



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 November 2013

15669/13

**INF 189
API 96**

NOTE

from : General Secretariat of the Council
to : Working Party on Information

Subject : Public access to documents
- Confirmatory application No 21/c/01/13

Delegations will find attached:

- a request for access to documents sent to the General Secretariat of the Council on 23 August 2013 and registered on the same day ([Annex 1](#))
- the additional reply from the General Secretariat of the Council dated 30 October 2013 ([Annex 2](#)) (a first reply was sent on 4 October 2013);
- a confirmatory application dated 30 October 2013 and registered on the same day ([Annex 3](#)).

[E-mail message sent on 23 August 2013 - 15:04]

From: DELETED

Sent: Friday, August 23, 2013 3:04 PM

To: SECRETARIAT DGF Access

Subject: request access to documents

Dear Sir/Madam,

I would like to request access to the legal opinions prepared by the Council legal service in relation to the following 8 (eight) Commission proposals:

COM (80) 635 proposal for a council regulation on community trade marks

COM (84) 470 proposal for a council regulation on community trade marks

COM(90) 283-2 proposal for a council regulation (EEC) laying down community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European agency for the evaluation of medicinal products

COM (90) 347 proposal for a council regulation (EEC) on community plant variety rights

COM (90) 564 proposal for a council regulation (EEC) establishing a European agency for safety and health at work

COM (91) 463 proposal for a council regulation (EEC) on the establishment of a European drugs monitoring centre and a European information network on drugs and drug addiction(reitox)

COM (94) 22 Proposal for a council regulation (EC) setting up a translation centre for bodies of the European union

COM (2000) 716 Proposal for a regulation of the European parliament and of the council laying down the general principles and requirements of food law, establishing the European Food Authority, and laying down procedures in matters of food

If the English version is not available I would be happy to receive the French version.

Thank you very much for your assistance.

Kind regards,

DELETED



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

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Brussels, 30 October 2013

DELETED

e-mail:

DELETED

Ref. 13/1414-ADD-jh/jj

Dear **DELETED**,

Further to our letter of 4 October 2013 in reply to your request of 23 August 2013 the General Secretariat of the Council has finalised the examination of documents **9221/86, 9525/91, 10736/92, 5438/92, 8866/01, 8891/01** and **9201/01** 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 access to documents **9525/91, 5438/92, 10736/92, 8866/01, 8891/01** and **9201/01 (+ COR 1)**.

Document **9221/86** comprises an opinion of the Council Legal Service on a proposal for a Council Regulation on the Community trade mark. It deals in particular with the impact of the Meroni judgment of the European Court of Justice³ on a possible conferral of powers to the Community Trade Marks Office. The document consequently contains legal advice, except for the first paragraph on page 1, which is already public.

Although the decision-making process is finalised, the aspects analysed are of direct relevance to on-going and future negotiations on similar matters within the Council. Disclosure of the legal advice would hence undermine the decision-making process pursuant to Article 4(3), second subparagraph, of the Regulation.

The legal advice covered by this opinion deals with issues which are very broad in scope and relevant to a wide range of current and future dossiers. Furthermore, the advice concerns issues which are subject to current litigation before the Court of Justice of the EU⁴. The legal advice remains therefore particularly sensitive.

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 Case 9/56, Meroni, [1957 and 1958] ECR 133.

⁴ Case C-270/12, Case C-146/13 and Case C-147/13.

Disclosure of such a document would therefore undermine 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 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, 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.

As regards the existence of an overriding public interest in disclosure in relation to the protection of the decision-making process and 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 interests so as to justify disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of the Regulation, you may have access to the first paragraph on page 1 of the document as well as to point 4 of the opinion on pages 6 and 7, which are already publicly accessible.

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 reply¹.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosures

¹ Confirmatory applications are published in the Council's Register of documents. Please indicate whether you would like your personal data to be removed from Council documents related to your confirmatory application. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 30 October 2013 - 14:25]

From: DELETED

Sent: Wednesday, October 30, 2013 2:25 PM

To: SECRETARIAT DGF Access

Subject: Confirmatory application Ref. 13/1414-ADD-jh/jj

Dear Sir/Madam,

Please find attachment a letter with my confirmatory application for full access to document 9221/86.

Kind regards,

DELETED

[Attachment:]

Dear Mr. Thomsen,

Thank you for your reply dated 30 October 2013, to my request for access to documents of 23 August 2013.

As regards the decision to grant partial access to document 9221/86, I would like to file a confirmatory application for full access.

I understand that the exception of Article 4 (2) of Regulation 1049/2001 on legal advice applies. I have also note that, in line with the CJEU's case law, your service has tried to establish whether the general considerations normally applicable to a particular type of document such as legal advice are applicable *in casu*.

However, further in line with the CJEU's case law on the exception of disclosure of legal advice, I am not fully convinced that your service has indeed shown to the standard required that the exception applies *in casu*.

To be specific, I would like to draw your service's attention to the fact that the document requested is almost thirty years old and that the reasons invoked for not granting access have to do with currently pending cases and discussions.

Thus, the document requested is related to a legislative proposal which has long been adopted and which is not (materially) connected to the pending cases and discussions. That there is no immediate link is further apparent when other opinions of the CLS are compared. Comparing opinions 5837/85 and 14547/13 for instance shows how the CLS's understanding of the *Meroni* jurisprudence, cited in your letter of 30 October, is subject to evolution. The disclosure of the content of document 9221/86 would therefore not automatically prejudice currently pending cases before the Court or discussions within the Council or between the Council and other Institutions.

It would therefore appear that the risks invoked by your service related to granting access to the requested document are hypothetical and are not reasonably foreseeable as required by the CJEU's case law.

I trust the Council will take these elements into account when reviewing its decision and I hope it will agree that access may be granted to the document requested.

Yours sincerely,

DELETED