



Council of the  
European Union

Brussels, 1 February 2016  
(OR. en)

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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 24/c/02/15

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 14 October 2015 and registered on the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 8 December 2015 ([Annex 2](#));
- confirmatory application dated 18 December 2015 and registered on the same day ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 14 October 2015 - 12:57]

**From:** **DELETED**

**Sent:** Wednesday 14 October 2015 - 15:57

**To:** SECRETARIAT DGF Access

**Subject:** **DELETED** request for documents - IP working party meetings re Trade Secrets Directive  
CE A2D request\_IP workingparty\_tradesecrets\_Council.docx

Sir, Madam,

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

Best regards,

**DELETED**

14 October 2015

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

Dear Mr Thomsen,

Subject: Access to documents regarding meetings of Intellectual Property Working Party and meetings of Intellectual Property Attachés regarding the Commission's proposal for a Trade Secrets Directive

We would like to have access to the minutes of all meetings of the Intellectual Property Working Party and the Intellectual Property Attachés at which 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 was discussed, including the positions of the Member States concerned. We would also like to have access to the preparatory documents for the meetings, and any documents which were discussed within the meetings.

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, 8 December 2015

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

Ref. 15/2289-ws/jj

Request made on: 28.09.2015

Dear **DELETED**,

Ref. 15/2435-ws/jj

Request made on: 14.10.2015

Deadline extension: 05.11.2015

Dear **DELETED**,

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

Please be informed that no minutes of the meetings you refer to have been drafted.

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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).

Enclosed you will find the documents of the file covered by your request (being understood that in three documents personal data has been redacted – see below), with the exception of the following documents:

- Background fiche (partially)
- 4-column table 01.07.2015 – Slovenia (partially)
- Comments on 4-column document, 22.07.2015 – Slovakia
- Greek observations, 22.07.2015
- 4-column draft document, 22.07.2015 – Belgian comments

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.

(Full) disclosure of the documents would therefore seriously undermine the decision making-process of the Council.

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 immediate (full) disclosure of the documents in question.

As a consequence, the General Secretariat has to refuse (full) access to the documents at this stage.<sup>2</sup>

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<sup>2</sup> Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

The General Secretariat has also looked into the possibility of releasing parts of the documents.<sup>3</sup> As regards documents "4-column table 01.07.2015 – Slovenia" and "Background fiche", only the fourth column and colour codings in other columns need to be withheld. You will therefore find partially accessible versions attached. The exception to the right of access applying to the entire content of the other documents, partial access to them cannot be given.

Concerning personal data withheld as mentioned above, this data is necessary for the organisation of the work of the Council.

Data protection rules at EU level<sup>4</sup> provide that when the personal data collected is to be used for a different purpose, including disclosure to the public, a balance needs to be established between the public interest in having access to such data and the legitimate right of individuals to protect their personal data.<sup>5</sup>

After carefully considering all the principles related to this request, on balance the General Secretariat has concluded that disclosure of the personal data contained in the documents would undermine the protection of privacy and the integrity of the identified individuals. As a consequence, the General Secretariat has to refuse access to the relevant parts of the documents.<sup>6</sup>

You can ask the Council to review this decision within 15 working days of receiving this reply.<sup>7</sup>

Yours sincerely,

Jakob THOMSEN

Enclosures

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<sup>3</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>4</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>5</sup> Article 8 of Regulation (EC) No 45/2001.

<sup>6</sup> Article 4(1)(b) of Regulation (EC) No 1049/2001.

<sup>7</sup> 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](mailto:access@consilium.europa.eu) on 18 December 2015 - 11:21 ]

**From:** **DELETED**

**Sent:** Friday 18 December 2015 - 11:21

**To:** SECRETARIAT DGF Access

**Subject:** **DELETED** Confirmatory Application Ref. 15/2435-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. 15/2435-ws/jj).

Kind regards

Yours sincerely,

**DELETED**

Brussels, 19 December 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. 15/2435-ws/jj - Confirmatory application for reconsideration of the European Council's decision to grant partial access to documents related to meetings of the Intellectual Property Working Party and meetings of Intellectual Property Attachés regarding the Commission's proposal for a 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 14 October 2015 **DELETED** wrote to the Council requesting access to “*the minutes of all meetings of the Intellectual Property Working Party and the Intellectual Property Attachés at which 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 was discussed, including the positions of the Member States concerned. We would also like to have access to the preparatory documents for the meetings, and any documents which were discussed within the meetings.*”



The Council sent its response on 8 December 2015 together with 22 non-itemised documents, a number of which were undated. The Council itemised the following 5 documents, two of which had been redacted and three of which were withheld completely.

1. Background fiche (partially redacted)
2. Four-column table of 1 July 2015 with comments from Slovenia (partially redacted)
3. Comments on the four-column document from Slovakia of 22 July 2015 (withheld);
4. Greek observations of 22 July 2015 (withheld);
5. Four-column draft documents of 22 July 2015 with Belgian comments (withheld).

A further email was sent the same day providing the relevant documents that can already been found in the Council's public register. This confirmatory application does not refer to these documents, given that they were already publicly accessible at the time the request was made.

Careful inspection of the 20 documents provided in full reveals that, with the exception of three documents that are already publicly available on the Parliament's web site, they relate to the formulation of the Council's General Approach and date from 2014. As the Council's response points out, the redacted and withheld documents contain comments made with a view to reaching agreement within the trilogue negotiations, and date from July 2015.

The Council stated that “[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.” In other words, it relies on the exception in the first paragraph of Article 4(3) of Regulation 1049/2001. The Council went on to say that it could not identify “any evidence suggesting an overriding public interest in immediate (full) disclosure of the documents in question”.

Personal data was redacted from some of the documents. This confirmatory application does not challenge the Council's right in this regard.

**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 redacted and withheld documents contain the details of how the Council formulated its position on the draft directive with a view to trilogue negotiations with the Parliament. This information should have been provided while the trilogue process was 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 and failure to state reasons**

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. 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.

On the contrary, Council fails to put forward any information to substantiate its claim that disclosing the documents would affect the “negotiating process and diminish the chances of reaching an agreement with the European Parliament.”

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*". The arguments provided by the Council do not constitute such a strict interpretation and fall short of providing sufficient reasons to understand its decision.

In the same case, the Court made clear that positions of the Member States had to be disclosed including the name of the delegations. Withholding comments from Slovakia, Greece, Slovenia and Belgium on the positions of the EP and proposals from the Presidency clearly does not follow a strict interpretation of Article 4(3) and breaches the ruling of the Court.

### **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, and has significant implications for access to business information for EU citizens. The Directive will impact the type and quantity of information that will be qualified as trade secrets by the industry, which could include information on the impact of products or production processes on public health and the environment. 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 position taken by the Council and its constituent Member States 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. The VW scandal showed that today there is an increased need for transparency regarding not only industry practice, but also regarding the Member States, not more confidentiality.

The adoption of a directive is very seldom discussed at national level, which prevents citizens from being aware of the discussions their governments are involved in, let alone the positions they adopt and proposals they make. Publishing the minutes of the meetings of the Council as well as the proposals from the governments would contribute to bringing the EU decision-making process closer to the citizens.

Keeping this information confidential prevents the organization of democratic debate on the direction that the draft is taking. It also prevents Member State governments 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 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**

The Council states that no minutes were taken of the meetings of the Council's Intellectual Property Working Group or the Intellectual attachés. This failure represents a breach of Article 2 of Regulation 1049/2001/EC.

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."*

Given that these meetings form part of the legislative process, the fact that the Council failed to take minutes of the discussions is entirely arbitrary and unpredictable. 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.

## **Failure to identify a number of documents which fall within the scope of **DELETED**'s request**

On 14 December, the Council sent to **DELETED** its response to a separate access to documents request (ref: 15/2549-ws/dm), providing access to a number of documents that were neither identified nor disclosed in the Council's response to the request forming the subject of this confirmatory application, but which undoubtedly fall within its scope. Such documents include:

1. Comments provided by the UK and France delegations following the attachés meeting of 7 October 2015;
2. Technical comments by the Polish delegation to the Presidency compromise proposals as presented for the intellectual property attaches meeting on 6 October 2015
3. 4-column document in preparation for attachés meeting dated 7 October 2015
4. Comments by the Finnish delegation dated 1 October 2015

**DELETED** now has access to these documents but we would like to highlight that the Council's failure to disclose them or even identify them in relation to the present request falls short of the obligations imposed by Regulation 1049/2001/EC and basic principles of good administration. It also begs the question of what other documents exist in relation to our request that have not been identified and disclosed.

## **Duty to publish the requested documents in the Council's Public Register**

Article 12 (2) of Regulation 1049/2001/EC stresses that "legislative documents" should be made directly accessible through the public registers. All of the requested documents should be published in their entirety as soon as possible, including those that were disclosed under **DELETED**'s request ref: 15/2549-ws/dm.

Yours sincerely,

**DELETED**

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