 INIT

Reasons justifying access to the document :

- Council Legislative Activity
- Topic of major interest to the public (transparency rules of the institutions , see ECJ " Turco " )

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**Council of the European Union**  
General Secretariat

Directorate-General Communication and Document Management  
Directorate Document Management  
Transparency and Access to Documents Unit

Brussels, 26 January 2015

**DELETED**

Email: **DELETED**

Ref. 15/0004-mj/jj

Request made on: 24.12.2014

Registered on: 05.01.2015

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>

Please find attached a partially accessible version of document 16983/14 (available in English only).<sup>2</sup> However, I regret to inform you that full access cannot be given for the reasons set out below.

The requested document contains an opinion of the Legal Service of the Council concerning a Commission's proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust). The legal opinion analyses the legality of Article 60 (transparency) of the text of the partial general approach which has been agreed by the Justice and Home Affairs Council of 4 and 5 December 2014 (the "draft Eurojust Regulation"). The document consequently contains legal advice, except for its paragraphs from 1 to 9.

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<sup>1</sup> The General Secretariat of the Council has examined your request on the basis of the applicable rules: 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, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

<sup>2</sup> Article 4(6) of Regulation (EC) No 1049/2001.

The decision-making process relating to the proposed Directive is currently ongoing. The requested document is a very recent opinion which deals with an issue on which Council members have expressed different positions. Moreover, the European Parliament has not yet adopted a position on the issue, which is one of the most sensitive issues in the ongoing inter-institutional negotiations. Under these circumstances the disclosure of the document could hamper the Council's decision-making on this issue internally as well as externally as disclosure of the legal advice contained in the opinion would risk compromising the capacity of the Council to reach an agreement on the dossier and would limit the Council's options during the ongoing interinstitutional negotiations.

Under these circumstances, disclosure of the document would undermine the decision-making process pursuant to Article 4(3) of Regulation (EC) No 1049/2001.

For the reason mentioned above, and in particular in light of the different views expressed by the Member States and the other institutional actors, the requested legal opinion appears particularly contentious and the risk of litigation particularly high. Moreover, an issue similar to the one discussed in the legal opinion is raised in the parallel legislative procedure on a new Europol Regulation, in relation to which trilogues negotiations are currently ongoing.<sup>3</sup> Therefore, the issue is also particularly sensitive and wide in scope.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent of Regulation (EC) No 1049/2001. 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, the 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.

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<sup>3</sup> Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, (COM(2013)0173 – C7-0094/2013 – 2013/0091(COD)).

As regards the existence of an overriding public interest in disclosing the requested document in relation to the interests in protecting the ongoing decision making procedure and in having a frank, objective and comprehensive 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 interests so as to justify disclosure of the document.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested document. However, in accordance with Article 4(6) of the Regulation (EC) No 1049/2001, you may have access to paragraphs 1 to 13 and to 20, letter e) only.

You can ask the Council to review this decision within 15 working days of receiving this reply.<sup>4</sup>

Yours sincerely,

Jakob THOMSEN

Enclosure

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<sup>4</sup> Article 7(2) of Regulation (EC) No 1049/2001.  
Council documents on confirmatory applications are made available to the public. According to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

**From:** **DELETED**

**Sent:** Monday, 26 January 2015 7:52 PM

**To:** SECRETARIAT DGF Access

**Subject:** Re: Ref. 15/0004-mj/jj

Good evening,

Thank you for your reply. By this confirmatory application I hereby ask you to reconsider your partial refusal of my request for access. The arguments you put forward appear to directly contradict the rules governing access to legal opinions, particularly those derived from the *Turco* case-law, which "**imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process**".

- Furthermore, it seems to me that the standard reasoning put forward by the Council, echoing that already used on dozens of occasions to refuse access to other opinions of its Legal Service, fails to meet the requirements set down by the Court in its statement that:

*"to submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of that provision and cannot, accordingly, provide a basis for a refusal to disclose such advice. It is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole. Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed." (C-39/05 P and C-52/05 P, Kingdom of Sweden and Maurizio Turco)*

- Finally, the Council fails to demonstrate that disclosing the document would have "serious" effects, and has clearly not taken the **specific nature of the requested document's subject-matter** into account in its reply: the document relates to Eurojust's implementation of the principle of transparency, one of the fundamental rights guaranteed by the Charter. Disclosure of the requested document is thus clearly of **major interest to the public**.

Regards,

**DELETED**

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