



Council of the  
European Union

Brussels, 30 September 2015  
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**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 21/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 19 July 2015 and registered on 20 July 2015 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 27 August 2015 ([Annex 2](#));
- confirmatory application dated 14 September 2015 and registered on 15 September 2015 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 19 July 2015 - 11:12 PM using the electronic form available in the Register application]

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of:

Address: **DELETED**

Telephone: **DELETED**

Mobile:

Fax:

Requested document(s): ST 6267 2014 INIT

ST 13302 2014 REV 1

ST 15260 2014 INIT

ST 16983 2014 INIT

ST 16983 2014 COR 1

ST 8904 2015 INIT

ST 8904 2015 COR 1



**Council of the European Union**  
General Secretariat

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

Brussels, 25 August 2015

**DELETED**

Email: **DELETED**

Ref. 15/1873-mjb/nb

Request made on: 19.07.2015

Registered on: 20.07.2015

Extended on: 11.08.2015

Dear **DELETED**,

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

Please find attached the documents **15260/14**, **16893/14 COR 1** and **8904/15 COR 1**.

Please find attached a partially accessible version of documents **6267/14**, **13302/1/14 REV 1**, **16983/14** and **8904/15**.<sup>2</sup> However, I regret to inform you that full access cannot be given for the reasons set out below.

Document **6267/14** is a contribution of the Legal Service of the Council, relating to the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. The document contains an analysis of the specific enhanced cooperation procedure provided for in the second and third subparagraphs of Article 86(1) TFEU.

<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.

Document **13302/1/14 REV 1** contains an opinion of the Legal Service of the Council concerning the proposal of the Commission for a Council Regulation on the establishment of the European Public Prosecutor's Office. In particular, the opinion analyses the compatibility with the Treaties of certain provisions of the proposed Regulation which limit the judicial review of the Court of Justice on the procedural measures taken by the European Public Prosecutor's Office.

Document **16983/14** also contains an opinion of the Legal Service of the Council concerning the Commission proposal for a Regulation of the European Parliament and of the Council on the EU Agency for Criminal Justice Cooperation (EUROJUST). The opinion gives a legal assessment of Article 60 of the proposal on public access to documents held by EUROJUST. Document **16893/14 COR 1** is a corrigendum to paragraph 10 at page 4 of document **16983/14**.

Document **8904/15** contains an opinion of the Legal Service of the Council concerning the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (hereinafter : "EPPO"). The legal opinion analyses the compatibility with Article 86 TFEU of the extension of the proposed European Public Prosecutor's jurisdiction to certain ancillary offences. Document **8904/15 COR 1** indicates that the corrigendum does not apply to the Polish version of document **8904/15**.

These documents contain therefore legal advices except for the parts indicated below.

First of all, it is to be stressed that the decision-making process relating to the above-mentioned two draft Regulations is currently on-going. The Council has not yet taken a final position on the issues dealt with by the requested documents. These issues are complex and form an important part of the on-going discussions. Moreover, the legal issues dealt with by the requested documents are controversial as well as the different actors involved in the legislative procedures have expressed different positions. As a consequence, the on-going discussions are very sensitive.

For those reasons, disclosure of these documents would adversely affect the negotiations by impeding internal discussions of the Council on the proposals and would have hence the risk compromising the capacity of the Council to reach an agreement on the two legislative dossiers in question as well as the effective negotiation with the EP of the EUROJUST proposal. It would thus undermine the concerned decision-making processes pursuant to Article 4 (3) of Regulation (EC) No. **1049/2001**.

Moreover, the legal advice covered by the requested documents are novel and complex. For example, the European Public Prosecutor's Office ("EPPO") will be a newly established Union body. Article 36 TFEU, the legal basis for its establishment, has been introduced by the Lisbon Treaty and has never been interpreted by the Court. The EPPO will have a peculiar hybrid nature, being a Union body but integrated into national criminal systems and prosecuting before national courts. As a consequence, the issues dealt with by the legal opinions and the CLS contribution in

question are, indeed, novel and particularly sensitive. Moreover, since the proposed EPPO will be in charge of criminal investigations and prosecutions against individuals, the risk of future litigation is extremely high. The legal advice relating to the EPPO is therefore particularly sensitive. The same level of legal sensitivity and complexity equally arises with regard to the legal advice, given in relation to the EUROJUST proposal, where the scope of application and the potential relevance of EU transparency law in the given case is under discussion.

Disclosure of such documents would consequently undermine the protection of legal advice under Article 4(2), second indent of Regulation (EC) No 1049/2001. It would make public internal opinions of the Legal Service intended only for the members of the Council. Thus, the disclosure of the legal advices in subject could also affect the ability of the Legal Service to defend effectively decisions taken by the Council before the Union courts.

As regards the existence of any overriding public interest in disclosure in relation to the interests in protecting the on-going decision making procedures and having a frank, objective and comprehensive legal advice, we consider 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 further disclosure of the requested documents.

In view of the foregoing, the General Secretariat of the Council is unable to grant you full access to documents 6267/14, 13302/1/14 REV 1, 16983/14 and 8904/15. However, in accordance with Article 4 (6) of the Regulation (EC) No. 1049/2001, you may have access to the parts of these requested documents are not covered by any of the above-mentioned exemptions and therefore have already been made public.:

- to all headings and subheadings as well as to paragraphs 1 to 10, paragraph 11. first sentence, paragraph 12. first sentence and last sentence, paragraphs 13-14, paragraph 15. first sentence, paragraph 17., and paragraph 18. first sentence of document 6267/14;
- to paragraphs 1 to 10, 13 to 17, 27, 28, 39 and 42 of document 13302/1/14 REV 1;
- to paragraphs 1 to 13 and paragraph 20e of document 16983/14 and 16983/14 COR 1; and
- to paragraphs 1 to 10 and paragraphs 17 to 19 of document 8904/15 and 8904/15 COR 1.

You can ask the Council to review this decision within 15 working days of receiving this reply.<sup>3</sup>

Yours sincerely,

Jakob THOMSEN

Enclosures

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<sup>3</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.

**[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 14 September 2015 - 11:56 PM]**

Sir/Madam,

In reply to the letter from the Council sent to me by email on 27 August 2015, please find enclosed a confirmatory application requesting review of that decision.

(Complimentary close).

## CONFIRMATORY APPLICATION

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, **I hereby request a review of the decision of 25 August 2015 to refuse full access to Council Legal Service documents** 6267/14, 13302/1/14 REV 1, 16983/14 and 8904/15.

### Reasons

1. On 19 July 2015 I applied for access to certain Council documents relating to the ongoing legislative process on the draft Council Regulation on the establishment of the European Public Prosecutor's Office, and on the draft Regulation of the EP and of the Council on the EU Agency for Criminal Justice Cooperation (Eurojust), which covers related subject-matter.
2. In the Council's reply of 25 August 2015 (emailed on 27 August 2015), I was informed that I would be granted only partial access to the above-mentioned CLS documents, in view of the fact that:
  - a) *'Disclosure of these documents would adversely affect the negotiations by impeding internal discussions of the Council on the proposals and would hence risk compromising the capacity of the Council to reach an agreement on the two legislative dossiers in question as well as the effective negotiation with the EP of the Eurojust proposal. It would thus undermine the relevant decision-making processes pursuant to Article 4(3).'*
  - b) *'the legal advice covered by the documents requested [by me] is novel and complex. (...) As a consequence, the issues dealt with by the legal opinions and the CLS contribution in question are, indeed, novel and particularly sensitive. Moreover, since the proposed EPPO will be in charge of criminal investigations and prosecutions against individuals, the risk of future litigation is extremely high. The legal advice relating to the EPPO is therefore particularly sensitive. The same level of legal sensitivity and complexity equally arises with regard to the legal advice, given in relation to the Eurojust proposal, where the scope of application and the potential relevance of EU transparency law in the given case is under discussion. Disclosure of such documents would consequently undermine the protection of legal advice under Article 4(2), second indent of Regulation (EC) No 1049/2001. It would make public internal opinions of the Legal Service intended only for the members of the Council. Thus, the disclosure of the legal advice concerned could also affect the ability of the Legal Service to defend effectively decisions taken by the Council before the Union courts.'*

3. I strongly disagree with the above arguments and hereby request the Council to reconsider its decision and grant full access to the Legal Service documents.

In this connection I rely on the established case-law of the Court of Justice<sup>1</sup> and legal theory, which, in my opinion, clearly favour full disclosure of the documents I am requesting.

4. With reference to the objection that disclosure would undermine the protection of legal advice, it should be pointed out that according to the guidelines of the Court of Justice, the Council must carry out an examination in three stages<sup>2</sup> to assess, inter alia, to what extent (if any) disclosure of a document 'would undermine the protection' of legal advice. Unfortunately neither Regulation No 1049/2001 nor its *travaux préparatoires* throw any light on the meaning of 'protection' of legal advice. It must therefore be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.

In the present case, there are, in my opinion, no grounds to suppose that disclosure of the requested CLS documents would undermine that interest. Paradoxically, moreover, full disclosure and public availability of legal opinions actually guarantee that an institution is not given inexpert or incorrect advice and hence that the advice it receives is frank, objective and comprehensive. Publication of legal advice, especially advice relating to the legislative process (where only the Council acts as legislator<sup>3</sup>) acts as a guarantee that legally questionable initiatives will be ruled out, thus reflecting one of the fundamental principles of the European Union, the rule of law. The above considerations lead me to conclude that disclosure of legal opinions (legal advice) provided to the Council in the context of an on-going legislative process can in no way be regarded as jeopardising or 'undermining the

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<sup>1</sup> The judgment of the Grand Chamber of the Court of Justice in the joined cases Sweden and Turco v Council (C-39/05 P and C-52/05 P) is particularly relevant here, although the judgments in *MyTravel Group v Commission* (T-506/08) and *Access Info Europe v Council* (T-233/09) are equally important.

<sup>2</sup> First, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Second, the Council must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice 'would undermine the protection' of that advice, in the sense that disclosure would undermine an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Third and last, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, *Sweden and Turco v Council*, EU:C:2008:374, paragraphs 38-44).

<sup>3</sup> The Court stressed in its judgment in *Turco* (paragraph 46) that weighing up the interest in the document being made accessible — in the light of the advantages stemming from increased openness, and also the fact that the administration would enjoy greater legitimacy and be more effective and more accountable to the citizen - is of particular relevance where the Council is acting in its legislative capacity.



protection' of legal advice. However, even supposing that such a risk might arise, it would at best be purely hypothetical, and therefore insufficient to warrant an exception to the right of access under Article 4(2), second indent, of Regulation No 1049/2001<sup>4</sup>. This conclusion is based on paragraph 43<sup>5</sup> of the Turco judgment.

Moreover, I do not agree with the opinion expressed in the General Secretariat's letter of 25 August 2015 that there was no overriding public interest in disclosure of the abovementioned legal opinions. I believe that public scrutiny and the transparency of the decision-making process in the Council are an essential factor in legitimising the decisions taken, improving the quality of the lawmaking process. They also guarantee the rule of law - this cannot be compromised by asserting that in the future, hypothetically, there may be litigation before a Union court, in which case the Council's position would be weakened when defending its own (unconstitutional?) decisions.

Nor do I accept the Council's position regarding a grave undermining of the protection of legal advice based on the argument that it deals with 'novel and complex' issues and is actually 'novel and particularly sensitive'. This is a conclusion reached - in my view - by circular reasoning, tantamount to a logical error, which does not adequately justify the view that disclosure of the abovementioned analyses would undermine the protection of legal advice, as defined by the Court.

Similarly, the argument that 'since the proposed EPPO will be in charge of criminal investigations and prosecutions against individuals, the risk of future litigation is extremely high' is also to be rejected. How is the protection of legal advice - taken as meaning the interest of an institution in seeking advice and receiving a frank, objective and comprehensive opinion - undermined in relation to an individual being prosecuted before a national court for an offence that falls within the jurisdiction of the EPPO? If the Council considers that there is a risk that the activities of the EPPO may be effectively compromised in such a way, then all the more reason why a legal opinion pointing out such an eventuality should be disclosed immediately, and appropriate steps taken from the outset, during the legislative process, to offset any such adverse legal effects which may arise in the future.

The same reasoning - as mentioned above - also applies to the Council's comment that 'disclosure of the legal advices in subject could also affect the ability of the Legal Service to defend effectively decisions taken by the Council before the Union courts'. According to the principle of legality and the rule of law, EU institutions are obliged to act on the basis of and within the confines of applicable law. Following the same line of reasoning could, however, lead to the conclusion that the Council is acting (or intends to act) contrary to that principle, by adopting a regulation about which there are serious legal doubts. If that were the case, the need for disclosure of the legal advice and the Council's manner of proceeding would be even greater - in accordance with the guidance given in the recitals of Regulation 1049/2001, which state that wider access should be granted to documents in cases where the institutions are

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<sup>4</sup> See D. Adamski, 'How wide is 'the widest possible'? Judicial interpretation of the exceptions to the right of access to official documents revisited', 46 Common Market Law Review (2009), p. 537.

<sup>5</sup> The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

acting in their legislative capacity (recital 6), as it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy (recital 2).

5. Nor do I agree with the reasons given in the letter from the General Secretariat of the Council for restricting access to Legal Service documents on the basis of the exception provided for in Article 4(3) of Regulation (EU) No 1049/2001 according to which full access to a document may be restricted 'if disclosure of the document would seriously undermine the institution's decision-making process'. It must be emphasised in the strongest possible terms that, according to that provision, access to documents may be restricted only if the decision-making process would otherwise be 'seriously' undermined. It does not, however, follow from the arguments put forward by the Council that any undermining arising from disclosure would be of such a nature. Moreover, it is clearly hypothetical, as it would only 'risk' compromising the capacity of the Council to reach an agreement.

It is clear from the wording of Article 4 of the Regulation that the Council must exercise particular caution in applying the two exceptions to the right of access laid down therein since it is not sufficient for disclosure of documents to undermine the institution's decision-making process. As mentioned above, it must constitute a 'serious' undermining of the decision-making process<sup>6 7</sup>. The exceptions under Article 4(3) of Regulation (EU) No 1049/2001 therefore differ from the exceptions contained in the first two paragraphs, under which any undermining is sufficient, even if it is not 'serious'. Such exceptions must be interpreted strictly.

The drafting history of Article 4(3) of Regulation (EU) No 1049/2001 is not without significance here. It should be noted that during the legislative work on the draft Regulation regarding public access to European Parliament, Council and Commission documents, the Commission had proposed excluding texts for internal use, such as discussion documents, opinions of legal departments, and informal messages, from its scope. It thereby intended to allow the institutions the necessary 'space to think'. Had that proposal been accepted, it would have been perfectly right to refuse access to the documents at issue.

Because the legislature declined, however, to exclude those documents from the scope of Regulation (EU) No 1049/2001, they are to be disclosed in principle like all other documents. Access is to be granted on an even more generous basis because the exception relating to the protection of internal deliberations is worded more strictly than the other exceptions. The legislature therefore wished to protect the 'space to think' less strongly than other interests<sup>8</sup>.

6. In conclusion, I am convinced that the Council's decision to refuse full access to the abovementioned Legal Service documents was given automatically and in contravention of

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<sup>6</sup> See the Opinion of Advocate General Jacobs in Case C-506/08 P

<sup>7</sup> COM(2000)30

<sup>8</sup> See the Opinion of Advocate General Jacobs in Case C-506/08 P

Regulation (EU) No 1049/2001, in a manner that clearly runs counter to its interpretation, including in the judgments of the Court of Justice cited above.

I therefore request that the matter be reviewed and that access be granted to the full contents of the requested documents.

(Complimentary close).

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