



Council of the
European Union

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Brussels, 18 November 2015
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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 23/c/01/15

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 28 September 2015 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 19 October 2015 ([Annex 2](#));
- confirmatory application dated 9 November 2015 and registered on the same day ([Annex 3](#))

[E-mail message sent to access@consilium.europa.eu on 28 September 2015 - 16:48]

From: **DELETED**

Sent: Monday 28 September 2015 - 16:48

To: SECRETARIAT DGF Access

Subject: **DELETED** request for documents - Trade Secrets Directive

Mr Sir, Madam,

Please find attached **DELETED** request for access to documents.

Best regards,

DELETED

28 September 2015

Jakob Thomsen
Council of the EU
General Secretariat - Directorate-General F
Communication-Transparency
[Access@consilium.europa.eu]

Dear Mr Thomsen,

Subject: Access to information on trilogue meetings regarding the Commission's proposal for a
Trade Secrets Directive

We would like to have access to the minutes of the trilogue meetings and technical meetings taking place between representatives of the Parliament, the Council and the Commission in connection with the Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. We would also like to have access to the preparatory documents for the meetings, and any documents which were discussed within the meetings, including position papers sent by industry representatives.

Yours sincerely,

DELETED



Council of the European Union
General Secretariat

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

Brussels, 19 October 2015

Ms **DELETED**
Email: : **DELETED**

Ref. 15/2289-ws/jj

Request made on: 28.09.2015

Dear Ms **DELETED**,

Thank you for your request for access to documents held by the Council of the European Union.¹
Please find attached two of the documents covered by your request: the agenda for the 15 September trilogue meeting and a four-column document of 7 September.

You will also find attached partially accessible versions of the other two documents concerned, being four-column documents of 24 and 28 September.² However, I regret to inform you that full access to these two documents cannot be given for the reasons set out below.

These documents were drafted to prepare for informal trilogues between the Council and the European Parliament. The documents contain comments made with a view to reaching an agreement between the two institutions.

¹ 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).

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

Negotiations are still ongoing and no agreement has yet been reached between the Council and the European Parliament. Full disclosure to the public of the documents at this stage would affect the negotiating process and diminish the chances of reaching an agreement with the European Parliament.

Full disclosure of the documents would therefore seriously undermine the decision making-process of the Council. (This concerns the fourth column, but also colour codings in other columns, which had to be deleted.)

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in full disclosure of the documents in question.

As a consequence, the General Secretariat has to refuse full access to the documents at this stage.³

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

Yours sincerely,

Jakob THOMSEN

Enclosures

³ Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

⁴ Article 7(2) of Regulation (EC) No 1049/2001.

Council documents on confirmatory applications are made available to the public. Pursuant 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 on 9 November 2015 - 15:29]

From: **DELETED**

Sent: Monday, November 1, 2015 16:29

To: SECRETARIAT DGF Access

Subject: **DELETED** Confirmatory Application Ref. 15/2289-ws/jj

Dear Mr Thomsen,

Please find attached **DELETED** Confirmatory Application in respect of the Council's response to our access to documents request (Ref. 15/2289-ws/jj).

Kind regards

Yours sincerely,

DELETED

Brussels, 9 November 2015

Council of the European Union
General Secretariat
Directorate-General Communication and Document Management
Directorate Document Management
Transparency and Access to Documents Unit
Head of Unit
By email: Access@consilium.europa.eu

Dear Mr Thomsen,

RE: Ref. 15/2289-ws/jj- Confirmatory application for reconsideration of the European Council's partial decision to refuse access to documents discussed at the trilogue negotiations regarding the Trade Secrets Directive.

In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter the "Regulation"), **DELETED** hereby submits a confirmatory application with regard to the partial refusal to disclose the requested documents.

On 28 September 2015 **DELETED** wrote to the Council requesting access to "the minutes of the trilogue meetings and technical meetings taking place between representatives of the Parliament, the Council and the Commission in connection with the Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [and]...the preparatory documents for the meetings, and any documents which were discussed within the meetings, including position papers sent by industry representatives."

The Council sent its response on 19 October 2015 together with the following documents:

1. The agenda for the trilogue meeting on 7 September;
2. A four-column document of 7 September 2015;
3. A four-column document of 24 September with the fourth column entirely redacted and colour coding from other columns removed;
4. A four-column document of 28 September with the fourth column entirely redacted and colour coding from other columns removed.

Apart from the first document, the rest of the information disclosed is already publicly available. All of the information in the four-column documents that is not publicly available was redacted or removed. It represents the comments and compromise proposals made in the fourth column of the documents dates 24 September and 28 September (documents 3 and 4), as well as colour coding which indicates which recitals/articles have been agreed and which are still under discussion.

The Council stated that "full disclosure of the documents would therefore seriously undermine the decision making-process of the Council." In other words, it relies on the exception in Article 4(3) of Regulation 1049/2001.

The Council went on to state that “on balance the General Secretariat could not identify any evidence suggesting an overriding public interest in full disclosure of the documents in question.”

The requested documents are legislative documents for the purpose of Article 12 of Regulation 1049/2001

Regulation 1049/2001 gives a right of access to documents held by the EU institutions. This right exists in particular when documents are generated during a legislative procedure. Article 12 of the Regulation first requires the institutions to make documents directly accessible and second creates a specific regime for legislative documents:

- "1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institutions concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."

The processes leading to the adoption of the Trade Secrets Directive is a legislative process.

In joined cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation’s preamble to conclude that *“openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights...It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible.”* This has been confirmed in case C-280/11P.

The requested documents contain the detail of the discussions between the three institutions within a legislative process. This information must be provided while the process is ongoing to allow for transparency and public participation. Disclosing the information once the law is adopted does not comply with Regulation 1049/2001 as interpreted by the EU courts. And, considering the Parliament’s limited role in rubber stamping the trilogue compromise, nor does disclosure following the conclusion of the trilogue negotiations.

The trilogue procedure is not provided for by the EU Treaties. Nevertheless, it has become a standard step in the legislative process. Its objective is to reach a compromise first reading position which is then rubber stamped by the European Parliament’s vote in plenary and the Council. This makes it even more important that the content of trilogue discussions is disclosed – this is precisely the information that the public needs to have access to at a point in time when they can still participate in the process. Decisions reached following discussion within an exclusive and closed group cannot be considered as having been adopted following a democratic process. Confidence and trust among institutions do not ensure transparency and democracy.

Misapplication of Article 4(3), first paragraph, of Regulation 1049/2001

Regulation 1049/2001 provides for some exceptions to the right of access to documents, including Article 4(3). However, according to settled case-law, these exceptions must be interpreted strictly. It is settled case-law that if an institution refuses access it must explain how disclosure of the document could specifically and actually undermine the interest protected by the exception. Moreover, the risk of that interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

In case C-280/11, the Court recalled that within a legislative process "*public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly*".

As justification for invoking the exception in Article 4(3), the Council states: "*These documents were drafted to prepare for informal trilogues between the Council and the European Parliament. The documents contain comments made with a view to reaching an agreement between the two institutions...Negotiations are still ongoing and no agreement has yet been reached between the Council and the European Parliament. Full disclosure to the public of the documents at this stage would affect the negotiating process and diminish the chances of reaching an agreement with the European Parliament.*"

Contrary to the Council's argument, transparency in the process could in fact enhance the institutions' ability to find a better compromise, one that is nourished by input from civil society. The Council does not demonstrate how the process would be undermined and how the chances of reaching an agreement would be jeopardised. It relies on mere assertions which are unsubstantiated by any solid arguments and evidence.

Misapplication of the overriding public interest test of Article 4(3) first paragraph of Regulation 1049/2001 and failure to state reasons

Even if the decision-making process would be undermined, there is a clear overriding public interest in disclosure of the documents, despite the Council's claim that it could not identify one.

The adoption of the Trade Secrets Directive will harmonise trade secret protection across the EU for the first time. As such, it will have a profound impact on the lives of EU citizens. The trilogue negotiations will effectively decide the extent and nature of these impacts. The public has the right to know the considerations that influence the positions taken by the institutions and be able to comment, participate, oppose or support the decisions before they are finalised. This right should be upheld by the institutions involved in this process.

Keeping the outcome of trilogue meetings confidential prevents the organization of democratic debate on the direction that the draft is taking. It also prevents Member State governments and MEPs from being accountable to their electorate with regard to the positions they defend at EU level. We see very clearly that citizens all over the EU require greater transparency and more democratic behaviour from their representatives, in order to maintain confidence in the EU institutions and their activities. The secrecy which the Council maintains with regard to the content of trilogue meetings will only increase "Eurosceptic" opinion, to the detriment of the Council, the Member States and the EU as a whole.

Failure of the Council to draw up and retain an adequate record of its activities

It is curious that the Council failed to identify any record taken of the discussions that took place during the trilogue and technical meetings that have been held so far. From this we must draw the conclusion that no such record was taken by the Council representatives present.

In Case T-264/04 *WWF European Policy Programme v the Council of the European Union*, the Court of First Instance held that *“it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities.”*

The fact that the Council failed to take minutes of the discussions is entirely arbitrary and unpredictable in this context, particularly given the duty of representatives to report back to COREPER on the proceedings. It also goes against basic principles of good administration.

In the WWF case, the Court of First Instance held that it could not be concluded that the Council, in claiming that minutes of the first agenda item of its Article 133 Committee meeting did not exist, acted in an arbitrary or unpredictable manner. The Court came to this conclusion owing to the *“purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure”*. However, the same conclusion cannot be applied to the Council’s failure to draw up and retain documentation relating to what has become a commonplace and important step in the legislative procedure, namely trilogue negotiations.

Also missing from the relevant documents listed in the Council’s reply is any record of the discussions which took place at the meeting of the Intellectual Property attachés held on 30 September 2015. Point 3 of the agenda for this meeting clearly refers to “preparation for the next trilogue meeting with European Parliament on 15 October 2015” (<http://data.consilium.europa.eu/doc/document/CM-4006-2015-INIT/en/pdf>). A record of such discussions certainly falls within the scope of our request for documents. If such a record does not exist, this is contrary to Article 2 of Regulation 1049/2001.

We also consider that the minutes of the COREPER meetings at which the presidency debriefed the Council of the outcome of trilogue meetings fall within the scope of our request and should have been disclosed.

For all these reasons, **DELETED** hereby requests that the Council grants full access to the requested documents.

Yours sincerely,

DELETED
