



Council of the  
European Union

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Eingelangt am 26/02/19

Brussels, 26 February 2019  
(OR. en)

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API 12

#### NOTE

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 04/c/01/19

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 14 February 2019 ([Annex 1](#));
- reply from the General Secretariat of the Council dated 18 February 2019 ([Annex 2](#));
- confirmatory application dated 21 February 2019 and registered on 22 February 2019 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 14 February 2019 - 13:32 using the electronic form]

From: **DELETED**

Sent: Thursday, February 14, 2019 1:32 PM

To: TRANSPARENCY Access to documents (COMM) [Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)

Subject: Electronic Request for Access

Title/Gender: **DELETED**

Family name: **DELETED**

First name: **DELETED**

Email: **DELETED**

Occupation: University

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): Opinion of the Council Legal Service on the Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ('whistleblowers' proposal) – Legal basis 14620/18 of 14 December 2018

Certain paragraphs have been deleted from the accessible version.

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**Council of the European Union**

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

*Head of Unit*

Brussels, 18 February 2019

Mr **DELETED**  
Email: **DELETED**

Ref. 19/0474-ld/jg

Request made on: 14.02.2019

Dear **DELETED**,

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

Document **14620/18**, dated 14 December 2018, comprises an opinion of the Council Legal Service on the Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ('whistleblowers' proposal). The requested document provides a detailed analysis of the legal bases for the proposal and therefore contains 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).

The decision-making process in question is currently ongoing. The Council has just started debating the proposal, on which a common position has not yet been reached. In addition, the issues analysed in the requested document are complex and form an important part of the basis for the discussions. Under these circumstances, disclosure of the legal advice at this stage would adversely affect the negotiations by impeding the Council's internal discussion of the proposal and would hence risk compromising the capacity of the institutions to reach an agreement on the file, thus undermining the decision-making process pursuant to Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

Moreover, the legal advice deals with issues which are particularly wide in scope, critical for the ongoing discussions and controversial. In particular, the analysis of the question of the appropriate legal bases for the proposal provided in the requested document is wide in scope, goes beyond the legislative file in question and could be transposed in other similar contexts. The legal advice is therefore sensitive.

In light of the above, disclosure of the requested document would undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. 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 could 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 for the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies Regulation (EC) No 1049/2001 would not, in this case, prevail over the abovementioned interests so as to justify full disclosure of the requested document.

In view of the above, the General Secretariat of the Council is unable to grant you full access to this document. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to paragraphs 1 and 4 (with the exception of footnote 7) and paragraphs 5 to 11 thereof.

For the same reasons, no access can be granted to document 14620/18 COR 1, which relates to the parts of document 14620/18 to which you do not have access.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application)<sup>2</sup>.

Yours sincerely,

Paolo Vidal

Annex: 1

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<sup>2</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 (EU) No 2018/1725), if you make a confirmatory application your name will appear in related documents only if you have given your explicit consent.

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 21 February 2019 - 23:03]

**From:** **DELETED**

**Sent:** Thursday, February 21, 2019 11:03 PM

**To:** TRANSPARENCY Access to documents (COMM) <[Access@consilium.europa.eu](mailto:Access@consilium.europa.eu)>

**Subject:** RE: Ref. 19/0474-ld/jg

Dear Sir/Madam,

Please find attached my confirmatory application in connection with the aforementioned file.

Yours sincerely,

**DELETED**

**DELETED**

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

**Ref. 19/0474-ld/jg**

Dear Mr Vidal,

By an application submitted via the 'Consilium' website on 14 February 2019, I requested to be sent document 14620/18, dated 14 December 2018, which comprises an opinion of the Council Legal Service on the Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ('whistleblowers' proposal).

In a letter dated 18 February 2019, you refused, on behalf of the Council, to grant this request on the basis of various provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

I hereby ask you to kindly reconsider your decision as it is utterly unfounded in law.

In particular, your decision disregards two fundamental principles, namely the principle of transparency and the principle of freedom of scientific research.

**- On the principle of transparency**

The refusal of my application is based primarily on Article 4(2), second indent, of Regulation (EC) No 1049/2001, concerning the protection of legal advice.

I would remind you, however, that the case-law of the Court of Justice greatly restricts the exception relating to the protection of legal advice.

In its landmark judgment of 1 July 2008, *Sweden and Turco v Council*, the Court considered that 'Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process'. It is true that this principle is not absolute and does have exceptions, particularly if the opinion is '*of a particularly sensitive nature or [has] a particularly wide scope that goes beyond the context of the legislative process in question*'. However, in this case '*a detailed statement of reasons*' must be given to justify the refusal to disclose the opinion. Yet this has not been done in this instance, since your letter offers only abstract, general remarks without ever giving any specific (and therefore detailed) reasons to justify the refusal to send the requested opinion.

The refusal of my application also relies on Article 4(3) of Regulation (EC) No 1049/2001, concerning the protection of the decision-making process. Once again, this ground is completely unfounded.

Firstly, it is unlikely that the Council can rely on this ground with regard to a legal opinion when Article 4(2), second indent, relates specifically to legal advice. In other words, Article 4(2), second indent, constitutes a *lex specialis* which prohibits relying on the general exception in Article 4(3).

Secondly, I would remind you that, in any event, the exception in Article 4(3) requires, first, that the decision-making process be '*seriously*' undermined. However, the refusal of my application at no point describes how seriously it would allegedly be undermined. Furthermore, even if it would be seriously undermined, disclosure is compulsory as soon as there is an '*overriding public interest*'. That is the case here. The very purpose of the proposal for a Directive – that is, the protection of whistleblowers – requires increased transparency. The Council's lack of transparency will only serve to give credence to the idea that it is trying to oppose the protection of whistleblowers. Furthermore, in addition to seriously and flagrantly undermining the principle of transparency, the refusal undermines freedom of scientific research, which also constitutes an overriding public interest within the meaning of Article 4(3) of the Regulation.



## - On freedom of scientific research

Article 13 of the Charter of Fundamental Rights of the European Union states that '*The arts and scientific research shall be free of constraint*'.

However, it is as part of my work as a researcher that I made my application. I am currently writing an article on whistleblowers, and more specifically on the Commission proposal for a Directive that the requested legal opinion pertains to. The aim of my piece is precisely to examine the legal bases of this proposal and the 'legal feasibility' of protecting whistleblowers at EU level.

As a result, the refusal to send me the opinion of the Council Legal Service constitutes a restriction of my freedom of scientific research. Admittedly, this restriction is indeed provided for by law (Regulation (EC) No 1049/2001) and it could be argued that it pursues a legitimate goal. However, it seems wholly disproportionate for at least two reasons.

Firstly, in the context of assessing proportionality in the strict sense, the interest protected by the refusal to send me the document cannot take precedence over a fundamental freedom protected by the Charter of Fundamental Rights of the EU. It would be different if the interest to be protected were a matter of protection of privacy or military secrecy, which are also mentioned in Article 4 of Regulation (EC) No 1049/2001. Under no circumstances, however, can a flagrant and current restriction of scientific research in the name solely of needing to prevent entirely hypothetical pressure on the Council Legal Service be justified in the abstract.

Secondly, the alleged sensitivity of the legal advice cannot constitute an admissible argument since the debate regarding appropriate legal bases is already a public one. The matter of appropriate legal bases has come up numerous times in the work of the Parliament, and is already widely referred to in Commission working documents. There is therefore no reason why the legal advice of the Parliament and the Commission should be public and that of the Council be kept secret.

For the reasons given above, I kindly ask that you reconsider your decision in the context of a confirmatory application within the meaning of Article 7(2) of the Regulation, and thus grant me access to both document 14620/18 and the corrigendum 14620/18 COR 1.

(Complimentary close)

**DELETED**

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