



Council of the  
European Union

146003/EU XXVII. GP  
Eingelangt am 21/06/23

Brussels, 21 June 2023  
(OR. en)

10892/23

INF 156  
API 116

#### NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 23/c/01/23

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Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 3 April 2023 and registered on 4 April 2023 (Annex 1);
- the reply from the General Secretariat of the Council dated 30 May 2023 (Annex 2);
- the confirmatory application dated 19 June 2023 and registered on 20 June 2023 (Annex 3).

**[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on Monday 3 April 2023, 17:20]**

From: **DELETED**

Sent: 03 April 2023 17:20

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

Subject: access to documents request - WK Documents on Nature Restoration Regulation

Dear Council of the European Union,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting the texts of the Council documents coded as "WK" and diffused in the Working Groups or Coreper between February 15th 2023 and April 3rd 2023 relating to the interinstitutional file number 2022/0195 (COD) (Nature Restoration Regulation).

Best regards,

**DELETED**

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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, 30 May 2023

**DELETED**

Email: **DELETED**

Ref. 23/0993-mj/nb

Request made on: 03.04.2023

Registered on: 04.04.2023

Deadline extension: 28.04.2023

Dear **DELETED**,

Thank you for your request for access to “*the texts of the Council documents coded as "WK" and diffused in the Working Groups or Coreper between February 15th 2023 and April 3rd 2023 relating to the interinstitutional file number 2022/0195 (COD) (Nature Restoration Regulation)*”.<sup>1</sup>

We apologise for the delay in replying to your request.

The following documents were identified as corresponding to your request:

<b>WK 1822 2023 ADD 3</b>	<b>WK 3396 2023 ADD 1</b>
<b>WK 1822 2023 ADD 4</b>	<b>WK 3396 2023 ADD 2</b>
WK 1822 2023 ADD 5	<b>WK 3396 2023 ADD 3</b>
WK 1822 2023 ADD 6	WK 3434 2023 INIT
WK 2345 2023 INIT	WK 3769 2023 INIT
<b>WK 2345 2023 ADD 1</b>	WK 3769 2023 ADD 1
<b>WK 2345 2023 ADD 2</b>	<b>WK 3769 2023 ADD 2</b>
<b>WK 2345 2023 ADD 3</b>	<b>WK 3769 2023 ADD 3</b>
<b>WK 2345 2023 ADD 4</b>	<b>WK 3769 2023 ADD 4</b>
<b>WK 2345 2023 ADD 5</b>	<b>WK 3831 2023 INIT</b>
<b>WK 2784 2023 INIT</b>	<b>WK 3929 2023 INIT</b>
WK 3049 2023 INIT	<b>WK 4011 2023 INIT</b>
WK 3215 2023 INIT	WK 4289 2023 INIT
<b>WK 3396 2023 INIT</b>	

<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).

You may have a full access to the abovementioned documents which are highlighted in bold.

Please find also attached, documents **WK 3049/2023 INIT**, **WK 3434/2023 INIT** and **WK 4289/2023 INIT**, in which the parts containing personal data have been redacted in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001 and European legislation regarding the protection of personal data.<sup>2</sup>

Document **WK 1822/2023 ADD 5** is a Working Document of 17 February 2023 from the General Secretariat of the Council to the Delegations on the Nature Restoration Regulation. It contains comments from a delegation on Chapter II, Articles 4 and 5.

You may have access to this document except for a small passage on page 4 which refers to an oral intervention of the legal service which concerns a question which is particularly sensitive.

Document **WK 1822/2023 ADD 6** is a Working Document of 3 March 2023 from the General Secretariat of the Council to the Delegations on the Nature Restoration Regulation. It contains comments from a delegation on Articles 4, 5, 6, 9, 3(14ter), Annex V and article 16.

Document **WK 2345/2023 INIT** is a Working Document of 20 February 2023 from the General Secretariat of the Council to the Delegations on the Nature Restoration Regulation. It contains comments / drafting suggestions from delegations on Chapter I (Article 1), Chapter II (Articles 7, 9, 10), Chapter III (Article 16) and Chapter V (Articles 19-21).

You may have access to these documents except for a small passage of **WK 1822/2023 ADD 6** on page 2 and a similar passage on page 55 of document **WK 2345/2023 INIT** which relate to legal advice provided by the legal service.

Document **WK 3215/2023 INIT** is a Working Document of 7 March 2023 from the General Secretariat of the Council to the Delegations on the Nature Restoration Regulation. It contains a Presidency Steering Note in view of the **Working Party on the Environment** meeting on 10 March 2023.

Documents **WK 3769/2023 INIT** and **WK 3769/2023 ADD 1** are Working Documents of 17 March 2023 from the General Secretariat of the Council to the Delegations on the Nature Restoration Regulation. They contain comments from delegations on Chapter II (Article 4, 5, 6, 7, 9 and 10) Chapter III (Article 16) and Chapter V (Articles 19-21), including Annex IV and related recitals.

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<sup>2</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

You may have access to these documents apart from a passage on page 7 of document WK 3215/2023 INIT, a similar one in document WK 3769/2023 INIT on page 14 and one on page 13 of document WK 3769/2023 ADD 1 which refer to the legal service's assessment on the legal basis of the proposal.

Pursuant to Article 4(2) of the Regulation (protection of court proceedings and legal advice), the General Secretariat is unable to grant access to those parts of the documents which contain legal advice given by the Legal Service of the Council. Indeed, the full disclosure of the abovementioned parts would undermine the protection of legal advice in the meaning of Article 4(2), second indent of Regulation (EC) No 1049/2001, as it would make known to the public an internal opinion of the Council Legal Service, intended for the members of the Council. The possibility that this legal advice be disclosed to the public may lead the Council to display caution when requesting written opinions from its Legal Service, which would actually and specifically undermine the institution's ability to receive frank, objective and independent legal advice.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under Article 4(2), second indent of Regulation (EC) No 1049/2001, the General Secretariat of the Council 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 the disclosure of the abovementioned parts of the requested documents.

However, as abovementioned, pursuant to Article 4(6) of the Regulation, you may have access to the rest of the documents which is not covered by this exception.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.

Yours sincerely,

Fernando FLORINDO

Enclosures: 27 – WeTransfer link to download the documents: <https://we.tl/t-OMUgRrXjEV>

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on Monday, 19 June 2023, 18:10]

From: **DELETED**

Sent: 19 June 2023 18:10

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

Subject: Internal review of access to documents request - WK Documents on Nature Restoration Regulation

Dear Council of the European Union,

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 'WK Documents on Nature Restoration Regulation':

1. In conformity with Article 7(2) of Regulation 1049/2001, Juliette Robert (the “Applicant”) hereby submits a confirmatory application regarding the Council’s decision of 30 May 2023 which refuses full access to certain documents that have been identified as falling under the scope of the request for access to documents submitted on 3rd April 2023 which was registered under Ref. 23/0993-mj/nb (the “Request”).

2. Namely, the confirmatory application is strictly connected to the following documents: WK 1822/2023 ADD 5, WK 1822/2023 ADD 6, WK 2345/2023 INIT, WK 3215/2023 INIT, WK 3769/2023 INIT, WK 3769/2023 ADD 1 (the “Requested Documents”).

3. The Council's decision refuses access to the Requested Documents on the basis of the exception from disclosure protecting court proceedings and legal advice provided by Article 4 para. (2), 2nd indent of Regulation (EC) 1049/2001.

4. The Applicant would like to thank the Council for its research and disclosure of the other documents falling within the scope of that Request.

5. The Request was refused on the ground that full disclosure of the abovementioned parts would undermine the protection of legal advice in the meaning of Article 4(2), 2nd indent of Regulation (EC) No 1049/2001, as it would make known to the public an internal opinion of the Council Legal Service, intended for the members of the Council. The Applicant is of the view that justifying non-disclosure by stating that disclosure would make the documents known to the public is a non-legal and redundant argument, and is insufficient grounds for refusal.

6. Article 4 para. (2) 2nd indent of Regulation (EC) 1049/2001 provides that “the institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice unless there is an overriding public interest in disclosure.”. Interpreting that provision, the Court of Justice of the European Union has established a three-step approach that each EU institution must follow regarding disclosure of legal advice (CJEU, 1 July 2008, Kingdom of Sweden and Maurizio Turco v Council of the European Union, C-39/05 P and C-52/05 P). Firstly, the document in question must relate to legal advice. Secondly, the institution concerned must examine whether the disclosure of the legal advice would be harmful to its interest in seeking and receiving frank, objective and comprehensive legal advice. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. Thirdly, if an institution takes the view that disclosure of a document would undermine the protection of legal advice, that institution must ascertain whether there is any overriding public interest justifying disclosure.

7. Firstly, the Applicant does not challenge the assessment made by the Council that the redacted parts in the Requested Documents do relate to legal advice given by the Legal Service of the Council.

8. Secondly, the Council must show in a detailed manner that the legal opinion requested is particularly sensitive or has a particularly wide scope that goes beyond the context of the legislative process in question (General Court, 18 September 2015, Samuli Miettinen v Council of the European Union, T-395/13, par. 27)

9. In its decision, the Council however, does not state its reasons for refusing access to the documents. It seeks to justify non-disclosure of the Requested Documents based on the generic statement that “it would make known to the public an internal opinion of the Council Legal Service, intended for the members of the Council.”, which “may lead the Council to display caution when requesting written opinions from its Legal Service, which would actually and specifically undermine the institution’s ability to receive frank, objective and independent legal advice”.

9. The Council does not explain how displaying the documents would be harmful for its interest in seeking legal advice, may that be in relation with the independence of the Legal service or the ability for the Council to defend its position court proceedings. It only mentions that the Council would have to display caution in seeking legal advice.

10. Furthermore, in its reasoning, the Council does not differentiate between the different documents containing parts that refer to legal advice given orally (for example document WK 1822/2023 ADD 5) and given in written format. Also, no difference is made in the justification depending on the content of the legal advice, even though the Council’s decision mentions “a question which is particularly sensitive” for one document and the “legal service’s assessment on the legal basis of the proposal.” In this regard, the Council does not provide any argumentation as to how and why that particular question is sensitive.

11. The same criticism can be expressed with regards to the legal basis justification. The General Court has indeed held that questions relating to the choice of the appropriate legal basis are legal questions not going beyond the normal context of the examination of legislative proposals (General Court, 18 September 2015, Samuli Miettinen v Council of the European Union, T-395/13, par. 41). The general claim that the legal advice relates to the legal basis does not per se justify that the legal advice is not to be disclosed.

12. This lack of justification also speaks for the hypothetical nature of the alleged risk.

13. The Council has thus failed to demonstrate that the disclosure would be harmful to its interest in seeking and receiving frank, objective and comprehensive legal advice in a non-hypothetical and foreseeable manner.

14. Alternatively, the Council did not provide satisfactory reasons as to why there is no overriding public interest for the disclosure of the documents.

15. The risk of undermining the protection of the independence of the Council's legal service must be weighed up by the Council against the public interest in disclosure (General Court, 18 September 2015, *Samuli Miettinen v Council of the European Union*, T-395/13, par. 26). In its decision, the Council 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 the disclosure of the abovementioned parts of the requested documents." It assesses that the principle of transparency is the public interest at stake here. It does not however provide reasons as to why this interest does not outweigh the alleged risk. The only element of concrete application of legal reasoning to the specific case is the expression "in the present case".

16. This lack of justification does not offer the possibility for the Applicant to justify the overriding public interest. The Applicant would still like to remind the Council that the General Court has recently reiterated that the "openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of Union citizens" and that the "principles of publicity and transparency are therefore inherent in the legislative procedures of the European Union" (General Court, 25 January 2023, *De Capitani v. Council of the European Union*, T-163/21, par. 38). Furthermore, the alleged risk would be circumvented by the facts that the Requested Documents only refer to legal advice and do not reproduce them in full, as can be understood in the Council's decision.

17. Hence, the Council has failed to demonstrate that there is no overriding public interest for disclosing the documents referring to legal advice.

Yours faithfully,

**DELETED**

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