



Council of the  
European Union

076698/EU XXVI. GP  
Eingelangt am 02/10/19

Brussels, 2 October 2019  
(OR. en)

12707/19

INF 263  
API 133

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 30/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 30 September and registered on 1 October 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 1 October 2019 (Annex 2);
- confirmatory application dated 1 October 2019 and registered on the same day (Annex 3).

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 30 September 2019 - 17:17 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of: on my own behalf

Address: **DELETED**

Telephone: **DELETED**

Mobile:

Fax:

Requested document(s): ST 12259 2019 INIT - Draft Regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom - Legal analysis of the draft Regulation

1st preferred linguistic version: EN - English

2nd preferred linguistic version: FR - French



**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, 1 October 2019

**DELETED**

Email: **DELETED**

Ref. 19/2074-mj/jg

Request made on: 30.09.2019

Registered on: 01.10.2019

Dear **DELETED**,

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

Document **12259/19** dated 16 September 2019 comprises an opinion of the Council Legal Service on the *Draft Regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom*. It contains a legal analysis of the draft Regulation.

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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. Moreover, the discussions are sensitive and complex. The issue analysed in the opinion forms an important part of the basis for the discussions. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence the risk compromising the capacity of the Council to reach an agreement on the dossier and thus undermine the decision-making process pursuant to Article 4(3) of Regulation (EC) No 1049/2001.

Moreover, the legal advice covered by this opinion concerns issues that are delicate and critical for negotiations and deals with issues which are very broad in scope. The legal advice is therefore particularly sensitive. Disclosure of such a document would therefore 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 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.

As regards the existence of an overriding public interest in disclosure under Regulation (EC) No 1049/2001, 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 interest so as to justify disclosure of the document.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the document 12259/19. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to its paragraphs 1 to 3.

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

Yours sincerely,

Fernando FLORINDO

Enclosure

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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. 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:** DELETED

**Sent:** Tuesday, October 1, 2019 15:38 PM

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

**Subject:** CONFIRMATORY REQUEST FOR ACCESS TO DOCUMENTS: Ref. 19/2074-mj/jg

Dear Mr Florindo,

I hereby request the review of your decision. I am extremely saddened by your decision that I believe is unacceptable from either the legal or democratic point of view. After all, the procedure to which the requested document relates is (supposed to be) a legislative procedure.

In brief, I believe that the reasons you have provided justifying the non-disclosure of the document are **purely speculative** and lead to unacceptable consequences.

- ‘The discussions are sensitive and complex’ – I believe that any discussions in the Council are sensitive and complex.
- ‘Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence the risk compromising the capacity of the Council to reach an agreement on the dossier and thus undermine the decision-making process pursuant to Article 4(3) of Regulation (EC) No 1049/2001’ – You basically admit that the issue is so sensitive that the public access to a legal opinion on the matter could actually make the Council discontinue the legislative proceedings in question and leave the current Ombudsman’s Statute unchanged. If there are legal problems with the Parliament regulation the public has the right to know them to participate, by soft means, in the democratic process. It is called participatory democracy (but I am sure you know that).

- ‘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.’ These sentences basically imply that any legal advice from the Council Legal Service should better not be disclosed to the public, even after the legislative proceedings are completed. This interpretation is not supported by Regulation (EC) No 1049/2001. You have basically created a new exception that is not provided for in the said regulation.

I believe there is overriding public interest in the disclosure of this document for the following reasons:

- The election of the new Ombudsman approaches and there are currently major controversies regarding the nature of the Ombudsman and the range of her/his tasks. See for instance, <https://verfassungsblog.de/a-supervisory-agency-of-its-own-making/>. The public has a right to know all the arguments raised by the institutions in the said discussion and to participate in it by soft means.
- A complaint to the Ombudsman is a fundamental right recognised in Article 43 of the Charter of Fundamental Rights. The Ombudsman’s Statute concretises the manner in which this right can be exercised. If the Parliament has already adopted a regulation that may violate the fundamental right to complain to the Ombudsman – as your Legal Service seems to imply – the EU citizens have the right to know this, also in order to make the MEPs accountable.

If the interpretation of the Regulation No 1049/2001 that you propose is well established in your practice, I hope in the future an Article 277 TFEU objection of illegality against Article 4(2) of the Regulation No 1049/2001 (protection of legal advice) will be raised within an action for annulment against a decision similar to this one. I believe Articles 4(2) in such an interpretation violates Article 42 of the Charter inasmuch as it disproportionately limits the fundamental right of access to documents. The Council's ability to reach a decision and the Legal Service members well-being and comfort are not more important than democracy.

Regards,

**DELETED**

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