



Council of the  
European Union

Brussels, 2 March 2016  
(OR. en)

6569/16

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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 05/c/01/16

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Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 27 January 2016 and registered on 28 January 2016 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 4 February 2016 (Annex 2);
- confirmatory application dated 25 February 2016 and registered on 26 February 2016 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 27 January 2016 - 7:17 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-15529-2015-INIT

ST-15529-2015-COR-1

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French



**Council of the European Union**  
General Secretariat

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

Brussels, 4 February 2016

**DELETED**

Email: **DELETED**

Ref. 16/0205-mjb/ns

Request made on: 27.01.2016  
Registered on: 28.01.2016

Dear Mr Staes,

Thank you for your request for access to documents of the Council of the European Union.<sup>1</sup>  
I regret to inform you that access to document **15529/15** and its corrigendum **15529/15 COR 1** cannot be given for the reasons set out below.

Documents **15529/15** is an opinion of the Council Legal Service to the Council, which concerns certain legal issues in relation to the Commission proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No **1829/2003** as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory. The opinion analyses the question of the appropriate legal basis for the draft legislative act, and its compliance with the relevant internal market and WTO rules. The requested document as well as its corrigendum contains, therefore, in its totality legal advice.

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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).

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

For these reasons, disclosure of the requested document would adversely affect the negotiations by impeding internal discussions of the Council on the Commission proposal in question and would carry hence the real and genuine risk of compromising the capacity of the Council to reach an agreement on the legislative dossier or to further conduct any future political negotiations with the EP, and thus it would seriously undermine the Council decision-making process.<sup>2</sup>

Moreover, the legal advice covered by the requested document is novel and complex as well as particularly sensitive. This is because the legal issues concerning the assurance of the safety and the proper use of genetically modified food and feed within the EU, whilst establishing an internal market for those products, fully in compliance with the WTO rules and the relevant EU law requirements, are, indeed, highly controversial.

Disclosure of the requested document would consequently undermine the protection of legal advice.<sup>3</sup> It would make public an internal opinion of the Legal Service intended only for the members of the Council. The disclosure of the legal advice could also affect the ability of the Legal Service in the future to defend effectively decisions taken by the Council in relation to the proposal before the Union courts.

As regards the existence of an overriding public interest in disclosure in relation to the interests in protecting the on-going decision making procedure and 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 any disclosure of the requested document.

The General Secretariat of the Council, pursuant to Article 4(6) of Regulation (EC) No 1049/2001, has also examined whether any partial access to the subject Council document could be granted to you, and it concluded that at this stage of the Council decision-making process even partial access cannot be granted as concerns the requested document.

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

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

In view of the foregoing, the General Secretariat of the Council is unable to grant you any access to document 15529/15 and to its corrigendum 15529/15 COR 1.

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

Yours sincerely,

Jakob THOMSEN

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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.

[E-mail message sent to **DELETED** on 25 February 2016 - 19:58 ]

From: **DELETED**

Sent: Thursday, February 25, 2016 19:58

To: Jakob THOMSEN

Cc: **DELETED**, **DELETED**, **DELETED**

Subject: Urgent: concerning access to the legal advice on the regulation of genetically modified food and feed

Dear Mr. Jakob Thomsen,

Thank you for your response to my request for document 15529/15 and its corrigendum 15529/15 COR 1.

I am writing to submit a confirmatory application and respectfully request that you review your refusal to provide access to the complete contents of both documents. I will briefly present my arguments below, and I look forward to your response on the matter.

I was requesting access to the legal advice on the regulation of genetically modified food and feed.

You claim, however, in your response that "the legal issues dealt with by the requested document are controversial and the different actors involved in the legislative procedure have expressed different positions. As a consequence, the on-going discussions are very sensitive."

However, the European Court of Justice has made clear in its jurisprudence in case C-39/05 P and C-52/05 P Sweden and Turco v Council and Commission that secrecy is not the right strategy if what you aim to achieve is a lower level of controversy. Indeed, the court ruled that "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."

I am also particularly concerned by your argument that "The disclosure of the legal advice could also affect the ability of the Legal Service in the future to defend effectively decisions taken by the Council in relation to the proposal before the Union courts."

In relation to this specific point, the European Court of Justice has already ruled that a general and abstract claim to the effect that disclosure could lead to doubts as to the lawfulness of the legislative act concerned does not suffice to conclude that protection of such advice would be undermined. It added that the risk that the legal advice would be attacked in court would actually be lower if there were a proper, public, reasoning behind the legal advice.

Finally, you argue that "the legal advice covered by the requested document is novel and complex as well as particularly sensitive. This is because the legal issues concerning the assurance of the safety and the proper use of genetically modified food and feed within the EU, whilst establishing an internal market for those products, fully in compliance with the WTO rules and the relevant EU law requirements, are, indeed, highly controversial."

However, the application of the exception to protect legal advice can only be applied if there is a reasonable and more than purely hypothetical risk that the publication of the legal advice would negatively affect the institution's interest in seeking and receiving frank, objective and comprehensive advice. Your refusal letter does not make any claim to this effect.

Indeed, publishing the legal advice would clearly demonstrate to citizens and Members of the European Parliament that the Council has in fact sought to receive frank, objective and comprehensive advice. We all know that laws are open to interpretation and that different lawyers can interpret laws in different ways. To publish this fact would in no way hamper the institutions' ability to receive comprehensive legal advice, and hence the application of this exception is void.

As for your arguments relating to the protection of the decision-making process, it is clear from the case law that the simple fact that a decision decision-making process is currently on-going is not sufficient reason to refuse access to documents. Neither is the fact that the Council has not yet taken a final position on the issue.

You claim in your refusal that "disclosure of the requested document would adversely affect the negotiations by impeding internal discussions of the Council on the Commission proposal in question and would carry hence the real and genuine risk of compromising the capacity of the Council to reach an agreement on the legislative dossier."

I must disagree with this point. The publication of the legal advice would have no bearing whatsoever on the internal discussions of the Council. What would change, however, is that citizens and European law-makers would be able to see on what legal basis decisions relating to genetically modified food and feed could be based on. This would mean that discussions could be held also externally to the Council, but there is no reason why external discussions - or public debate - on the issue should paralyse the Council in such a way that no decisions could be taken.

I also disagree with your claim that publishing this information would damage the Council's ability "to further conduct any future political negotiations with the EP". As a Member of the European Parliament, our ability to negotiate politically with the Council is hampered by these excessive levels of secrecy.

For these reasons, I respectfully request that you reconsider your refusal to provide access to the documents.

In addition, I would like to contest your decision that there is no overriding public interest in the disclosure of the legal advice. This is not just a question of transparency, but a question of legitimacy. And without transparency legitimacy is almost impossible to gain in a democratic society.

The matter of genetically modified food and feed is of utmost importance and interest both to citizens and to the MEPs that represent them, so for decisions such as this to be negotiated in the dark runs contrary to the regulation on access to documents and the case law of the European Court of Justice. Indeed, the ECJ has clearly stated that "Openness ... 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."

I look forward to your response.

Yours sincerely,

**DELETED**