



Council of the  
European Union

169160/EU XXVII. GP  
Eingelangt am 15/01/24

Brussels, 15 January 2024  
(OR. en)

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## NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 03/c/01/24

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Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 11 December 2023 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 10 January 2024 (Annex 2);
- the confirmatory application dated 14 January 2024 and registered on 15 January 2024 (Annex 3).

**From:** **DELETED**

**Sent:** Monday, 11 December 2023 10:17

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

**Subject:** access to documents request - Case law overview and templates for Regulation 1049

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 documents which contain the following information:

- Any documents providing insights into case law on Regulation 1049/2001. This is meant to include any documents containing a case law overview, internal manuals, instructions or FAQs used by the Transparency Unit.
- Any templates for replies to access to documents requests. This includes standard responses that a request has been registered or that a request has not been registered; concerning wide-scope requests; concerning "fair solutions"; "holding replies"; third party consultations. This is meant to apply to templates for both initial as well as confirmatory applications.

Yours faithfully,

**DELETED**

Follow the Money



**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, 10 January 2024

**DELETED**

E-mail: **DELETED**

Ref. 23/3663-ws/ns

Request made on: 11.12.2023

Dear **DELETED**

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

Concerning the first part of your request, the General Secretariat of the Council (GSC) has identified one document in its possession, which is a case-law table with the title “Regulation (EC) No 1049/2001 – Excerpts from relevant case-law and other interpretative tools”, as updated on 20 June 2023 and shared by Commission services with the GSC. There are no further overviews, internal manuals or FAQs used by the Transparency Team and providing insights into case law on Regulation 1049/2001.

We have duly consulted the European Commission concerning possible public access to this document.

Taking into account the explanations provided by the Commission, the GSC has come to the conclusion that access to the document cannot be given.

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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).

Indeed, the document aims at providing legal advice to case-handlers and the Commission as a whole. Being a selection of relevant case-law the document certainly relates to legal advice and includes a critical choice of case law accompanied by an interpretation aimed at the services; its disclosure would be harmful to the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice. This risk is reasonably foreseeable and not purely hypothetical. It should be mentioned that (i) the internal views and interpretation of the case law (as well as the very selection of the case law) flag the sensitive points that case handlers need to look at while assessing the possibility of disclosure and drafting decisions; (ii) disclosing it would deter the relevant service from drafting/updating it and the Commission from ordering its update. It should also be noted that release of the document by the Council would impair the willingness of the Commission to share internal legal advice with GSC services.

Furthermore, the document contains opinions for internal use and deliberation. Indeed, the selection of case law and the internal considerations attached to each extract constitute internal guidance, not validated by the hierarchy, to enrich and inform the decision making on how to reply to each request for access to documents. Disclosing the document would thus impose a straightjacket on the decision making of the services concerned, which would then be constrained by the internal considerations and preliminary choice of case law that was included in the document to inform the decision making, losing both its ability to ponder serenely and decide which case law/course of action best suits the case at hand, and the ability to resort to case law/courses of action which were not included in the document.

Disclosure of the document at this stage would therefore undermine the protection of legal advice and seriously undermine the administrative decision-making process.

Having examined the context in which the document was drafted and the current state of play on this matter, on balance the GSC could not identify any evidence suggesting an overriding public interest in its disclosure. In this regard, it should in particular be noted that the document concerns an administrative matter and is not related to the legislative process, for which there is a need for wider access to documents.

We have also looked into the possibility of releasing parts of the document. However, as the information contained in the document forms an inseparable whole, the GSC is also unable to give partial access to it.

As a consequence, the GSC has to refuse access to the document.

Concerning the second part of your request, documents SN 1183/12, SN 4772/14, SN 4452/17, SN 5139/19, SN 5292/19, SN 4135/20, SN 1776/21 and SN 1779/21 are covered by it. Please find them enclosed.

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)

**From:** **DELETED**

**Sent:** Sunday, 14 January 2024 19:03

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

**Subject:** Internal review of access to documents request - Case law overview and templates for Regulation 1049

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 'Case law overview and templates for Regulation 1049'.

I was denied access to a document which summarizes case law on Regulation 1049/2001 based on the exceptions for the protection of legal advice and for ongoing decision-making.

In its reply, the Council said that “release of the document by the Council would impair the willingness of the Commission to share internal legal advice with GSC services”, as disclosure would be harmful to the Commission’s interest in seeking and obtaining “frank, objective and comprehensive” legal advice. According to the reply, the document in question “flag[s] the sensitive points that case handlers need to look at while assessing the possibility of disclosure and drafting decisions”.

While the reply does not make this explicit, the refusal is ostensibly based on the exceptions in Article 4, 2., second indent, and Article 4, 3., first indent.

I would like to challenge this decision and ask for the document to be release in full.

First, I would like to challenge the notion that disclosure could harm the Commission (or the Council, for that matter) in obtaining legal advice. From the description I was given, the document is a run-of-the-mill overview of case law that is meant to inform officials in their work of evaluating access requests. I struggle to think which “interpretative tool” the Commission could have placed in this document that disclosure would somehow affect its ability to access legal advice.

And while I am being deprived of the Commission’s learned overview of case law, I would still like to add that the General Court found in the case Pech v Council that an “allegedly sensitive subject matter cannot be confused with a sensitive document” (para 57). Rather, the court noted that to validate the claim of special sensitivity in grounding non-disclosure, “it is the content of the opinion itself which must be particularly sensitive” (para 93). In this light, I ask for a clear explanation why the Commission’s interpretation of case law on Regulation 1049/2001 would be so sensitive that it could not be disclosed. I contend that it isn’t.

I further would like to point out the finding of the court in Pech in regard to Article 4(2), second indent, which is invoked in the reply. “In that regard, as the Court of Justice has observed, it is precisely transparency concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated” (para 55).

As regards your refusal under Article 4(3), first subparagraph, I contend that the Council has not sufficiently demonstrated that disclosure of the document would "seriously undermine" the institution's decision-making process, as is required under this exception. I believe that there is a difference between "allowing scrutiny of" and "undermining". What I wish to do is access the case law in question with a view towards public participation and outside scrutiny of a routine administrative procedure. Indeed, I think it is fair and appropriate for citizens to ask for the procedural documents that guide administrative decision-making.

Lastly, I would like to argue there is a overriding public interest in disclosure. When the Council or the Commission interpret Regulation 1049/2001 to handle access request such as this one, they decide over citizens' ability to exercise a fundamental right under the EU Charter (Article 42). The interpretation of the case law for the Regulation likely plays a key role in the way that right can be exercised. Therefore withholding the document, in my view, creates a barrier to public understanding and public access to this fundamental right.

Yours faithfully,

**DELETED**

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