



Council of the  
European Union

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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 11/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 11 February 2019 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 25 March 2019 (Annex 2);
- confirmatory application dated 4 April 2019 and registered on 5 April 2019 (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 11 February 2019 - 11:04]

**From:** Vicky Cann <ask+request-6382-b98f1f84@asktheeu.org>

**Sent:** Monday, February 11, 2019 11:04

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

**Subject:** access to documents request - Transparency in the Council

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001,

I am requesting documents including:

- the questionnaire to member states' delegations on Council legislative transparency from Autumn 2018
- all member states' delegations' responses to the questionnaire
- all minutes from Council meetings which discuss Council legislative transparency in the past 2 years
- all discussion or other papers from the General Secretariat or member states' delegations which discuss Council legislative transparency in the past 2 years

Yours faithfully,

Vicky Cann

CEO

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**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, 25 March 2019

Ms Vicky Cann

Email: vicky@corporateurope.org

Ref. 19/0412-ld/mf

Request made on: 11.02.2019

Deadline extension: 04.03.2019

Dear Ms Cann,

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

As you probably know, and although a debate on the Council's policy on legislative transparency has not taken place in Council in the past two years, such debate has been initiated at the level of Ambassadors in the Committee of Permanent Representatives on 18 July 2018. The basis for this debate was document **11099/18** of 13 July 2018 which is publicly available in the Council's Register.

Since progress and conclusions on such complex questions cannot be achieved in one meeting, the Committee of Permanent Representatives has decided to mandate a Working Party of the Council to examine all details and to come-up with concrete ideas and suggestions.

This group has held three meetings on 4 September, 11 October and 4 December 2018. The Working Party discussed the aforementioned document **11099/18** as well as the possible options for evolution of current practices notably on the basis of a case study and a questionnaire prepared by the General Secretariat of the Council (GSC).

<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 case study is an example illustrating the lifecycle of a realistic but fictitious legislative proposal at its different stages of discussion in the Council's preparatory bodies. It also makes suggestions for possible changes in the Council's approach on transparency. The questionnaire on Legislative Transparency, which aims at clearly establishing the Member States' positions on the different possibilities, constitutes the more recent document circulated to delegations on that file (on 11 January 2019).

Overall, the General Secretariat of the Council has identified the following documents, relevant to the works of the Working Party, as falling within the scope of your request :

- Scene setter of the Austrian Presidency for the Antici+1 meeting on Legislative Transparency of 4 September 2018;
- Document describing the legal framework of legislative transparency ;
- GSC internal note of 4 September 2018 on current practice on access to documents at the General Secretariat of the Council ;
- Table on Legislative transparency in two versions, the first describing current practices also accompanied by statistics and the second further presenting possible options;
- Case study on Legislative transparency accompanied by a cover note;
- Legislative transparency questionnaire;
- Comments sent by Member States and notably their replies to the Legislative transparency questionnaire;
- Document comprising replies of the GSC to the questions sent by Member States in their written comments.

Having thoroughly examined the content of the documents concerned by the request, the GSC has concluded that full public access may be granted to the scene setter of the Austrian Presidency for the Antici+1 meeting on Legislative Transparency of 4 September 2018 ; the document describing the legal framework of legislative transparency ; the case study on Legislative transparency and the Legislative transparency questionnaire. You may find those documents attached herewith.

As regards the comments received by the Member States and notably their replies to the Legislative transparency questionnaire (19 replies have been received to date), access cannot be granted for the reasons set out below.

The disclosure of the replies and comments of the Member States at a moment when the appropriate balance of the various interests involved has not yet been achieved within the Council's preparatory bodies may put delegations under additional pressure of stakeholders.

It would also reduce the flexibility for delegations to formulate and reconsider their positions in the light of the arguments exchanged in the debate. This would seriously affect the chances of finding a convergence in delegations' positions and find a compromise to achieve the progress that is awaited by many.

The General Secretariat therefore considers that, at this stage, disclosure of these documents would be premature in that it would impede the proper conduct of the discussions and compromise the reaching of an agreement.

Disclosure of Member States replies and comments to the aforementioned questionnaire would therefore seriously undermine the decision-making process of the Council. As a consequence, the General Secretariat has to refuse access to these document at this stage.<sup>2</sup>

We have also looked into the possibility of releasing parts of the documents.<sup>3</sup> However, as the exception to the right of access applies to their entire content, the General Secretariat is unable to give partial access.

For the same reasons, and even if full access is granted to the case study itself, as far as its cover note is concerned, partial access is granted to its greater part.

As regards the other documents covered by your request:

- [GSC internal note of 4 September 2018](#) on current practice on access to documents at the General Secretariat of the Council

Access can be granted to the greatest part of this document. However since certain parts of the document contain information that if released to the public would, for the reasons mentioned above, seriously undermine the decision-making process of the Council, the General Secretariat has to refuse full access . You may however have access to these parts of the document which are not protected by this exception<sup>4</sup>.

- [table on legislative transparency](#)

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

<sup>3</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>4</sup> Article 4(6) of Regulation (EC) No 1049/2001.

Since this document, in its different versions, contains information that if released to the public would, for the reasons mentioned above, seriously undermine the decision-making process of the Council, the General Secretariat has to refuse access at this stage of the ongoing discussions. We have also looked into the possibility of releasing parts of the requested table.<sup>5</sup> However, as the exception to the right of access applies to the entire content, the General Secretariat is unable to give partial access.

- document on GSC replies to the questions contained in the written comments of MS:

The release of this document would, for the reasons explained above, seriously undermine the decision-making process of the Council. As a consequence, the General Secretariat has to refuse access to this document.<sup>6</sup>

In addition, this document contains, in different parts, legal advice on a decision-making process which is not legislative. Full disclosure of the document would make public an internal thinking of the Legal Service, intended for the members of the Council. The possibility that legal advice would be disclosed to the public can lead the Council to display caution when requesting future written opinions from its Legal Service, since it could find itself in the situation of having to defend a decision against a - potentially critical - legal advice. In addition, the Legal Service could come under external pressure which could affect the way in which legal opinions are drafted and hence prejudice the possibility of the Legal Service to express its views freely and objectively. Disclosure of the parts of this document containing legal advice would therefore undermine the protection of legal advice. As a consequence, the General Secretariat has to refuse full access to this document.<sup>7</sup>

As for the possibility of releasing parts of this document<sup>8</sup>, since the exception related to the protection of the decision-making applies to its entire content and some parts are further covered by the exception related to the protection of legal advice, the General Secretariat is unable to give partial access.

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<sup>5</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>6</sup> Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

<sup>7</sup> Article 4(2), second indent, of Regulation (EC) No 1049/2001.

<sup>8</sup> Article 4(6) of Regulation (EC) No 1049/2001.

Finally, as regards the exceptions based on legal advice and the serious undermining of the Council decision making process, and after having examined the context in which the documents to which (full) access is refused were drafted and the current state of play of the decision-making, on balance, the General Secretariat could not identify any evidence suggesting an overriding public interest in (full) disclosure of the documents in question.

We hope, Ms Cann, that in the light of our common goal to make progress on this important issue, this reply is acceptable to you. However, if this were not the case, you can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).<sup>9</sup>

Yours sincerely,

Paulo VIDAL

Enclosures: 6

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<sup>9</sup> 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 (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

**From:** Vicky Cann <ask+request-6382-b98f1f84@asktheeu.org>

**Sent:** Thursday 4 April 2019 21:53

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

**Subject:** Internal review of access to documents request - Transparency in the Council

Dear Council of the EU,

Please pass this on to the person who reviews confirmatory applications.

I am filing the following confirmatory application with regards to my access to documents request 'Transparency in the Council'.

Thank you for releasing a number of the requested documents. However, I would still like to receive:

- comments received by the Member States and notably their replies to the Legislative transparency questionnaire
- the full GSC internal note of 4 September 2018 on current practice on access to documents at the General Secretariat of the Council
- the table on legislative transparency
- document on GSC replies to the questions contained in the written comments of MS

My arguments are as follows:

- Matters pertaining to lobby transparency, access to documents, transparency of decision-making are very relevant and there is a significant public interest in them. I note Article 10 of the Lisbon Treaty which says: "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."



- It seems that my request is very similar to Case 280/11 P – 17/10/2013, AccessInfo Europe vs. the Council of the EU and I wondered why you had not applied the Court's ruling in my case. After all, the Court did not accept the Council's argument for withholding access to negotiating positions ("it makes it harder to reach compromise"). I ask you to reconsider your response to my request in the light of that Court ruling.

- With regard to the note "GCS internal note of 4 September 2018" and "Table on legislative transparency in two versions", given the document titles and their descriptions, one is led to assume that these documents particularly offer an insight into existing policy practices. Why disclosure of information concerning existing policy practices would specifically, actually and seriously undermine the decision-making process is unclear. It particularly is not clear why the public is to be denied the right to know how the Council precisely implements its transparency duty to provide access to documents.

- With regard to the document "GSC replies to the questions contained in the written comments of MS", there is a rather similar policy precedent where such answers to a survey were in fact made public while the negotiations were still ongoing (namely, in 2008/2009, on the revision of Regulation 1049/01). It is not clear why release cannot go ahead in this case.

- With regard to the non-disclosure of legal advice, it is not credibly explained why partial access would not be possible. Moreover, the jurisprudence concerning legal advice in non-legislative decision making is somewhat open-ended. The Court held in In 't Veld that legal advice in non-legislative decision making cannot a priori be excluded from the scope of the access to documents rules, and could in some situations pertain to decision-making procedures with a semi-legislative character (such as trade agreements).

- Finally, I note that all of these documents concern a non-legislative decision-making process.

I trust that you will reconsider my request in the light of these arguments and release the requested documents.

A full history of my request and all correspondence is available on the Internet at this address:

[https://www.asktheeu.org/en/request/transparency\\_in\\_the\\_council](https://www.asktheeu.org/en/request/transparency_in_the_council)

Thank you in advance.

Yours faithfully,

Vicky Cann

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