



Council of the  
European Union

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Brussels, 25 June 2018  
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10389/18

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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 15/c/01/18

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 11 April 2018 and registered on 12 April 2018 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 31 May 2018 ([Annex 2](#));
- confirmatory application dated 21 June 2018 and registered on 22 June 2018 ([Annex 3](#)).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 11 April 2018- 18:10]

From: Anne Friel <**DELETED**@asktheeu.org>

Sent: Wednesday, April 11, 2018 18:10

To: SECRETARIAT DGF Access

Subject: access to documents request - Access to information regarding total allowable catches (TACs) of EU fish stocks in the Northeast Atlantic discussed and adopted on 11 and 12 December 2017

Dear Council of the EU,

In accordance with Regulation 1049/2001 and Regulation 1363/2006, we hereby request access to the minutes of the Agriculture and Fisheries Council held on 11-12 of December 2017, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2018.

We would also like to have access to all preparative and supporting documents related to this issue, even those dated after the December Council, including any scientific or economic evidence or arguments used and/or referred to by the EU institutions and the Member States, and any correspondence exchanged.

For the sake of clarity, we do not need to be provided with the documents that can be found by searching the consilium document database under interinstitutional file code 2017/0287 (NLE) at the date of this request.

We are particularly interested in obtaining the following:

- written comments from Sweden and France on the Commission's proposal, if these exist (having noticed that these are not available when searching the document database under the interinstitutional file code mentioned above);
- any additional documents used by Member States to support deviation from the Commission's proposal;
- records, minutes or notes of the Council Working Party discussions held in the lead-up to December Council;
- a full table of all proposed and agreed quota top-ups (in tonnes and %) and TACs before the top-ups were applied

Yours faithfully,

Anne Friel

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**Council of the European Union**

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

*Head of Unit*

Brussels, 31 May 2018

Ms Anne Friel

Email: **DELETED**@asktheeu.org

Ref. 18/0747-rh/ns

Request made on: 11.04.2018

Registered on: 12.04.2018

Deadline extension: 04.05.2018

Dear Ms Friel,

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

Please find attached an extract of document **15686/17 INIT** that you requested (*only the part covered by your request is released*).

Please also find attached documents **14872/17 ADD 12 + ADD 23** - *written comments by the French delegation* that you requested.

Please note that there are no written comments by the Swedish delegation.

Written comments by some delegations to support deviation from the Commission's proposal are contained in the following public documents. They can be found in the public register as you know:

**ST 14872/17 INIT** - written comments by the United Kingdom delegation

**ST 14872/17 ADD 1** - written comments by the Spanish delegation

**ST 14872/17 ADD 2** - written comments by the Czech delegation

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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).

**ST 14872/17 ADD 3** - written comments by the Portuguese delegation  
**ST 14872/17 ADD 4** - written comments by the Latvian delegation  
**ST 14872/17 ADD 5** - written comments by the Netherlands delegation  
**ST 14872/17 ADD 6** - written comments by the German delegation  
**ST 14872/17 ADD 7** - written comments by the Irish delegation  
**ST 14872/17 ADD 8** - written comments by the Danish delegation  
**ST 14872/17 ADD 9** - written comments by the Czech delegation  
**ST 14872/17 ADD 10** - written comments by the Belgian delegation  
**ST 14872/17 ADD 11** - written comments by the Lithuanian delegation  
**ST 14872/17 ADD 13** - written comments by the Spanish delegation  
**ST 14872/17 ADD 14** - written comments by the Netherlands delegation  
**ST 14872/17 ADD 15** - written comments by the Polish delegation  
**ST 14872/17 ADD 16** - written comments by the Czech delegation  
**ST 14872/17 ADD 17** - written comments by the Netherlands delegation  
**ST 14872/17 ADD 18** - written comments by the United Kingdom delegation  
**ST 14872/17 ADD 19** - written comments by the Danish delegation  
**ST 14872/17 ADD 20** - written comments by the Portuguese delegation  
**ST 14872/17 ADD 21** - written comments by the Finnish delegation  
**ST 14872/17 ADD 22** - written comments by the United Kingdom delegation  
**ST 14872/17 ADD 24** - written comments by the Lithuanian delegation  
**ST 14872/17 ADD 25** - written comments by the Spanish delegation  
**ST 14872/17 ADD 26** - written comments by the Croatian delegation

There are no more additional documents used by Member States to support deviation from the Commission's proposal.

No further documents in relation to this file and in the possession of our institution have been identified.

Please find also enclosed the following link to our press-release:  
<http://www.consilium.europa.eu/en/meetings/agrifish/2017/12/11-12/>

Yours sincerely,

Sally BLISS

Enclosures

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 21 June 2018 - 18:26]

Anne Friel <**DELETED**@asktheeu.org>

Sent: Thursday, June 21, 2017 6:26 PM

To: SECRETARIAT DGF Access

Subject: Internal review of access to documents request - Access to information regarding total allowable catches (TACs) of EU fish stocks in the Northeast Atlantic discussed and adopted on 11 and 12 December 2017

Dear Ms Sir/Madam,

RE: Ref. 18/0747-rh/ns- Confirmatory application regarding Council's decision on disclosure of Fisheries Council Minutes and accompanying documents

In accordance 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, ClientEarth hereby submits a confirmatory application with regard to the Council's initial reply to its request for documents with reference 18/0747-rhs/ns relating to the adoption of the fishing opportunities for the Northeast Atlantic for 2018 under Article 16 of Regulation (EC) No 1380/2013 and accompanying documents.

On 11 April 2018 ClientEarth requested access to the minutes of the Agriculture and Fisheries Council held on 11 and 12 of December 2017, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2017, as well as all preparative and supporting documents related to this issue (which had not been published in the Council's documents register under inter-institutional code 2017/0287/NLE on the date of ClientEarth's initial request). The request also specifically included any scientific evidence or social/economic arguments and supporting information used and/or referred to by the EU institutions and/or the Member States, records, minutes or notes of Council working party meetings, and information on the proposed and agreed quota top-ups.

The Council replied on 4 May 2018, stating that the Council's General Secretariat was still conducting consultations relevant to our request. On 31 May 2018, the Council sent its decision together with the relevant section of the minutes of the Agriculture and Fisheries Council at which political agreement on the TACs was reached (the "minutes") and written comments on the Commission's TAC proposal submitted by the delegation from the French Government which had not been published in the Council's document register with the comments of the other Member States.

**FAILURE TO DOCUMENT DISCUSSIONS AT THE AGRICULTURE AND FISHERIES COUNCIL AND WORKING PARTY MEETINGS: BREACH OF ARTICLE 2 OF EC REGULATION 1049/2001**

Like the minutes of the discussion at the same Council in 2016 (ClientEarth made a similar request for the documents following the Agriculture and Fisheries Council that took place on 10 and 11 December 2016 (see ref: 16/2430-Id/dm), the minutes of the Council meeting in 2017 are noteworthy for the lack of information they contain. They simply state:

"The Council reached unanimous political agreement on the Regulation fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters. Latvia abstained and announced a statement on snowcrab. Denmark and Sweden considered the closure for eel fisheries unbalanced and announced a statement on this matter. Italy reiterated its disagreement with the quota distribution of swordfish. Spain made the declaration in Annex.

Given the need for a timely adoption, the Council agreed to the use of the written procedure for the adoption of this Council Regulation."

Notably, the minutes do not contain any information on how the different Member State positions published in the Council's documents register were ultimately reconciled, leading to the adoption of TACs, a number of which depart from the Commission's proposal.

This is significant given the Council's press release following the Agriculture and Fisheries Council, which states that, "On 13 December 2017 after all-night negotiations, the Council reached a political agreement on a regulation concerning the 2018 fishing opportunities for the main commercial fish stocks in the Atlantic and the North Sea" (emphasis added - <http://www.consilium.europa.eu/en/press/press-releases/2017/12/13/council-agreement-on-2018-fishing-quotas-in-the-atlantic-and-north-sea/>). The minutes make no attempt to record these negotiations.

Similarly, the Council's documents register does not contain any record or minutes of the discussions that took place at the various working party meetings in the lead up to the Agriculture and Fisheries Council, nor has the Council provided us with such documents. While we understand that many of the documents in the register, notably the Member State statements and the presidency compromise amendments, would have been the subject of discussion at such meetings, the public has no way of knowing the content of these discussions, or the conclusions drawn.

Yet, according to EU law, the EU institutions have a legal duty to draw up and retain documentation relating to their activities in a non-arbitrary and predictable manner.

Article 10(3) of the Treaty on European Union states that, "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen". Article 15(3) of the Treaty on Functioning of the European Union further develops this principle by giving citizens a right to access documents of the Union's institutions, "subject to the principles and the conditions to be defined in accordance with this paragraph."

The principles and conditions were defined in Regulation 1049/2001, Article 2 of which provides that, "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation." The Council's failure to make a detailed record of the deliberations that took place at the Council meeting of 11 and 12 December 2017 at which a political consensus was achieved regarding the TACs for 2018 infringes ClientEarth's right of access under Article 2.

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.”

Contrary to the present case, in Case T-264/04, 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”. The same conclusion cannot be applied to the Council’s failure to draw up and retain a record of discussions leading to the unanimous political agreement for a Regulation which, in many respects, departs significantly from the Commission’s proposal and which requires implementing legislation at national level.

This is supported by the text of Regulation No. 1049/2001. Recital 2 of the Regulation states that, “[o]penness enables citizens to participate more closely in the decision-making process”. Article 6 very clearly states that “[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.”

These considerations are of particular importance in the context of setting TACs, where the Council's discretion in the decision-making process is fettered by Regulation (EU) No 1380/2013 on the Common Fisheries Policy (the "CFP Basic Regulation"). The TACs are adopted on the basis of Article 16 of the CFP Basic Regulation. According to Article 2(2), “[t]he CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.” Article 3(c) provides for the “establishment of measures based on the best available scientific advice”. This is why the Commission’s proposal takes account of the scientific advice provided by the International Council for the Exploration of the Sea (ICES), and has the objective of bringing the stocks to levels that can deliver MSY by “2015 where possible and on a progressive and incremental basis at the latest by 2020”. Recital 7 to the CFP Basic Regulation states that, "Achieving those exploitation rates by a later date should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved." Therefore, in order for EU citizens to be able to scrutinise the considerations underpinning the Council's decision in setting TACs and to ensure that the Council has acted within the legal limits of the CFP Basic Regulation, the reasons for any departure from the Commission’s proposal, and the scientific advice reflected therein, must be recorded.

The disclosed and publicly available documents are far from meeting this legal standard. The documents in the Council's register are helpful in gaining an understanding of the positions held by some of the Member States on some of the stocks, as well as the compromise amendments agreed between the presidency and the Commission, at various points in the decision-making process. But there is no record of how these positions were reconciled during discussions either in the working parties or, ultimately, at the Agriculture and Fisheries Council. As a result, the public has no way of knowing why a number of the TACs agreed by the Council exceed the Commission proposal.

In many cases, the documents provided (particularly the ‘Council bible’ and the written comments submitted by the Member States) include arguments regarding why a particular Member State advocated for a TAC to be set higher than the Commission’s proposal and the underlying scientific advice. However, the points made are rarely substantiated with any concrete scientific or socio-economic evidence or other supporting information, which makes it impossible to assess the validity of these statements, based on the files provided.

There are several examples, where the agreed TAC considerably exceeded both the Commission’s proposal and the underlying advice, as specified below.

For example, the TAC for WHG/56-14 covers two whiting stocks (West of Scotland and Rockall). The West of Scotland stock has been in a dire state for many years; with spawning stock biomass below the limit reference point Blim since the late 1990s. ICES has been advising 0 catch since 2006, which has so far not been followed. The Council bible and Member State positions show that Ireland and the UK asked for the current TAC of 213 t to be rolled over, based on the argument that ‘a zero TAC will not be helpful’ and ‘will only increase discards’. However, no further evidence or details to support these assertions or to outline how the stock will be recovered above biomass levels capable of producing the maximum sustainable yield (CFP Art. 2(2)) is presented.

Another example is the TAC for PLE/7HJK. This stock was included in the list of ‘statement stocks’ for which the Commission and the Council agreed in 2013 to keep the TAC constant for 5 years (i.e. until the end of 2018) unless the perception of the stock changed significantly according to scientific advice. Last year, the ICES advice decreased to 86 t from previously 135 t, and the TAC for 2017 was decreased slightly from 135 t to 128 t. The current ICES advice shows that the perception of the stock has deteriorated further, leading to catch advice of 0 t, which the Commission’s proposal followed. However, the Council agreed to roll over last year’s TAC of 128 t. The Council bible and Member State positions show that Belgium, Ireland and the UK asked for a ‘small TAC’, i.e. on the basis that ‘a zero TAC will not cut fishing mortality’ and that under full landing obligation implementation, this stock would represent a choke species. However, no further evidence or details to support these assertions or to outline how the stock will be recovered above biomass levels capable of producing the maximum sustainable yield (CFP Art. 2(2)) is presented. Moreover, the choke argument – while comprehensible for 2019 and beyond when the landing obligation will be fully phased in – does not apply in 2018, as the stock has not been brought under the landing obligation yet.

Regarding the TAC for SRX/07D, since this TAC covers a range of stocks of skates and rays, it is difficult to directly compare the proposed and agreed TACs to the underlying scientific advice. However, it is unclear based on the documents provided on what basis the Council agreed a 20% increase of the TAC to 1276 t instead of the proposed roll-over (1063 t). The Council bible and Member State positions show that the UK and France asked for an increase, based on the argument that this is ‘in line with scientific advice’ and that the ‘abundance justifies an increase’. However, no further evidence or details are provided to substantiate these claims, and it is unclear how the 20% increase was agreed upon, considering France asked for 30% (the basis of which is not explained further or supported by evidence either). Similarly, it is unclear how the extent of the increase for the SRX/89-C. (15% increase), compared to a proposed roll-over of 3762 t was agreed upon, since different Member States advocated for different percentages (Spain, France and Portugal asked for a ‘small increase’, ‘10%’ and ‘15-20%’, respectively).



The biomass of stock HER/7G-K has been decreasing significantly since its peak in 2011, and is now close to the limit reference point Blim, while fishing mortality is now above the precautionary reference point Fpa. The Commission's proposal followed the cut of 62% advised by ICES (resulting in 5445 t), but only a 30% cut (resulting in 10127 t) was agreed for 2018. This means that the agreed TAC exceeds the advice by 86%. The only documented comment is Ireland's request for the management (which constrains the inter-annual TAC variation to 30%) to be applied. No further evidence or details to support this request or to demonstrate how the stock will be recovered above biomass levels capable of producing the maximum sustainable yield (CFP Art. 2(2)) is presented.

These examples demonstrate the importance of the Council's duty to record its discussions at working party and ministerial level.

With particular regard to the discussions in the relevant working parties, the Ombudsman has had cause to note that such meetings are not open to the public, and therefore the public can only follow their progress by accessing records of the discussions that take place. As a result, such discussions must be recorded. Please see European Ombudsman Decision in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/94896/html.bookmark>. This decision concerned transparency within Council preparatory bodies in a legislative context. Although the Council Regulation setting TACs is not legislative in nature, we submit that the same level of transparency is required, given that the information constitutes environmental information within the meaning of Article 2(3) of the Aarhus Convention.

Regarding the final negotiations at ministerial level, it is helpful to compare this stage of the decision-making procedure to the final negotiations in trilogues which take place under the ordinary legislative procedure. In the context of trilogues, the public would at least have access to the four column documents recording the negotiating positions of the Parliament, the Council and the Commission, and the compromise reached, as well as, in many cases, the positions of the individual Member States. In the four column documents, such negotiating positions are documented in an orderly manner, allowing the reader to compare the positions held by the different negotiating parties on specific provisions of the proposed act and the agreed text. In contrast, the disclosed documents relating to this decision-making procedure require the public to read and analyse the contents of over 70 documents to have an understanding of the different negotiating positions of the Member States and the Commission going into the Agriculture and Fisheries Council. In this respect, trilogue meetings, often criticised as being an opaque process, benefit from a far greater level of transparency than the negotiations that result in the Council Regulation setting the TACs and quotas.

This failure to record the negotiations that reconciled the different Member State and Commission positions on the relevant TACs in a non-arbitrary and predictable manner, within the meaning of Case T-264/04, is in breach of Article 2 of Regulation 1049/2001 and the democratic principles enshrined in Article 10 TEU and Article 15 TFEU.

## INFORMATION ON TOP-UPS

In addition to this, ClientEarth specifically requested access to documents on the proposed and agreed quota top-ups (in tonnes and %) and TACs before the top-ups were applied. No information on this has been provided in response to our request and nothing has been published in the Council's document register, with the exception of a few documents containing updates to the Commission's proposed top-ups. However, these documents do not contain information on the agreed top-ups and/or TACs before top-ups were applied.

As outlined below, this information is needed to analyse whether the TACs were set in line with the maximum sustainable yield exploitation rate as required by Article 2(2) of the CFP, or - where MSY-based advice is not available - in line with the best available scientific advice. The gradual introduction of the obligation to land all catches of quota stocks in the Northeast Atlantic has added a further level of complexity to this analysis. As the 'discard ban' is phased in throughout European waters, the purpose of TACs changes from regulating landings to regulating catches. What was previously a Total Allowable Landing limit now becomes a true Total Allowable Catch limit. In terms of assessing whether TACs are in line with scientific advice, this means that TACs now need to be compared to the advice for catches and not for landings. Until 2019, catches of many stocks are subject to the landing obligation only if taken by certain fleet segments, i.e. these stocks are only partially under the landing obligation. The main difficulty lies in the calculation of appropriate quota 'top-up' or 'uplift' amounts that are added to the advised landings to account for those catches that were previously discarded, but which must now be landed.

Since 2015, the Commission has been proposing such quota top-ups, which have subsequently been incorporated into the TACs adopted by the Council. Access to information on the proposed and agreed top-ups is crucial to reliably assess whether the proposed and agreed TACs (including top-ups) are in line with scientific advice. The TAC and Quota Regulation itself only contains the final agreed TACs, which include any potential top-ups, without the top-up amount being specified. Moreover, since the underlying calculations for the proposed top-ups are complex, it is difficult for external stakeholders, that do not have access to the data and methodology used, to assess whether these top-up levels are in line with scientific advice. Therefore, a list of the proposed and agreed top-ups as well as the TACs before the top-ups were applied, is particularly important to allow at least a direct comparison of the 'pre-top-up TACs' with the relevant ICES landings advice.

The Council's press release regarding the adoption of the TACs and quotas for 2018 asserts that "the number of fish stocks managed at maximum sustainable yield (MSY) levels will increase next year to 53" in 2018 (<http://www.consilium.europa.eu/en/press/press-releases/2017/12/13/council-agreement-on-2018-fishing-quotas-in-the-atlantic-and-north-sea/>). However, as explained above, such an assertion necessitates a comparison of the TACs before top-ups were applied to the relevant ICES landing advice. In previous years, the Commission has provided the top-up information requested in response to access to documents requests submitted by other NGOs, such as Seas at Risk and Pew Charitable Trusts. Moreover, ClientEarth is aware from a similar request made to the Commission last year that documents relating to top-ups in previous years were discussed in the Council Working Party meetings. This raises questions regarding the Council's failure to disclose this information.

As confirmed by the CJEU in case T-653/16 Malta v Commission, it is well-established practice for the Secretary General to verify as part of the assessment of a confirmatory application whether all documents falling under the scope of the request have been identified at the initial stage. This is especially the case where the applicant, as in this confirmatory application, contests that the initial list of documents was complete. ClientEarth therefore requests the Secretary General to conduct such a verification of the scope of the initial request.

Should any other relevant documents in fact exist, non-disclosure would constitute an implied refusal of access, for the purposes of Article 7(1) of Regulation No 1049/2001. As clarified by the CJEU in case T-300/10 Internationaler Hilfsfond eV, para. 186, "[s]uch an implied refusal implies, by definition, an absolute lack of reasoning" and therefore also a failure to comply with Article 296 TFEU.

Should it be confirmed that the Council does not hold documents containing this information, ClientEarth submits that this constitutes a breach of the Council's duty to document its activities in a predictable and arbitrary manner and breaches ClientEarth's right to access documents under Article 2 of Regulation 1049/2001.

ACCESS TO "ENVIRONMENTAL INFORMATION" IN COMPLIANCE WITH REGULATION NO 1367/2006 ON THE APPLICATION OF THE PROVISIONS OF THE AARHUS CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS TO COMMUNITY INSTITUTIONS AND BODIES

The minutes of the discussion that took place at the working party meetings and the Agriculture and Fisheries Council and the information on top-ups constitute "environmental information" within the meaning of Article 2(d) of the Aarhus Regulation because they are information on measures affecting biological diversity. The Aarhus Regulation goes further than Regulation No 1049/2001 in that it guarantees access, not only to documents, but to information. Therefore, even if the Council is not in possession of the documents requested, it is obliged to provide ClientEarth with information on the content of the discussions at the Council meeting in question.

Yours faithfully,

Anne Friel

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