



Council of the
European Union

049631/EU XXVI. GP
Eingelangt am 10/01/19

Brussels, 10 January 2019
(OR. en)

5167/19

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 01/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 13 November 2018 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 19 December 2018 (Annex 2);
- confirmatory application dated 9 January 2019 and registered on the same day (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 13 November 2018 - 12:23 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation:

On behalf of:

Address:

Telephone:

Mobile:

Fax:

Requested document(s): Dear Sir/Madam,

I request access to the following documents with numbers:

8122/12;
12944/12; and
13736/09.

Best regards,

DELETED

1st preferred linguistic version: EN - English

2nd preferred linguistic version:



Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 19 December 2018

DELETED

Email: **DELETED**

Ref. 18/2213-em-ns

Request made on: 13.11.2018

Deadline extension: 04.12.2018

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached partially accessible versions of documents **ST 8122/12**, **ST 12944/12** and **ST 13736/09**.² However, I regret to inform you that full access to these documents cannot be granted for the reasons set out below.

Document **ST 8122/12** is a contribution of the Council Legal Service of 30 March 2012 addressed to the Friends of the Presidency Working Party regarding the Extension of the macroeconomic conditionality, as regards the 2014-2020 period, to CAP first pillar funds.

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.

Document ST 12944/12 is a contribution of the Council Legal Service of 26 July 2012 addressed to the Friends of the Presidency Working Party regarding the Macroeconomic conditionality in the framework of the multiannual financial framework 2014 -2020.

Document ST 13736/09 is an opinion of the Council Legal Service of 25 September 2009 concerning the Proposal for a Council regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy.

The decision-making procedures to which the requested documents refer are, by now, finalized. Nevertheless, the legal issues discussed in the requested documents – concerning in particular the conditionality mechanisms– are of interest for other files in the context of the post 2020 Multiannual Financial Framework (MFF) which are currently ongoing and for which discussions are complex. More specifically, the legal advice provided in the requested documents is relevant for the discussions regarding the proposal for a new Common Provisions Regulation (CPR) as well as for the discussions on the proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

Under these circumstances, full disclosure of the requested documents would adversely affect the negotiations and would hence risk compromising the capacity of the institutions to reach an agreement on the dossiers and thus undermine the decision-making process.³ As a consequence, the General secretariat of the Council has to refuse full access to the documents in question.

Moreover, all three documents contain legal advice. The legal advice covered by the requested contributions and opinion deals with issues which are very broad in scope and relevant to a wide range of current and future dossiers. The legal advice is therefore sensitive. Disclosure of such documents would therefore undermine the protection of legal advice⁴. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

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

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

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested documents. However, in accordance with Article 4(6) of Regulation (EC) No. 1049/2001, you may have access to paragraph 1 of document ST 8122/12, to paragraphs 1 to 6 of document ST 12944/12 and to paragraphs 1 to 5 of document ST 13736/09.

As regards the existence of an overriding public interest in disclosure, 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 full disclosure of the documents.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁵

Yours sincerely,

Paulo VIDAL

(Enclosures)

⁵ 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.

From: **DELETED**

Sent: Wednesday, January 9, 2019 1:08 PM

To: SECRETARIAT DGF Access <Access@consilium.europa.eu>

Subject: RE: Ref. 18/2213-em-ns

Dear Sir/Madam,

I refer to your email below and **attach** a confirmatory application with respect to same.

Please contact me if you have any further questions.

I look forward to receiving your reply and confirmation of receipt of the application.

Best regards,

DELETED

Helsinki, 9 January 2018

Mr Paolo Vidal
Council of the European Union
General Secretariat
Directorate-General Communication and Information
Information Services Unit / Transparency
Rue de la Loi/Wetstraat 175
B-1048 Bruxelles/Brussel

email: access@consilium.europa.eu

Subject: Confirmatory application to the reply of the General Secretariat of the Council dated 19 December 2018

Your ref: 18/2213-em-ns

1. Subject of the dispute

In your letter of 19 December 2018, I was granted partial access to three separate documents following my request for public access to them pursuant to Regulation 1049/2001. The documents in question are as follows ("the Documents"):

- Document ST 8122/12 is a contribution of the Council Legal Service of 30 March 2012 addressed to the Friends of the Presidency Working Party regarding the Extension of the macroeconomic conditionality, as regards the 2014-2020 period, to CAP first pillar funds ("Document 1");
- Document ST 12944/12 is a contribution of the Council Legal Service of 26 July 2012 addressed to the Friends of the Presidency Working Party regarding the Macroeconomic conditionality in the framework of the multiannual financial framework 2014 -2020 ("Document 2"); and
- Document ST 13736/09 is an opinion of the Council Legal Service of 25 September 2009 concerning the Proposal for a Council regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy ("Document 3").

This letter is a confirmatory application seeking full access to the Documents. The reasons for the confirmatory application are as follows.

2. Reasons for the confirmatory application

a) Misapplication of Article 4(3) second paragraph of Regulation 1049/2001

According to the first of the arguments advanced by you in refusing to allow full access to the Documents, you invoke Article 4(3) second paragraph of Regulation 1049/2001 ("Article 4(3)"), which provides that:

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the

decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

In advancing your argument pursuant to Article 4(3), you note that all of the Documents relate to finalised decision-making processes but, nevertheless, contain a discussion of legal issues that “are of interest for other files in the context of the post 2020 Multiannual Financial Framework (MFF) which are currently ongoing and for which discussions are complex”. You then go on to provide that the legal advice provided in the Documents “is relevant for discussions regarding the proposal for a new Common Provisions Regulation (CPR) as well as for the discussions on the proposal for a Regulation on the protection of the Union’s budget in case of generalized deficiencies as regards the rule of law in the Member States”.

For these reasons, you reach the conclusion that full release of the Documents would adversely affect the relevant negotiations and therefore “undermine the decision-making process”. I submit that you have misapplied Article 4(3) second paragraph in these circumstances.

First, it is necessary to outline the nature of the Documents, something that you failed to do in your reply. All of the documents relate to legislative files, either with respect to their original decision-making process contexts which have now been finalised or, as you have argued, other related ongoing decision-making processes. According to Regulation 1049/2001, all institutional documents are subject to the principle of “widest possible access”, however legislative documents are supposed to be afforded even wider and, where possible, direct access.¹

Pursuant to Regulation 1049/2001 and the consistent jurisprudence of the CJEU, institutional transparency with respect to legislative documents is of paramount importance in the democratic present of the European Union. For example, in the case of *Turco*, the European Court of Justice (“ECJ”) expressed that, “[o]penness 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.”² And, more recently, in *ClientEarth*, the ECJ built upon this idea by providing that, “the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices.”³ Because of the importance of the openness of legislative documents within the democratic European Union, any application of exceptions to documents of that nature must be interpreted “all the more strictly”.⁴ With these points in mind, it is possible to turn to your misapplication of Article 4(3) in this instance.

According to the actual wording of Article 4(3) second paragraph, it is not enough that, as you provided in your reply, that the interest would be merely “undermined” but rather that the interest would be “seriously undermined” by release of the document. More specifically, you must show in your application of Article 4(3) to each of the Documents that there is a, “specific, actual and

¹ Regulation 1049/2001, recital 6 and Article 12(2).

² Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* EU:C:2008:374, para 46.

³ Case C-57/16 P *ClientEarth v Commission* EU:C:2018:660, para 84.

⁴ *Ibid*, para 101.

reasonably foreseeable risk that access to the documents at issue would seriously undermine” the relevant decision-making processes.⁵ You have not passed that significant threshold in your reply.

Rather, you have merely provided, in an unsubstantiated and general manner, that “full disclosure of the requested documents would adversely affect the negotiations and would hence risk compromising the capacity of the institutions to reach an agreement on the dossiers”. Arguments precisely of this nature were firmly rejected by the ECJ in *ClientEarth*. There, the Commission attempted to argue, regarding the disclosure of its impact assessments (also legislative documents), that there was a “need to preserve its discretion, its independence, its ability to reach compromises”, that an “atmosphere of trust ... ought to prevail during its internal discussions” and that there was a “risk of external pressure liable to have a serious adverse effect on the way in which those discussions are conducted”.⁶ The arguments you have provided with respect to the application of Article 4(3) to the Documents are even less substantiated and of a more general nature than those put forward by the Commission in *ClientEarth*, which were, as noted just above, ultimately rejected by the ECJ as being insufficient. Dismissal by the Court of similar arguments can also be found in, for example, *Miettinen*.⁷

For these reasons, Article 4(3) has been misapplied and full access to the Documents should be granted.

b) Misapplication of Article 4(2) second indent of Regulation 1049/2001

In refusing to allow full access to the Documents, you have also argued that all of the Documents contain legal advice and are, therefore, covered by Article 4(2) second indent of Regulation 1049/2001 (“Article 4(2)”), which seeks to protect “legal advice”. In your opinion, the legal advice contained in the Documents “deals with issues which are very broad in scope and relevant to a wide range of current and future dossiers” and therefore the legal advice is “sensitive”. Releasing the Documents would therefore undermine the protection of legal advice.

According to your unsubstantiated and anti-democratic arguments, release of the Documents would open up a “possibility that the legal advice in question ... may lead the Council to display caution when requesting similar written opinions from its Legal Service”. And, further that “disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the council before the Union courts”. Finally, you provide that “the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influence”.

First, the same considerations relating to the legislative nature detailed above with respect to Article 4(3) is also of relevance to the application of Article 4(2). For these reasons, Article 4(2) must be interpreted particularly strictly.

Secondly, the ECJ has held that with respect to application of Article 4(2), a three-stage test must be applied by the institutions. According to this test, the institutions must: first, be satisfied that the

⁵ Ibid, para 121.

⁶ Ibid, para 118.

⁷ Case T-395/13 *Miettinen v Council* EU:T:2015:648.

document, or parts of that document, actually relate legal advice⁸; secondly, assess whether disclosure of the document or the parts of the document covered by the exception would actually undermine, in a “reasonably foreseeable and not purely hypothetical” manner, the institutions “interest in seeking legal advice and receiving frank, objective and comprehensive advice”⁹; and, finally, “ascertain whether there is any overriding public interest justifying disclosure” regardless of whether they have determined that the interest protected by the exception would be undermined.¹⁰

I assume that the first stage of this test has been carried out correctly by the Council in this case.

The second stage has, however, not been applied correctly in this instance (neither has the third stage regarding the overriding public interest in disclosure, however that will be discussed in detail below). More specifically, all of the arguments adduced by you in favour of withholding the documents according to Article 4(2) have been expressly rejected by the CJEU as being insufficient.

First, your argument that release of the Documents “may lead the Council to display caution when requesting similar written opinions from its Legal Service” was rejected by the ECJ in *Turco* as being a general and unsubstantiated argument.¹¹ Your second argument that disclosure of the Documents “could also affect the ability of the Legal Service to effectively defend” its decisions before the CJEU was also rejected expressly in the case *Miettinen*.¹² And, finally, your argument that “the Legal Service could come under external pressure which could affect the way legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences” was rejected again in *Turco*.¹³

You are correct in saying that a piece of legal advice does not need to be disclosed if it is “of a particularly sensitive nature or having a particularly wide scope”.¹⁴ If you are of the opinion that the Documents are of such a type, however, it is necessarily incumbent upon you to “give a detailed statement of reasons for such a refusal”.¹⁵ It is clear that you have not done this in this case.

With respect to this issue, you have argued that “the legal advice covered by the requested contributions and opinion deals with issues which are very broad in scope and relevant to a range of current and future dossiers. The legal advice is therefore sensitive”. Your reasoning in this instance is effectively identical to that expressly rejected by the Court in the case *Miettinen*, where the Council attempted to argue that the document as issue was “relevant to a ‘wide range of current and future dossiers’”. You have therefore not provided sufficient reasons as to why you are of the opinion that the Documents are particularly sensitive or have a particularly wide scope.

Article 4(2) has therefore been misapplied in this instance and full access should be granted to the Documents.

⁸ *Turco*, paras 38-39.

⁹ *Ibid.*, paras 40-43.

¹⁰ *Ibid.*, para 44.

¹¹ *Ibid.*, paras 62-63.

¹² *Miettinen*, para 31.

¹³ *Turco*, para 64.

¹⁴ *Ibid.*, para 69.

¹⁵ *Ibid.*

c) Failure to recognise an overriding public interest in disclosure

Finally, in your reply, you deal with the issue of an overriding public interest in disclosure, which is applicable to both Article 4(3) and Article 4(2). In this regard, you provide that “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 full disclosure of the documents”. You do not provide any further justifications for this conclusion.

On the contrary to your conclusion, it appears clear that an overriding public interest in disclosure does apply to the Documents in this instance. In *Turco*, a case involving a document directly analogous to the Documents, the Court held that an overriding public interest in disclosure was “constituted by the fact that disclosure of documents containing the advice of an institution’s legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.” In this instance, an overriding public interest is constituted by the very same reasons. Refusal to recognise this fact is in direct contravention of a clear statement by the ECJ.

Therefore, regardless of the inapplicability of Articles 4(2) and (3) to the Documents outlined above, they should still be released due to the existence of an overriding public interest in disclosure.

3. Requested action

For the above reasons, I request that the Council disclose the Documents in full at its earliest possible convenience.

Finally, I would like to provide a general statement with respect to the issue at hand. The exceptions to disclosure provided for in the Regulation are meant to be strictly interpreted—and particularly so when the matter concerns legislative documents—to be invoked only when one of the protected interests would actually be affected by the disclosure of a particular document. The kind of reasoning being pursued in your letter of 19 December 2018 follows a disappointing but well-trodden institutional path that is distinctly at odds with not only the clear case law of the CJEU but also with the legal and theoretical importance placed upon openness and transparency as a bedrock principle of the modern democratic European Union. To complain of waning citizen trust and increasing disaffection with the European Union while simultaneously refusing to open up secret decision-making processes is blind acceptance of historical Brussels-centric institutional attitudes that need to be abandoned.

Yours sincerely,

