



Council of the  
European Union

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Brussels, 10 April 2019  
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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 12/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 8 February 2019 and registered the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 15 March 2019 ([Annex 2](#));
- confirmatory application dated 5 April 2019 and registered on 8 April 2019 ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 8 February 2019 - 14:33]

From: Anne Friel <ask+request-**DELETED**@asktheeu.org>

Sent: Friday, February 8, 2019 2:33 PM

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

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 17 and 18 December 2018

Dear Council of the EU,

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to the minutes of the Agriculture and Fisheries Council held on 17-18 of December 2018, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2019.

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, this request does not cover documents that are available on the consilium register under interinstitutional file code 2018/0380(NLE) at the date of this request, nor those documents already disclosed to ClientEarth in response to access to documents requests with reference numbers 18/2412, 18/2381, 18/2516, 18/2518.

We are particularly interested in obtaining the following:

1. any additional documents used by Member States to support deviation from the Commission's proposal;
2. records, minutes or notes of the Council Working Party and COREPER discussions held in the lead-up to December Council, including those taken by members of the Council secretariat;
3. a full table of all proposed and agreed quota adjustments (such as those previously referred to as quota top-ups and/or any deductions) to account for a) catches that could be discarded before the introduction of the landing obligation, but now will have to be landed and b) exemptions from the landing obligation (in tonnes and %), and TACs before the adjustments (top-ups and/or deductions) were applied;

4. a detailed description of the methodology used to calculate quota adjustments (top-ups and/or deductions);
5. the calculations that the proposed and agreed quota adjustments (top-ups and/or deductions) were based on, ideally in Excel spreadsheet format.

In the interests of good administration, ClientEarth requests that the response clearly identifies the documents in the Council's possession in relation to each of these categories and clearly indicates to which category the disclosed documents relate.

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, 15 March 2019

Ms Anne Friel

E-Mail: ask+request-**DELETED**@asktheeu.org

Ref. 19/0408-aa/nb

Request made on: 08.02.2019

Deadline extension: 01.03.2019

Dear Ms Friel,

Following our letter of 1st March 2019, the General Secretariat of the Council has concluded the consultations required to the examination of your request.<sup>1</sup> These consultations allowed us to identify 22 documents matching your request, as follows:

1. *Additional documents used by Member States to support deviation from the Commission proposal:* ST 14649/18, 14385/18 + ADD 1 - 2, 15725/18 + ADD 1 - 2, 15650/18 + REV 1 + REV 2, 14437/18 ADD 13, WK 15264/18 + ADD 1, WK 15065/18 and WK 15550/18.

2. *Records, minutes or notes of the Council Working Party and COREPER discussions held in the lead-up to December Council, including those taken by members of the Council Secretariat:* ST 14339/19, 14706/18, 14709/18, 15445/18, 15444/18, and 15624/18. To be noted that the elements not related to your request were removed from these documents.

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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).

3. As regards *points 3, 4 and 5 of your request*, we have identified document WK 13666/2018. In addition, you can find in the Council's Press Release of December 2018 an overview of the agreed total allowable catches (TACs): <https://www.consilium.europa.eu/en/press/press-releases/2018/12/19/atlantic-and-north-sea-council-agrees-2019-fishing-quotas/>.

Please find attached all the above-mentioned documents.

Yours sincerely,

Paulo VIDAL

Enclosures: 22

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 5 April 2019 - 19:24]

From: Anne Friel <[ask+request-DELETED@asktheeu.org](mailto:ask+request-DELETED@asktheeu.org)>

Sent: Friday, April 5, 2019 7:24 PM

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

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 17 and 18 December 2018

Dear Council of the EU,

RE: Ref. 19/0408-aa/nb - 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 Ref. 19/0408-aa/nb relating to the adoption of the fishing opportunities for the Northeast Atlantic for 2019 under Article 16 of Regulation (EC) No 1380/2013 and accompanying documents.

On 8 February 2019 ClientEarth requested access to the minutes of the Agriculture and Fisheries Council held on 17 and 18 of December 2018, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2019, 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 2018/0380(NLE) on the date of the request, or already disclosed to ClientEarth in response to access to documents requests with reference numbers 18/2412, 18/2381, 18/2516, 18/2518). 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 adjustments made to account for exemptions from the landing obligation.

The Council replied on 1 March 2019, stating that the Council's General Secretariat was still conducting consultations relevant to our request. On 15 March 2019, the Council sent its decision together with a number of documents, including reports of certain meetings of the Working Party on Internal and External Fisheries and one working paper regarding the calculation tables for 2019 Discard Plan Exemptions and Deductions provided by the Commission Services. However, ClientEarth has verified that a number of documents falling within the scope of this request have not been disclosed and cannot be found on the Council's documents register. This is particularly concerning since these documents are legislative documents for the purpose of Regulation 1049/2001 and contain "environmental information" within the meaning of Article 2(1)(d) of Regulation 1367/2006.

Article 12(2) of Regulation 1049/2001 provides a clear definition of "legislative documents", that is "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". The documents at issue in this request meet this definition because they are documents drawn up (or which should be drawn up) and received in the course of the procedure for the adoption of the TACs Regulation, which is legally binding in and for the Member States.

Furthermore, the Aarhus Regulation defines "environmental information" as, inter alia: "any information in written, visual, aural, electronic or any other material form on:

...

(iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements". The elements referred to in point (i) are:

"the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements." The documents contain information about the TACs for 2019, which regulate the exploitation of stocks of fish and other marine species. Therefore, they have a direct impact on biological diversity in coastal and marine areas. As such, they contain "environmental information" within the meaning of the Aarhus Regulation.

#### FAILURE TO DOCUMENT DISCUSSIONS AT THE AGRICULTURE AND FISHERIES COUNCIL AND MEETINGS OF RELEVANT PREPARATORY BODIES: BREACH OF ARTICLE 2 OF EC REGULATION 1049/2001

Unlike previous years (see ClientEarth's previous requests for the minutes of the Agriculture and Fisheries Councils that took place on 12 and 13 December 2016 (Ref: 16/2430-Id/dm) and 13 and 14 December 2017 (Ref: 18/0747-rh/ns)), the Council has not disclosed the minutes of the Agriculture and Fisheries Council of 17 and 18 December 2018. We have also been unable to identify any minutes of this meeting on the Council's documents register.

Also in contrast to previous years, the Council disclosed reports of certain meetings of the Working Party on Internal and External Fisheries that took place in November/December 2018 and January 2019. We regret that, perhaps with the exception of document st 15445, these reports do not record the discussions that took place at these meetings or the positions defended by the various Member State delegations.

The documents in the Council's documents register and those that were disclosed in response to our request are helpful in gaining an understanding of the positions held by some of the Member States on some of the stocks at various points in the decision-making process. But there is a significant gap in the information available regarding how these positions were reconciled during discussions either in the Council's preparatory bodies 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 and the underlying scientific advice.

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. ClientEarth therefore requests the Secretary General to conduct such a verification regarding minutes of the *Agriculture and Fisheries Council* of December 2018 and relevant working party meetings that record the discussions held and the positions defended.

In the event that such minutes do not exist, or if they do exist but fail to provide a record of the discussions that took place at the meeting, ClientEarth submits that such failure breaches EU transparency laws.

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 detailed principles and conditions of access to documents were defined in Regulation 1049/2001. Recital 2 of the Regulation states that, "[o]penness enables citizens to participate more closely in the decision-making process". Article 2 states 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 significance of making legislative documents available to the public has been stressed on a number of occasions by the Courts of Justice of the EU. In joined case C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European*, the Court of Justice stated 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". These principles were emphasised by the Court of Justice more recently in case C-57/16 *ClientEarth v Commission*, paragraph 84.

In addition to this, records of the deliberations on TACs at the *Agricultural and Fisheries Council* and relevant meetings of the Council's preparatory bodies constitute "environmental information" and, as such, the obligations contained in Regulation 1367/2006 must also be upheld. In case C-57/16 the Court of Justice recalled its consistent case law that states:

"Regulation No 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information... It follows, in essence, from recital 2 of that regulation that the purpose of access to that information is to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken".



However, the transparency obligations enshrined in Article 10(3) TEU, Article 15(3) TFEU, Regulation 1049/2001 and Regulation 1367/2006 are contingent on the institutions drawing up and retaining documents relating to their functions. Institutions cannot simply frustrate the right to access documents by failing to document their activities in sufficient detail.

Indeed, the (then) Court of First Instance (now the General Court) has recognised that such failure is unlawful. In case T-264/04 WWF European Policy Programme v the Council of the European Union, the then 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 of the TACs Regulations for 2019 which, in some respects, departs significantly from the Commission’s proposals and the best available scientific advice and which require implementing measures at national level.

With specific regard to the meetings of the Council’s preparatory bodies, both the Ombudsman and the European Parliament have called on the Council to record discussions at such meetings and to make them publicly available in a timely manner.

The Ombudsman's Decision in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process states:

"Since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions.

14. For this to be possible, legislative discussions in the preparatory bodies must be documented; where Member States take positions in preparatory bodies, this must be recorded' and timely access to legislative documents must be easily available.

15. The Ombudsman found that the Council’s failure systematically to record the identity of Member States when they express positions in discussions within preparatory bodies [18] constitutes maladministration".

On 19 January 2019 the European parliament adopted Resolution 2018/2096(INI) on the Ombudsman's Strategic Inquiry . In the Resolution, the Parliament:

"Deplores the fact that, unlike committee meetings in Parliament, meetings of the preparatory bodies of the Council as well as the majority of debates in the Council are held in camera; believes that citizens, media and stakeholders must have access by appropriate means to the meetings of the Council and its preparatory bodies, including via live- and web streaming, and that the minutes of these meetings should be published in order to ensure a high level of transparency in the legislative process in both components of the European legislature; underlines that, according to the principle of democratic legitimacy, the public must be able to hold both components of the legislature accountable for their actions".

The failure of the Council to record in sufficient detail the discussions at the Agriculture and Fisheries Councils and meetings of the relevant preparatory bodies in relation to the adoption of the TACs for 2019, at the very least recording the positions adopted by the different Member States in these discussions breaches Article 2 of Regulation 1367/2001.

## INFORMATION ON QUOTA ADJUSTMENTS

ClientEarth specifically requested access to documents on the proposed and agreed quota adjustments (in tonnes and %) and TACs before the adjustments were applied. We also requested access to the methodology used to calculate adjustments, as well as the actual calculations.

Document WK 13666/2018 INIT is a working document with the calculations for the proposed quota deductions. ClientEarth regrets that this document, although highly relevant to the decision-making process, is not included on the Council's database.

ClientEarth also received document ST 15577 2018 INIT in response to a previous request submitted on 14 December 2018 (and it can be found on the documents register). However, this document only contains calculations for deductions proposed for two TACs, but not for the other stocks for which deductions were made.

It should be noted that we have not received and cannot locate on the Council's documents register any other document specifying the agreed quota deductions and the agreed TACs before the deductions were applied, or the calculations for the agreed quota deductions, since the two relevant files referred to above both relate only to the proposed deductions.

This information is needed to analyse whether the agreed TACs, taking into account any applied quota adjustments, 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.

Before the introduction of the landing obligation, TACs effectively were 'Total Allowable Landing' limits, since catches in excess of these TACs could be discarded. This means that when following scientific advice, TACs were based on the scientific advice on landings rather than advice on total catches.

As the landing obligation was gradually phased in between 2015 and 2019, the purpose of TACs changed from regulating landings to regulating catches. The landing obligation came fully into force in 2019, meaning that all catches of quota stocks in the Northeast Atlantic now have to be landed, unless exemptions apply. The Commission therefore proposed catch-TACs, with deductions applied to TACs subject to certain exemptions, to reflect that certain discards may continue under these exemptions.

Access to information on the proposed and agreed deductions is crucial to reliably assess whether the proposed and agreed TACs (after deductions have been applied) are in line with scientific advice. The TAC Regulation itself only contains the final agreed TACs, without the applied deduction amount being specified. Moreover, since the underlying calculations for the proposed adjustments are complex, it is difficult for external stakeholders, who do not have access to the data and methodology used, to assess whether these adjustment levels are in line with scientific advice. Therefore, a list of not only the proposed, but also the agreed adjustments as well as the TACs before the adjustments were applied, is particularly important to allow at least a direct comparison of the 'pre-adjustment TACs' with the relevant ICES landings or catch advice, respectively.

ClientEarth therefore requests the Secretary General to verify whether further documents related to the agreed quota adjustments are in the Council's possession.

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 non-arbitrary manner and breaches ClientEarth's right to access documents under Article 2 of Regulation 1049/2001.

Yours faithfully,

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