Council of the European Union

Brussels, 22 April 2025
(OR. en)

8152/25

INF 74
API 43

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 11/c/01/25

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 12 February 2025 and registered on the same day (Annex 1);
- the reply from the General Secretariat of the Council dated 31 March 2025 (Annex 2);
- the confirmatory application dated 16 April 2025 and registered on 22 April 2025 (Annex 3).

ANNEX 1

-----Original Message-----
From: **DELETED**
Sent: mercredi 12 février 2025 15:42
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: access to documents request - Selection of candidates for the CJEU

Dear Council of the European Union,

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

1. the Article 255 Panel's opinions regarding the two judicial candidates nominated for the CJEU (that is General Court and Court of Justice) by the Portuguese government in 2023, 2024 and 2025, as well as any minutes, audio, and video recordings pertaining to the candidates' hearings;

2. all communications and exchanges between the Portuguese government and the Council and between the Article 255 Panel and the Council, before and after the Article 255 Panel's interviews, including minutes and exchanges among the members of the Council, the Representatives of the Governments of the Member States, and the Article 255 Panel in connection to the Panel's decisions concerning the two Portuguese candidates;

3. the national file of the candidates considered by the Portuguese Government to become members of the CJEU (that is General Court and Court of Justice), containing inter alia the CV of the candidates, their public hearing before the national parliament (any minutes, audio, and video recordings pertaining to the candidates' hearings), the vote cast on their nomination and any other documents regarding the national selection process and in possession of the Council.

Yours faithfully,

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ANNEX 2

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, 31 March 2025

DELETED
Email: **DELETED**

Ref. 25/0444

Request made on: 12.02.2025
Deadline extension: 05.03.2025

Dear **DELETED**,

We would like to thank you for your request[1] for public access to:

"*1. the Article 255 Panel's opinions regarding the two judicial candidates nominated for the CJEU (that is General Court and Court of Justice) by the Portuguese government in 2023, 2024 and 2025, as well as any minutes, audio, and video recordings pertaining to the candidates' hearings;*

2. all communications and exchanges between the Portuguese government and the Council and between the Article 255 Panel and the Council, before and after the Article 255 Panel's interviews, including minutes and exchanges among the members of the Council, the Representatives of the Governments of the Member States, and the Article 255 Panel in connection to the Panel's decisions concerning the two Portuguese candidates;

3. the national file of the candidates considered by the Portuguese Government to become members of the CJEU (that is General Court and Court of Justice), containing inter alia the CV of the candidates, their public hearing before the national parliament (any minutes, audio, and video

[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).

recordings pertaining to the candidates' hearings), the vote cast on their nomination and any other documents regarding the national selection process and in possession of the Council".

The following documents have been identified as relevant to the three points of your request:

1. The opinions of the panel provided for in Article 255 TFEU (the panel) on the two candidates proposed by Portugal in 2024 for the post of Judge of the Court of Justice of the European Union;

2.

   a. the letters of 15 July 2024 and 12 December 2024 from the Permanent Representative of Portugal to the European Union (EU) to the Secretary-General of the Council proposing the two candidates for the post of Judge of the Court of Justice;

   b. the letter, in Portuguese, of 25 September 2024 from the Permanent Representative of Portugal to the EU to the Secretary-General of the Council, requesting that the CRGMS to be held on 2 October 2024 consider the Portuguese candidacy submitted on 15 July 2024. This letter was transmitted to the Representatives of the Governments of the Member States by the secretariat of the CRGMS by means of document **ST 13861/24**;

   c. the minutes of the CRGMS held on 2 October 2024 (**ST 14108/1/24 REV 1** and **ST 14108/24 ADD 1**);

   d. the information note from the secretariat of the CRGMS to the Representatives of the Governments of the Member States (**ST 13358/24** of 13 September 2024 and **ST 13358/1/24 REV 1** of 26 September 2024); and

   e. The note from the secretariat of the CRGMS to the CRGMS (**ST 13680/24** of 23 September 2024 and **ST 13680/1/24 REV 1** of 25 September 2024);

3.

   a. The CVs of the two candidates proposed by Portugal in 2024 for the post of Judge of the Court of Justice of the European Union; and

   b. The letters of the Portuguese government to the President of the panel of 12 July 2024 and 6 December 2024, describing the national selection procedure and the reasons why the respective candidacies were retained.

1. As regards the two opinions of the panel

The General Secretariat of the Council (GSC) considers that the requested documents fall within the remit of the exceptions relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001), the protection of the decision-making process (Article 4(3) of Regulation (EC) No 1049/2001) and the protection of commercial interests (first indent of Article 4(2) of Regulation (EC) No 1049/2001).

At the outset, it must be noted that this approach is consistent with the conclusion of the European Ombudsman in her decision in case 1955/2017/THH on the Council of the European Union's refusal to grant public access to opinions evaluating the merits of candidates for appointment to the Court of Justice and the General Court of the European Union. In that decision, the European Ombudsman found that '*the overriding public interest in this case lies in protecting the Panel's decision-making process*' and that '*this constitutes a greater public interest than that of the public knowing further details of the Panel's opinions*', and concluded that '*the refusal of the Council to provide full public access to the opinions of the Panel on judicial appointments was justifie*d'[2].

It should be also stressed that in its activity reports[3], the panel has stated that it considers that the disclosure of its opinions – which pertain to an assessment of candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court, and therefore contain personal data – would be likely to undermine the privacy of the candidates (Article 4(1)(b) of Regulation (EC) No 1049/2001). The panel is also of the opinion that the full disclosure of its opinions would undermine the aims and quality of the consultation and appointment procedures provided for in Articles 253 to 255 TFEU, notably because it would jeopardise the secrecy of the panel's deliberations and of the intergovernmental conference at which Member States appoint the Judges and Advocates-General (Article 4(2) and (3) of Regulation (EC) No 1049/2001).

The panel therefore considers that its opinions are intended exclusively for Member State governments and that the positions it takes on the suitability of candidates for judicial office at EU level may not be disclosed to the public, either directly or indirectly. This stems from the operating rules of the panel annexed to Council Decision 2010/124/EU[4] which provide that the deliberations of the panel '*shall take place in camera*', the hearing of the candidate '*shall take place in private*' and that the panel's opinion '*shall be forwarded to the Representatives of the Governments of the Member States*'.

Taking into account the above considerations, the GSC is of the view that providing access to the requested documents would jeopardise the attainment of the objectives of Regulation (EC) No 1049/2001 for the reasons set out below.

First, the requested documents contain, in most of their parts, personal data pertaining to the candidates to whom they refer.

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2 Decision in case 1955/2017/THH on the Council of the European Union's refusal to grant public access to opinions evaluating the merits of candidates for appointment to the Court of Justice and the General Court of the European Union, paragraphs 54 and 56.

3 Seventh Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, page 16, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/2022.2597-qcar22002enn_002.pdf.

4 Annex to Council decision 2010/124/UE of 25 February 2010.

According to Article 3(1) of 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 (Regulation (EU) 2018/1725), personal data is defined as '*any information relating to an identified or identifiable natural person*'. Moreover, the Court of Justice has ruled that professional data or information provided as part of a professional activity must also be characterised as personal data[5], and that the fact that certain information has already been made public does not preclude its characterisation as personal data[6].

Thus, both the factual elements concerning the candidates' professional experience and qualifications and the panel's assessment of the candidates' competences are to be classified as personal data.

Such data come under the exception provided for in point (b) of Article 4(1) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual).

According to established case-law, where an applicant seeks to obtain access to a document that includes personal data, the legal framework on the protection of individuals with regard to the processing of personal data by the European institutions becomes applicable in its entirety.

More specifically, in accordance with Article 9 of Regulation (EU) 2018/1725, '*personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if:*

[…]

(b) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

[…]

3. Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law.'

It follows from this provision that it is up to the applicant to show whether the transfer of the requested personal data is necessary – that is to say, whether it is the most appropriate measure to achieve the objective pursued by the applicant and if it is proportionate to that objective. However, such a disclosure should not prejudice disproportionally the legitimate interests of the individual or individuals concerned.

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5 Judgment of 29 June 2010, *Commission* v *Bavarian Lager*, C-28/08, EU:C:2010:378, paragraphs 66 to 76.

6 Judgment of 16 December 2008, *Tietosuojavaltuutettu* v *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraphs 48 and 49.

In the case at hand, on the one hand, the necessity of the transfer of the requested personal data has not been established in the application. Indeed, the applicant makes no reference at all to the necessity to release these documents.

On the other hand, the disclosure of the requested personal data could cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.

The demanding professional requirements associated with the post of Judge usually attract individuals of a particularly high seniority and who often hold prominent positions, both at national and EU level, such as judges in the highest courts or renowned professors. The reputation of individuals in such positions would inevitably suffer greater damage should negative opinions concerning them be made public. Such damage could even have an effect on their potential career prospects, at both national and international level, even if the opinion of the Panel is on the suitability of the candidate specifically to perform the functions of a Judge or Advocate-General of the Court of Justice or the General Court.

Under these circumstances, providing access to the parts of the opinions concerning the assessment of the suitability of the candidates to perform the duties of a Judge of the Court of Justice would not only jeopardise the attainment of the objectives of point (b) of Article 4(1) of Regulation (EC) No 1049/2001, but would also be in breach of Regulation (EU) 2018/1725 on the protection of personal data.

In addition, it is stressed that the automatic prevalence of the principle of transparency over data protection has been expressly ruled out by the Court. Indeed, Regulation (EC) No 1049/2001 only provides a right of public access to the extent that none of the exceptions provided by the said Regulation applies.

In any case, should the necessity of transfer be justified by the objective to ensure public trust in the EU courts and more specifically to allow public control over the competence and qualifications of the members of the EU judicature, these are exactly the objectives that led to the establishment of the panel in the first place and that form the basis of the panel's operating rules, which provide for the confidentiality of its activities. In that regard, it is noted that if transparency is crucial to allow the citizen to hold political decision-makers accountable and therefore to strengthen the democratic legitimacy of the EU institutions that are representative in nature, it plays a very different role in relation to the EU judiciary. The legitimacy of the Judges is first and foremost assured by their independence, objectivity and professional competence, not by the power of public opinion. It is not for members of the public to assess the suitability of candidates to the post of Judge or Advocate-General.

In this context, the disclosure of personal data would, for the reasons that will be set out below, risk compromising the effective selection of suitable candidates for the posts of Judges and Advocates-General and would therefore undermine, rather than pursue, the objective of ensuring the public's trust in the EU courts.

In any event, the panel already publishes detailed reports of its activities, which provide an accurate account of its working methods and of the criteria used to assess the candidates. This information suffices to reassure the public on the fairness of the selection procedure and to guarantee that the best candidates will be retained. It appears that the applicant has not taken this

circumstance into account and has failed to show why the significant transfer of personal data that its application requires would be the only appropriate measure to achieve the objective pursued.

Secondly, disclosure of the requested documents would seriously undermine the decision-making process leading to the appointment of Judges.

The publication of the panel's opinions would affect the confidentiality of the procedure for assessing the suitability of the candidates. In that regard, it should be recalled that the principle of secrecy regarding assessment bodies' proceedings is widely acknowledged in EU law and finds its justification in the need to guarantee the independence of the assessment bodies and the objectivity of their proceedings, by protecting them from all external interference and pressures. This rationale applies, of course, all the more to the panel provided for in Article 255 TFEU.

In the case of the panel, the principle of confidentiality has been expressly enshrined in the panel's operating rules, which set out a number of specific provisions concerning the arrangements for holding panel meetings and a specific system of circulation of and access to documents. Needless to say, those rules have to be coordinated with the provisions of Regulation (EC) No 1049/2001.

According to well-established case-law, when potential conflict exists between the provisions of Regulation (EC) No 1049/2001 and a specific set of rules regulating the circulation of and access to documents in the framework of a specific procedure, the conflict has to be solved by interpreting the exception provided for in Regulation (EC) No 1049/2001 in line with those rules. This ensures that the procedure to which those rules apply operates correctly and guarantees that its objectives are not jeopardised.

Typically, this coordination is carried out by the recognition of a general presumption. Such a presumption is based on the fact that access to a document involved in the relevant procedure would be incompatible with the proper conduct of that procedure and aims to ensure the integrity of that procedure by limiting the intervention of third parties.

In the present situation, there is no doubt that the disclosure of the requested documents would undermine the conduct of the selection procedure, and notably its confidential nature, as expressly provided for in the panel's operating rules. It follows that, in line with the case-law of the EU courts[7], the documents are covered by a general presumption according to which the disclosure of the panel's opinions would, as a matter of principle, seriously undermine the panel's decision-making process.

But even if the existence of a general presumption was put in question, the serious risk for the decision-making process leading to the appointment of members of the EU judicature results from a number of circumstances.

[7] See, for example, judgment of 12 November 2015, Alexandrou v Commission, T-515/14 P and T-516/14 P, EU:T:2015:844, paragraph 88 and following

To start with, a number of the considerations mentioned above in relation to the prejudice to the candidates' reputation have broader systemic implications for the correct functioning of the selection procedure for Judges and Advocates-General.

Disclosure of an opinion, be it unfavourable or favourable, could dissuade future qualified candidates from applying, for fear of any possible negative impact that the panel's opinions could have on their reputation.

This 'chilling effect' is linked to the fact that potential candidates are usually individuals of particularly high seniority and visibility at national level, who could be deterred from participating in the selection procedure if their reputation might be put at risk.

Furthermore, disclosure of its opinions would affect the working methods of the panel. In particular, the panel could become more restrained and more guarded when drafting its written opinions. This would be unfortunate, firstly because it would greatly reduce the usefulness of the panel's opinions, with the effect of rendering more difficult the work of the intergovernmental conference which is called to appoint Judges and Advocates-General. It could also cause the panel to decide to have more systematic recourse to the possibility, provided for in its operating rules, to present its opinions to the intergovernmental conference orally.

As mentioned above, the panel provides its opinions to an intergovernmental conference composed of representatives of the Member States that appoint the Judges and Advocates-General by common accord. Disclosure of the opinions of the panel would inevitably attract the attention of the public and possibly the media towards the assessment of the candidates. This in turn could lead to a politicisation of the issue and the adoption of politically postured positions, thereby significantly reducing Member States' margin for manoeuvre in the deliberations relevant for the adoption of a decision by common accord. In the framework of a political discussion on the appointments, the heretofore much-respected opinion of the panel could be called into question in light of considerations of a political nature, which would ultimately affect the quality of the selection of Judges and Advocates-General.

For all the reasons stated above, disclosure of the requested opinions would undermine the decision-making process leading to the appointment of Judges and Advocates-General, and therefore would jeopardise the attainment of the objectives of Article 4(3) of Regulation (EC) No 1049/2001.

Lastly, full disclosure of the requested documents could undermine the protection of the candidates' commercial interests, in the event that the candidates were to carry out paid work as lawyers or legal advisers.

While an opinion of the panel concerns the suitability of a candidate for a specific position, the fact remains that the evaluation carried out by the panel takes into account the file submitted by the candidate, his academic record, his professional experience and his performance at interview. All this information would be relevant for any other position, in either the public or the private sector, for which the candidate might later be considered, since it shows the capabilities of the candidate as a legal professional. Therefore, it cannot be denied that the disclosure of, in particular, unfavourable opinions could have a negative impact on the candidates' chances of succeeding in other selection procedures.

Consequently, disclosure of the opinions of the panel would jeopardise the attainment of the objectives of Article 4(2) of Regulation (EC) No 1049/2001.

As regards the existence of an overriding public interest in disclosure, on balance, the principle of transparency which underpins Regulation (EC) No 1049/2001 would not, in this case, prevail over the abovementioned interests protected under the exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 in such a way as to justify disclosure of the documents.

It must be acknowledged that transparency – and more specifically legislative transparency – plays a crucial role in the correct functioning of the EU democratic system, enshrined as it is in the Treaties, secondary legislation and the relevant case-law.

However, as indicated above, it must be underlined that in a democratic society, transparency and public participation do not have the same role in relation to legislative activity and the role of the judiciary.

Magistrates are subject only to the law. Their position cannot be compared to that of politicians or citizens' representatives. As a consequence, the procedure for their appointment needs to strike a balance between the need to select the candidates with the best legal expertise, the greatest professional experience and the most reliable guarantees of objectivity, and the principle of transparency.

In the case at hand, such a balance is satisfied by the significant level of transparency that is already assured by the panel's periodic publication of detailed activity reports, which, as explained above, provide information about its working methods, its criteria for assessing candidates and its overall yearly activity.

However, when it comes to the publication of individual opinions on the suitability of candidates for the post of Judge or Advocate-General, on balance, the public interest in having access to those opinions does not override the interests in the protection of the decision-making process and the commercial interest of the candidates.

In light of the above, the GSC concludes that full disclosure of the requested documents would jeopardise the attainment of the objectives of Regulation (EC) No 1049/2001. The possibility of partially disclosing the opinions concerned by your request in accordance with Article 4(6) of Regulation (EC) No 1049/2001 has also been examined. Partial access could be granted to those parts of the requested documents which are not covered by the aforementioned exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.

Thus, a redacted version of the two opinions issued by the panel on the two candidates proposed by Portugal in 2024 for the post of Judge of the Court of Justice of the European Union (reflecting the parts to which partial access is granted) is attached.

2. As regards the "*communications and exchanges between the Portuguese government and the Council and between the Article 255 Panel and the Council, before and after the Article 255 Panel's interviews*"

a. Letters of 15 July 2024 and 12 December 2024

The requested documents consist in two letters from the Permanent Representative of Portugal to the Secretary-General of the Council proposing the two candidates subsequently put forward by that Government for the post of Judge of the Court of Justice of the EU.

Certain parts of the requested documents cannot be disclosed based on the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). These parts contain the names of the persons proposed by Portugal for the post of Judge of the Court of Justice of the EU, the signature of the Permanent Representative of Portugal to the EU and the initials of the staff of the Permanent Representation of Portugal to the EU. The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that regulation.

In particular, the personal data in question could be transmitted to you if:

a) you showed that the transfer of the requested personal data is necessary – that is to say, that it is the most appropriate measure to achieve the objective you pursue and if it was proportionate to that objective, and

b) such a disclosure would not prejudice disproportionally the legitimate interests of the individuals concerned.

We consider that in the case at hand, on the one hand, the necessity of the transfer of the requested personal data has not been established in the application and, on the other hand, it cannot be excluded that the disclosure of the requested personal data could cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests, nor that it would prejudice the legitimate interests of the other data subjects concerned.

In view of the foregoing, the GSC is hereby providing you with partial access to the requested documents, after redaction of the names of the persons proposed by Portugal for the post of Judge of the Court of Justice of the EU, of the signature of the Permanent Representative of Portugal to the EU and of the initials of the staff of the Permanent Representation of Portugal to the EU.

b. Letter of 25 September 2024

You have already been granted partial access to this document, in its English version, following your request with reference 24/2569, after redaction of the name of the person proposed by Portugal for the post of Judge of the Court of Justice of the EU, by virtue of the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).

The GSC is of the view that no further access to the document can be granted.

By virtue of the same exception related to the protection of privacy and the integrity of the individual, the GSC is further unable to grant you access to the parts of the document containing the signature of the Permanent Representative of Portugal to the EU and the initials of the staff of the Permanent Representation of Portugal to the EU, as the disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that Regulation.

c. Minutes of the CRGMS held on 2 October 2024 (14108/1/24 REV 1 and 14108/24 ADD 1)

Full access is granted to document **14108/1/24 REV 1**.

Document **14108/24 ADD 1** contains a statement by Portugal to item 2d set out in document 13837/24, the provisional agenda of the CRGMS held on 2 October 2024, an item that related to the adoption of a Decision of the Representatives of the Governments of the Member States appointing a Judge to the Court of Justice.

The content of the statement is sensitive.

Firstly, the statement contains personal data of the person proposed by Portugal for the post of Judge of the Court of Justice of the EU. The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that Regulation. Access to the parts of the document containing personal data can therefore not be granted, by virtue of the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).

Secondly, the content of the statement relates to matters pertaining to the recent activity of the panel, known only to the Representatives of the Governments of the Member States as the sole recipients of the panel's opinions, pursuant to point 8 of the operating rules of the panel. Disclosure of this statement would reveal specific elements in the panel's opinions. This would jeopardise the secrecy of the panel's deliberations and of the intergovernmental conference at which Member States appoint the Judges and Advocates-General. Such disclosure could further expose the panel to external interference and pressures as it would inevitably draw the attention of the public and possibly the media towards specific assessments and considerations that were topical at that moment in time and go beyond the aggregate information that is already public through the panel's periodic publication of detailed activity reports. Putting in the public domain discussions reserved to the panel and the addressees of its opinions would risk casting doubt on the work of the panel and its role in the selection of members of the EU judiciary, ultimately undermining the aims and quality of the consultation and appointment procedures provided for in Articles 253 to 255 TFEU.

As regards the existence of an overriding public interest in disclosure of the requested document in relation to the interest under Article 4(3) of Regulation (EC) No 1049/2001 in protecting the decision-making process leading to the appointment of Judges and Advocates-General in the EU Courts, the GSC 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.

In view of the foregoing, the GSC is unable to grant you access to document 14108/24 ADD 1.

d. Information note from the secretariat of the CRGMS to the representatives of the Governments of the Member States

Full access is granted to document **ST 13358/24** of 13 September 2024.

Conversely, certain parts of document **ST 13358/1/24 REV 1** of 26 September 2024 cannot be disclosed based on the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). These parts contain the name of the person proposed by Portugal for the post of judge of the Court of Justice of the EU who was not subsequently appointed by the CRGMS, their name has therefore not been made public by the Council. The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that regulation.

In view of the foregoing, the GSC is hereby providing you with partial access to document ST 13358/1/24 REV 1 of 26 September 2024, after redaction of the name of the person concerned.

e. Note from the secretariat of the CRGMS to the CRGMS

Document ST 13680/24 of 23 September 2024 has already been rendered public following an access to documents request, you are therefore granted full access to it.

Conversely, certain parts of document **ST 13680/1/24 REV 1** of 25 September 2024 cannot be disclosed based on the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). These parts contain personal data of the person proposed by Portugal for the post of Judge of the Court of Justice of the EU who was not subsequently appointed by the CRGMS, their name has therefore not been made public by the Council. The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that regulation.

In view of the foregoing, the GSC is hereby providing you with partial access to document ST 13680/1/24 REV 1 of 25 September 2024, after redaction of the personal data of the person concerned.

3. <u>As regards the national file of the candidates considered by the Portuguese Government</u>

a. <u>The CVs of the candidates</u>

The requested documents contain the CVs of the candidates put forward by Portugal for the post of Judge of the Court of Justice of the EU.

The requested documents cannot be disclosed based on the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001) as they exclusively consist of personal data pertaining to the candidates to whom they refer. The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that regulation.

In particular, the personal data in question could be transmitted to you if:

1. you showed that the transfer of the requested personal data is necessary – that is to say, that it is the most appropriate measure to achieve the objective you pursue and if it was proportionate to that objective, and

2. such a disclosure would not prejudice disproportionally the legitimate interests of the individuals concerned.

We consider that in the case at hand, on the one hand, the necessity of the transfer of the requested personal data has not been established in the application and, on the other hand, it cannot be excluded that the disclosure of the requested personal data could cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.

In view of the foregoing, the GSC is unable to grant you access to the requested documents.

b. The letters of 12 July 2024 and 6 December 2024

The requested documents contain the letters of the Portuguese government to the President of the panel of 12 July 2024 and 6 December 2024, describing the national selection procedure and the reasons why the respective candidacies were retained.

The parts of the requested documents referring to the reasons why the respective candidacies were retained contain personal data of the persons proposed by Portugal for the post of Judge of the Court of Justice of the EU. Additionally, the signatures of the Portuguese Ministers of State and Foreign Affairs, and Justice, constitute personal data of the persons concerned. All these personal data cannot be disclosed based on the exception related to the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). The disclosure of these personal data does not fulfil the conditions under Article 9 of Regulation (EU) 2018/1725 nor does it constitute lawful processing in accordance with the requirements of Article 5 of that Regulation.

In particular, the personal data in question could be transmitted to you if:

1. you showed that the transfer of the requested personal data is necessary – that is to say, that it is the most appropriate measure to achieve the objective you pursue and if it was proportionate to that objective, and

2. such a disclosure would not prejudice disproportionally the legitimate interests of the individuals concerned.

We consider that in the case at hand, on the one hand, the necessity of the transfer of the requested personal data has not been established in the application and, on the other hand, it cannot be excluded that the disclosure of the requested personal data could cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests, nor that it would prejudice the legitimate interests of the other data subjects concerned.

In view of the foregoing, the GSC is hereby providing you with partial access to the two documents, after redaction of the personal data of the persons concerned.

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

Yours sincerely,

Fernando FLORINDO

Enclosures: 12

ANNEX 3

-----Original Message-----
From: **DELETED**
Sent: mercredi 16 avril 2025 20:11
To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>
Subject: Internal review of access to documents request - Selection of candidates for the CJEU

General Secretariat of the Council of the European Union DG F – Communication Rue de la Loi 175 B-1048 Brussels

Dear Sir/Madam,

Object: Council General Secretariat Ref. No. Ref. 25/0444

Confirmatory application for access to Council documents introduced on 12 February 2025 regarding the activity of the panel established by Article 255 TFEU.

Pursuant to Article 7(2) of Regulation (EC) 1049/2001, and having been partially refused our request for access to documents, we hereby submit a confirmatory application for access to Council documents in response to your refusal to grant these documents dated 31 March 2025.

Under the right of access to documents in the EU Treaties, as enshrined in Regulation (EC) 1049/2001, we submitted our original application in order to request access to the Article 255 Panel's opinions regarding the two judicial candidates nominated for the CJEU (that is, the General Court and Court of Justice) by the Portuguese government in 2023, 2024 and 2025 and relevant documentation in both the EU and national relevant files.

Since the Council has partially refused our original request, we now file this confirmatory application pursuant to Section 2 of that Article. Specifically, we reaffirm our right of access to documents in the EU Treaties and hereby request access to the following documents:

--> the Article 255 Panel's opinions regarding the two judicial candidates nominated for the CJEU by the Portuguese government in 2023, 2024 and 2025, as well as any minutes, audio, and video recordings pertaining to the candidates' hearings.

Arguments

The General Secretariat of the Council (hereinafter, GSC) considers that the requested documents fall within the remit of the exceptions relating to the protection of the public interest as regards the privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001), the protection of the decision-making process (Article 4(3) of Regulation (EC) No 1049/2001) and the protection of commercial interests (first indent of Article 4(2) of Regulation (EC) No 1049/2001).

We believe that this is not the correct application of Regulation 1049 for the following reasons:

A. Candidates' privacy interest is not protected by non-disclosure of Panel Opinions (exception contained in Article 4 (1) let. b)) B.Disclosure of the Panel Opinions would not jeopardize the candidates' commercial interests ((exception contained in Article 4 (2)) C.Reference to the European Ombudsman decision in case 1955/2017/THH does not carry legal value and can't be used in support of the Council's rejection

A. Candidates' privacy interest is not protected by non-disclosure of Panel Opinions (exception contained in Article 4 (1) let. b))

Regarding the statement in the 31 March 2025 rejection letter that granting us access to these opinions would undermine the protection of the privacy and integrity of the candidates in view of the personal data contained in the panel's opinion, we would like to submit that:

1.According to settled case-law, the exceptions to access to documents must be interpreted and applied strictly so as not to frustrate application of the general principle that the public should be given the widest possible access to documents held by the institutions (Case C 64/05 P Sweden v Commission [2007] ECR I 11389, paragraph 66; Joined Cases C 39/05 P and C 52/05 P Sweden and Turco v Council [2008] ECR I 4723, paragraph 36; and Joined Cases T 391/03 and T 70/04 Franchet and Byk v Commission [2006] ECR II 2023, paragraph 84). Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case T 471/08 Toland v Parliament [2011] ECR II 0000, paragraph 28).

2.Moreover, the examination required for the processing of a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception. In principle, such an application can be justified only if the institution has previously determined that access to the document would specifically and actually undermine the protected interest. Second, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (Toland v Parliament, paragraph 29). That examination must be apparent from the reasons for the decision (Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, paragraph 69; Franchet and Byk v Commission, paragraph 115; and Toland v Parliament, paragraph 29). Therefore, if the Council decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4(1)(b) of Regulation No 1049/2001 (see, to that effect, Sweden and Turco v Council, paragraph 49). Such an explanation cannot therefore consist of a mere assertion that – as it is the Council has done in its contested decision– access to certain documents – in this case the two opinions prepared by the 255 panel on the two Portuguese candidates – would undermine privacy within the meaning of Article 4(1)(b) of Regulation No 1049/2001.

3.Even assuming that all information contained in the opinion must be qualified as "personal data" as defined by European legislation (Regulation (EU) 2018/1725), we argue that, in accordance with Article 9 of Regulation (EU) 2018/1725, personal data must be transmitted if the applicant shows that the transfer of the requested personal data is necessary – including for the performance of a task carried out in the public interest – and if it is proportionate to that objective.

4.To justify the necessity of the transfer of personal data under Art 9 EU DPR, it is submitted that:

a.In the present case, the public interest arises from – and is linked to – the public debate prompted by unprecedented, EU-wide and intense public coverage and political contestation around the two specific 255 opinions of candidates as witnessed in EU media, national media, and specialised media.
b.Given that the designation of the candidate(s) by the Portuguese government was public and announced in the media, their non-confirmation automatically suggested that something went wrong. In other words, it is easy to deduce from the current selection system whether any candidate has received a favourable or unfavourable opinion. Therefore, since the current policy of non disclosure of the opinion only succeeds in protecting why but not whom has received an unfavourable opinion, it fails to ensure the respect of the reputation of the candidates.
c.Against this backdrop, it is in the public interest to know what is the content of the opinion about the candidate(s). This conclusion finds support in the preamble to Regulation (EU) 2018/1725 that explicitly recognises that, "The specific purpose in the public interest could relate to the transparency of Union institutions".

Yet, the Council considers that the disclosure of the requested personal data would inevitably cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests. As highlighted above and documented by the media, it is the absence of disclosure – not the actual disclosure - of the opinion of the candidates, whose identity has widely been reported, that causes harm to the reputation of the candidates and therefore prejudices their legitimate interests. The media have reported that the two opinions in questions were negative , thus alluding to the possibility that the candidates lack the qualifications necessary to appear suitable for the job. Yet by refusing to disclose the opinions, the public as well as the candidates themselves are deprived of the possibility to understand the reasons leading the panel to a negative conclusion. Hiding behind alleged reputational repercussions overlooks the fact that a candidate's integrity—and therefore his (and the Panel's) legitimacy—is likely to be affirmed by disclosing the reasons for which the Panel supported or rejected his appointment to the CJEU.

In any event, the Council systematically took the view that the public should not have access to documents revealing the identity and suitability assessment of the Portuguese candidate(s) but failed to verify whether the risk of the protected interest being undermined was reasonably foreseeable and not purely hypothetical.

By simply relying on the risk of harm to the reputation of the candidates – and prejudice to their legitimate interests -, the Council failed to show to what extent the disclosure of the opinions containing the names of the Portuguese candidates would "specifically and effectively undermine their right to privacy" (by analogy, T-190/10 - Egan and Hackett v Parliament, paras 93-95), even though the applicants seek access to opinions which were compiled in the context of professional life and in the public interest. Moreover, as we have previously pointed out, this confirmatory request seeks access to opinions whose contents have – amid unprecedented media coverage – previously been made available to the public.

Yet, by not acknowledging and examining these specific circumstances, – despite by required to do so under the applicable legal standard – the Council failed to prove that "there is a risk of a specific and actual adverse effect on the interest protected" (see by analogy C-615/13 P - ClientEarth and PAN Europe v EFSA, paras 69-70).

Should the Council had embarked on such an in concreto analysis, it would have concluded that it is the absence of disclosure – not the disclosure – of personal data that, for the reasons that are set out above, risks compromising the effective selection of suitable candidates for the posts of Judges and Advocates-General and undermine, rather than pursue, the objective of ensuring the public's trust in the EU judicial system.

B. Disclosure of the Panel Opinions would not jeopardize the candidates' commercial interests ((exception contained in Article 4 (2))

The Council argues that full disclosure of the requested documents could undermine the protection of the candidates' commercial interests, if the candidates were to carry out paid work as lawyers or legal advisers.

This suggests that the integrity of the candidates could be put at stake should their opinions be rendered public and this even in case of subsequent appointment of the candidate in question, quod non in the present circumstances.

This argument, as reflected in the negative language used by the Council, does not appear convincing, as the Council fails to explain how disclosure of the requested documents could "undermine the protection of the candidates' commercial interests".
In any event, the argument does not hold when considered against the backdrop of the current two opinions which – in the absence of their publication – have become the object of unprecedented media coverage and fuelled speculation that has damaged – not protected – the alleged candidates' commercial interests. This hints to the fact that the current confidentiality policy does not only fall short of protecting the candidates' reputation but – by denying access to the reasons leading to the panels' opinions – also threatens it, as it does threaten the legitimacy of the panel itself. .

Let us unpack the alleged reputational effects stemming from the current non-disclosure policy of the committee's opinions. First, while the reasons leading to an unfavourable opinion remain confidential (as this document is not proactively published), both the identity of the candidate and the outcome of the panels' opinion are publicly known. As previously illustrated, the designation of the candidate(s) by the Portuguese governments being public and announced in the media, their non-confirmation automatically suggests that something went wrong. In other words, it is easy to infer from the current selection system whether a given candidate has received a favourable or unfavourable opinion. Therefore, since the current policy only succeeds in protecting why but not whom has received an unfavourable opinion, it fails to ensure the respect of the reputation of the candidates, who – as illustrated by the present circumstances – have not opportunity to defend their reputation when returning to their current position (that of a member of a Supreme court in the case of one of the two candidates).

Second, as the first decade of operation of the panel has shown, a situation in which – like the present one – the identity of the candidate who failed is widely known (and reported by the media) but not the reasons that led to that conclusion lends itself to gossip, as witnessed by multiple media articles in Portugal, EU media as well as social media and blogosphere. By preventing the public from knowing for what reasons a particular candid ate has failed to receive a favourable assessment by the panel, the actual confidentiality policy is prone to speculation, chattering, and manipulation. Virtually every observer belonging to the EU legal epistemic community – who is by nature the most merciless in judging the candidate and prone to speculating about the reasons for her/his failure – is currently aware of the outcome and presumed reasons that have led to these two

(negative) opinions. One may therefore contend that the current policy seems more effective in protecting the panels' operation from public scrutiny than the candidates' reputation.

As I had the chance to argue over the past decade in scholarly writings and previous requests and complaints to the EU Ombudsman, the legitimacy of a judge increases, rather than decreases, if the public is aware of the reasons that judge was appointed or not, disclosing the opinion of the panels would increase the perception of personal integrity of the judge and, as a result, of the jurisdiction to which she belongs to. This increases the democratic legitimacy of the courts and does not necessarily harm – but rather protect – the rejected candidate. It has thus been shown that, in countries in which judicial candidates for the highest court are confirmed by a public hearing (such as the United States, but also several Member States' jurisdictions), disclosing the reasons for which a candidate was confirmed or rejected can increase both the independence and legitimacy of a court in the eyes of the public, without harming the reputation of rejected candidates, who were largely rejected based on legitimate factors such as partisanship, political philosophy, or insufficient experience. This is in keeping with the fact that judges are beholden to internal and external pressures and that they must maintain a strong judicial reputation within the judiciary and outside of it, and it has been shown repeatedly that both internal and external pressures are vital to the functioning and overall reputation of courts.

Finally, when considering the inevitable repercussions stemming from a negative opinion on the candidate's reputation, we should not forget the limited scope and intensity of the review exercised by both panels upon the choice of the candidates. As stated by Jean-Marc Sauvé in an academic contribution to an edited volume discussing judicial appointments, in case of unfavourable opinion motivated by limited expertise, 'similar lack of knowledge undermines in no way the ability of the candidates to hold their office, often a prominent one, on the national level; it is just does not recommend them, in the eyes of the Panel, to be appointed to the office for which they applied'

Last but not least, the lack of transparency around the panel's motivation behind its opinion also threatens their legitimacy vis-à-vis the specialised legal community, and beyond that. Paradoxically, it affects the reputation of the committee's members who are instead committed to protect that of the candidates they have negatively assessed.

The final, related argument that the Council's decision of 31 March 2025 invokes to justify the policy of limited disclosure pursued by both panels has to do with the concern that publicity would discourage further candidatures for the judicial jobs. It is believed that more openness might lead to a domino effect whereby potential candidates would be dissuaded from allowing their name to go forward.

Yet while the Council is not required to establish the existence of a "definite risk" of discouraging prospective candidates to the post of member of the CJEU, it still expected – under the threshold of the exceptions under Regulation 1049/2001 to prove "the existence of a reasonably foreseeable and not purely hypothetical risk" (see, e.g., Agrofert C-477/10 p.79; Bronckers T-166/19 p. 60) .

Moreover – as argued above - due to the limited confidentiality ensured by the current system, some risk of chilling effect already exists. This dynamic is at play in the present case where the absence of publicity of the two panel opinions has not only fuelled speculation about the reasons leading those candidates not to have been confirmed but also prevented them from protecting their reputation, which appears in tatters as a result of the former.

Furthermore, any form of 'quality review' whose mission is to exercise external scrutiny on governmental choice may produce some chilling effect on candidates. This appears all the more so if such a review process is fully untransparent and unpredictable as what is currently performed by the 255 committee, in particular when it comes to the suitability requirements employed by the panel when exercising its review.

Over 20 years ago, the former President of the General Court of the EU contended that the procedure as it is already threatens to put off prospective candidates, who may either fear a negative result or believe the whole scheme violates their dignity.

This scenario is at play right now. At least two candidates to the CJ, whose identity and track-recorded is well known and is widely recognised as complying with the Treaty requirements, appear to have received an unfavourable opinion. And yet none of them – only their respective governments – have received that opinion, which one might expect to provide the reasons behind such a decision.

In these circumstances, all the arguments that have traditionally been invoked – as they have been in the contested decision of 31 March 2025 – to justify its non-publicity policy appear disproven: (i) the identity of the individual candidates appears to have been disclosed anyway, (ii) their reputation is at stake as in the absence of publicity of the reasons justifying that decision they can't defend themselves, but are subject to speculation, and, (iii) future candidates might be chilled in being nominated due to the lack of predictability characterising the 255 committee's untransparent oversight and baseline used to exercise their suitability check.

Ironically, if only it had taken that original critique several observers made to its opaque policy more seriously, the 255 committee would today have been better placed not only to defend the reputation of candidates – those it incessantly declared to care about – for the judicial posts, but also that of its own members. Ultimately, by reconsidering the balance to be struck between the imperative of transparency and the candidates' privacy concerns, the committee would have prevented the overall legitimacy of the judicial oversight system from being questioned.

The case for enhancing the transparency of the operation of the 255 committee to legitimize both its process and outcome has never been more evident.

This is what prompted us to file yet another request for access – this time not to all unfavourable opinions formulated over the past two year, but to two specific (presumably negative yet black-boxed) opinions regarding the two last candidates for the post of judge of the CJEU by the Portuguese government – to encourage both the 255 Committee and the Council to reconsider their publicity policy.

Ultimately, it is not only legally possible but also in line with societal expectations for the advisory committee to gradually shift the balance away from privacy concerns towards more openness both during and after the selection process.

This would allow the panel to address the significant democratic legitimacy and accountability concerns raised by their operation and help them discharge their final mission: to strengthen the authority of the CJEU by facilitating the acceptance of their rulings in the eyes of the public.

The systematic rejection of any form of publicity of its opinions appears difficult to reconcile with the principle of institutional openness applicable to all EU institutions and the applicable regime of access to documents. This appears even more problematic insofar as the Council failed to substantiate its alleged concern that access to the opinion would damage the candidates' reputation, which is already in tatters despite (rectius because) of its integral secrecy.

C. Reference to the European Ombudsman decision in case 1955/2017/THH does not carry legal value and can't be used in support of the Council's rejection

Last but not least, it must be noted that the GSC's rejection to our request is not supported by the European Ombudsman decision in case 1955/2017/THH, which found - in those specific circumstances- that "the refusal of the Council to provide full public access to the opinions of the Panel on judicial appointments was justified". This is true insofar as:

1.That conclusion was reached in a case in which the complainant had asked access for all 255 opinions delivered by the panel since its inception, and not – as in the present case – in which the applicant requested access to two specific opinions of candidates which have become the object of intense public scrutiny as documented above.
2.While the Ombudsman concluded that the rejection did not represent maladministration, it "nonetheless welcomed the public interest served in submitting the complaint as it provided an opportunity for some independent scrutiny of a matter of significant importance to EU citizens".

It is in this spirit that we lodge this confirmatory request today, by reserving the possibility of seeking an action of annulment against the Council's future rejection of such a request.

Conclusions
We trust that this confirmatory application will be addressed expeditiously and within the time limits set forth in Regulation (EC) 1049/2001. We thank you in advance for your timely and complete response.

Sincerely,

Brussels, 16 April 2025

A full history of my request and all correspondence is available on the Internet at this address: https://www.asktheeu.org/request/selection_of_candidates_for_the

Yours faithfully,

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