



Council of the
European Union

Brussels, 30 April 2021
(OR. en)

8361/21

INF 117
API 63

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 16/c/01/21

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 12 March 2021 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 19 April 2021 (Annex 2);
- the confirmatory application dated 29 April 2021 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 12 March 2021 - 07:23]

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 analysis of the Council Legal Service concerning the EU's compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which has been repeatedly questioned by its monitoring bodies.

Yours faithfully,

DELETED



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, 19 April 2021

DELETED

Email: **DELETED**

Ref. 21/0651-mj/jl

Request made on: 12.03.2021

Deadline extension: 07.04.2021

Dear **DELETED**,

Thank you for your request for access to *"documents which contain the analysis of the Council Legal Service concerning the EU's compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which has been repeatedly questioned by its monitoring bodies"*.¹

Documents 15435/04 and 8445/17 were identified as corresponding to your request.

Document 15435/04 of 30 November 2004 is a contribution of the Council legal service to the proceedings of the Environment Working Party on the Proposal for a Regulation of the European Parliament and of the Council on the application of provisions of the Aarhus Convention on Access to information, Public participation in Decision-making and Access to Justice in environmental matters to EC institutions and bodies.

¹ 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).

Document **8445/17** of 25 April 2017 is an opinion of the Council legal service to the Working Party on International Environment Issues on the findings of the Aarhus Convention Compliance Committee - preparation for the MoP ("Meeting of the Parties") and next steps.

The decision-making process to which document **15435/04** pertains has been finalised with the adoption of Regulation (EC) No **1367/2006** of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. However, the legal advice contained thereof as well as the legal advice contained in document **8445/17** is still relevant in the context of the ongoing procedure regarding the compliance of the Union with its obligations pursuant to the Aarhus Convention, following the findings of the Aarhus Convention Compliance Committee in case **ACCC/C/2008/32**. The legal advice is also relevant for the ongoing discussions within the Council and between the institutions on the Commission's proposal for a regulation amending Regulation (EC) No **1367/2006**.

The issues analysed in the requested documents are complex and their disclosure would adversely affect the internal discussions of the Council and would risk compromising the capacity of the institutions to reach an agreement in the context of the deliberations on the proposal for the amendment of Regulation (EC) No **1367/2006**. In addition, should the documents be released, third parties may attempt to influence or exert pressure on the policy choices to be made by the institutions. Thus, disclosure would undermine the decision-making process pursuant to Article 4(3) second indent of Regulation (EC) No **1049/2001** of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

Moreover, the legal advice covered by the requested contribution and opinion deals with issues which are critical elements for the negotiations, broad in scope and contentious. The legal advice is therefore sensitive. Disclosure of those documents 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, the General Secretariat considers that, on balance, the principle of transparency which underlies Regulation (EC) No **1049/2001** would not, in the present case, prevail over the above indicated interests so as to justify full disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to documents 15435/04 and 8445/17. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to paragraphs 1 to 8 of document 15435/04 and paragraphs 1 to 10, with the exception of the two last sentences of paragraph 1, the first part of paragraph 11, paragraph 12, paragraphs 14 to 18 and paragraph 21 of document 8445/17.

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

Yours sincerely,

Fernando FLORINDO

Enclosures: 2

[E-mail message sent to access@consilium.europa.eu on 29 April 2021 - 14:38]

Dear Council of the European Union,

I am filing the following confirmatory application with regards to my access to documents request 'Legal advice on the EU's compliance with the Aarhus Convention' following your decision of 19 April 2021.

On 12 March 2020 I requested for access to 'documents which contain the analysis of the Council Legal Service concerning the EU's compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which has been repeatedly questioned by its monitoring bodies.

In your reply, you identify two legal opinions and provide one general justification for only granting highly limited public access to them.

You argue that while the negotiations on Regulation 1367/2006 have been completed, the advice continues to be relevant for the ongoing revision of the regulation. This would seem to be a highly general justification. If legal advice could be withheld simply because the EU act in question might later be subject to a revision process, this is an argument that would apply generally to all legal advice adopted in legislative matters, and is as such too broad and hypothetical to fulfil the criteria set in Court jurisprudence.

The legislative process in question has come to an end in 2006. It would seem disproportionate that the Council has not disclosed the Opinion during the following 15 years. This practice seems to run counter to Article 12(2) of Regulation 1049/2001, which establishes that "In particular, legislative documents, that is to say, 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, should, subject to Articles 4 and 9, be made directly accessible."

The Council further explains that the issues analysed in the requested documents are complex. Many topics are, but this question does not seem to be particularly complex and the legal questions involved are well known and broadly debated in civil society.

The Council further refers to how 'third parties may attempt to influence or exert pressure on the policy choices to be made by the institutions. First, the possibility of third parties to influence policy choices is a fundamental aspect of democratic debate in any society governed by the rule of law, which the Council should not undermine. Second, as the General Court recently confirmed in [Case T-252/19](#):

92 Finally, as regards the Council's argument that disclosure could lead to the exposure of individual members of its Legal Service to external pressure, it must be recalled that, while the risk of external pressure may constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure (see, to that effect, judgment of 18 December 2008, *Muñiz v Commission*, T-144/05, not published, EU:T:2008:596, paragraph 86). It should, however, be noted that, in the present case, the Council's argument is not substantiated and that there is no tangible evidence in the file to establish the reality of such external pressure.

The same conclusion would seem to apply in this case.

Further, the Council refers to the sensitivity of the identified legal opinions. It is difficult to see how a legislative document that relates to access to information and public participation could be sensitive.

Finally, the Council refers to Article 4(2) second indent of Regulation 1049/2001. The Court has clarified its interpretation in Case T-252/19 quoted above:

89 As regards the existence of a risk that the Council's ability to defend its position in court proceedings might be undermined, it should be noted that, as the Court of Justice has stated, such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001 (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 65).

90 In addition, it is apparent from the contested decision that the Council merely indicated that disclosure of the opinion presented a risk of undermining its ability to defend its position, during court proceedings, because the proposed measure, if adopted, would have a direct impact on the allocation of funds, with the result that it was necessary to expect a high risk of litigation in that area and that the questions raised in the opinion would be at issue in any such disputes. The Council merely mentioned, in general terms, hypothetical legal actions and failed to explain how disclosure of the opinion could harm its ability to defend itself. Similarly, the references made by the Council in its written pleadings, without further clarification, to the 'ongoing debate' and to its 'previous experience in similar files' must be rejected. Those latter factors, which, moreover, do not form part of the statement of reasons for the contested decision, are not relevant and are also incapable of showing how disclosure of the opinion would specifically present a risk that the Council's ability to defend itself might be undermined.

The same conclusion applies to the explanation offered in the decision that I am appealing.

For the above reasons, I hereby request the Council to reconsider its decision and provide full access to the requested opinions at its earliest convenience.

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

DELETED

Yours faithfully,

DELETED
