



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 23 October 2012

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API 96**

NOTE

from : General Secretariat of the Council
to : Working Party on Information

Subject : Public access to documents
- Confirmatory application made by Mr Sam Van den plas (No 20/c/01/12)

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 26 July 2012 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 7 September 2012 ([Annex 2](#))
- confirmatory application dated 28 September 2012 ([Annex 3](#))

[E-mail message sent on 26 July 2012 - 13:18]

Subject: Initial application for public access to Council documents 12130/04 & 12130/04/COR1

Dear General Secretariat

Under Regulation 1049/2001, please may I obtain public access in full to Council documents 12130/04 & 12130/04/COR1. For convenience, I note that the scope of this application overlaps with the confirmatory application of my WWF colleague, Mark Johnston, on which your colleague **DELETED** has in recent days provided additional information by email. Thank you in advance for your kind attention to this application.

Kind regards,

Sam Van den plas | Policy Officer | Climate and Energy Programme| WWF European Policy Office



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Communication
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Brussels, 7 September 2012

Mr Sam Van den plas

**e-mail:
svandennplas@wwf.eu**

12/1268-ls/mr/mi

Dear Mr Van den plas,

Your request of 26 July 2012 for access to documents 12130/04 and 12130/04 COR 1 has been registered by the "Access to Documents" unit. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Official Journal 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, Official Journal L 325, 11.12.2009, p. 35). On 17 August 2012, the time-limit for replying to your application was extended by 15 working days. Having examined the request, the General Secretariat has come to the following conclusion:

Document 12130/04 contains a contribution from the Council Legal Service to Coreper. The contribution examines the question of the voting method to be used for adopting Council conclusions. The requested document thus contains legal advice, except for its introductory paragraph on page one of the document.

The legal advice has not been given in the context of any decision-making process. It examines in an abstract way the applicable procedure for the adoption of Council conclusions, based on different scenarios. The legal advice is therefore of a general nature, its scope exceptionally broad.

Moreover, it must be noted that the adoption of Council conclusions is frequently a very sensitive exercise and that under such circumstances a general answer to the question of the applicable voting method is also sensitive. The requested legal advice is therefore exceptionally sensitive in nature.

Were legal advice of such a broad and sensitive nature, intended for the members of the Council, disclosed to the public, it would undermine the protection of legal advice as referred to in Article 4(2), second indent of the Regulation, since it would make public internal legal advice to the Council by its Legal Service. The possibility that the legal advice in question be disclosed to the public may discourage the Council to request written advice of a similarly broad and sensitive nature from its Legal Service since it could find itself in a situation where it would need to defend the decision it has taken against - potentially critical - advice given by its Legal Service. Moreover, public release of this broad and sensitive advice could negatively affect the position of the Council Legal Service in potential legal proceedings involving Council conclusions. Finally, the Legal Service could come under external pressure which could affect the way in which legal opinions are drafted and hence prejudice the possibility of the Legal Service expressing its views free from external influences.

In the view of the foregoing, the General Secretariat is unable to grant you full access to document 12130/04, since the disclosure of the document would prejudice an interest protected under Regulation (EC) No 1049/2001, notably under the second indent of 4(2) of the Regulation. As regards the existence of an overriding public interest in disclosure in respect of the protected interest, the General Secretariat considers that there is no public interest which would, in the present case, prevail over the above interest so as to justify disclosure of the document.

However, pursuant to Article 4(6) of the Regulation, you may have access to those parts of document 12130/04 which are not covered by the exception under the second indent of Article 4(2) of the Regulation.

You may also have access to document 12130/04 COR 1 which is not covered by any of the exceptions referred to in Article 4 of the Regulation.

According to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply¹.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosure

¹ Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application - sent by e-mail on 28 September 2012 - 22:38]

Subject: Confirmatory application for access to Council document 12130/04 (“Council conclusions”)

dear Ministers,
dear Permanent Representatives,
dear Council delegates,

Confirmatory application for access to Council document 12130/04 (“Council conclusions”)

On behalf of the WWF European Policy Programme a.s.b.l. (hereinafter WWF), I submit this confirmatory application for public access to the above-mentioned document. The supporting observations are as follows.

Manifest error in the Reply to Confirmatory Application 16/c/01/12 (‘the first application’)

On 8 June 2012, WWF asked for public access to “a document or document describing the basis on which the Council adopts conclusions.”

In its subsequent reply on 24 September 2012, the Council stated that “*after a thorough enquiry*” it was “*unable to identify*” such a document.

However on 24 July 2012 the General Secretariat of the Council (GSC), while handling that application, informed WWF of the existence of document 12130/04. An extract of the email sent on that date reads:

“In fact, following your [confirmatory application] sent on 20 July 2012, we did a new research in order to see whether any Council documents could be identified on the subject “basis for adopting Council conclusions”. Following this research, we did identify an opinion of the Council Legal Service, notably document 12130/04, which concerns the voting methods to be used for adopting Council conclusions. We sincerely apologise for not having identified this document at the time of your initial request made on 8 June 2012.”

Since the initial application of 8 June asked for a document “describing” the basis for Council conclusions -- and not one e.g. “providing” a basis for Council conclusions -- WWF considers that, due to its title, content and description, document 12130/04 clearly and easily fell within the scope of that first application.

Consequently WWF considers that, by subsequently not providing public access to document 12130/04, or alternatively providing valid reasons for not doing so at that time, the Council has committed a manifest error in both of its replies.

Without prejudice to any other procedural rights that exist, e.g. application to the Court of Justice, WWF invites the Council to consider, within this second application, what steps it might take to address and rectify its manifest error in the first application.

Initial Application for document 12130/04 ('the second application')

Since document 12130/04 clearly appears to be within the scope of the first application, WWF introduced a initial (second) application for access to this specific document on 26 July 2012, while at the same time maintaining its confirmatory (first) application submitted on 20 July 2012. (Partial access only to document 12130/04 had already been granted to an unknown applicant on an earlier date and consequently a redacted version was and remains available in the public register.)

In a reply of 7 September, the GSC rejected WWF's request for full access to 12130/04, claiming that Council procedures of general application regarding the adoption of conclusions under various scenarios were very sensitive, therefore should remain secret and that in its view there was no overriding public interest. That rejection is the subject of this confirmatory application.

Known content and description of document 12130/04

The publically-accessible content of document 12130/04 (i.e. the several sub-headings over three pages) and the GSC email description quoted above ("methods", n.b. use of plural) indicate that there is more than one scenario in which, and that there is more than one method by which, the Council can adopt conclusions.

In conformity with basic principles of good governance provided for in several places in the EU treaties, it is a right of the Union's citizens and representative groups to be able to know and understand each of the different procedures frequently used in the Council and to know the reasons why a particular procedure is used on any given occasion. This should include different methods of voting, e.g. majority voting and unanimity, as indeed is already so for other types of procedure.

Overriding public interest: climate change

European Commission President Jose Manuel Barroso has described global climate change as "*the defining issue of our generation*" and the "*most existential of challenges*" that face our societies. (EC RAPID press database SPEECH/09/502).

Dangerous or even catastrophic global climate change, caused by inadequate public policy and other responses to now well-known scientific observations and advice risks death, damage and destruction on a scale unprecedented in human history. For more information, see especially the UN IPCC's periodic assessment reports. Many political and scientific voices have said that 'time is running out' for human societies to respond sufficiently to growing concentrations of greenhouse pollution in the atmosphere which traps increasing amounts of the sun's heat.

In the context of this application, the first application cited above referred to three occasions in 2011 and 2012 in which the Council failed to adopt conclusions endorsing the long-term actions contained in the 2050 climate and energy roadmaps tabled by the European Commission even when 26 out of 27 delegations supported the draft text prepared by the presidency.

The support of the 26 environment ministers and 26 energy ministers on the respective dates for the draft texts indicates an overwhelming public desire and therefore an overriding public interest in more climate protection measures based on decisions taken in Europe's representative political institutions, especially the Council.

By withholding access to document 12130/04 and by not otherwise providing public access to an explanation of its (non)actions adopting conclusions only by consensus, the Council as in institution manifestly frustrates the public will and public interest of those citizens represented by the 26 environment and 26 energy ministers of member states referred to above.

If by contrast document 12130/04 does indeed indicate (as is plausible or even likely) that it is lawful, possible and perhaps even required that, in conformity with the treaties (cf. below) the Council could, should or shall operate on the basis of qualified majority voting on issues such as climate protection, then more effective, more stringent environmental protection measures could be adopted or (in the context of international negotiations) supported.

Treaty requirements upon the Council

Article 16 TEU states in paragraph 3 that the Council “*shall act by a qualified majority except where the Treaties provide otherwise.*” Moreover, Article 218 TFEU concerning the negotiation and conclusion of international agreements -- such as those under United Nations Framework Convention on Climate Change (UNFCCC) -- states in paragraph 8 that the Council “*shall act by a qualified majority throughout the procedure*”.

Since neither the Treaties nor the Council’s rules of procedure contain any special provisions concerning the adoption of “Council conclusions”, WWF considers that above legal provisions under primary law are those that should ordinarily be applied to acts such as the adoption of Council conclusions. Council acts including conclusions that are not in conformity with treaty provisions are at risk of legal challenge.

The non-inclusion of specific provisions concerning “Council conclusions” in either the treaties or the Council rules of procedure do not constitute grounds for maintaining confidential legal advice on the procedural conduct of the Council.

Timing and deadlines

WWF asks the GSC to transmit this application to Council delegations for consideration without any undue delay. In particular, delaying transmission until a draft reply is prepared by the GSC (as occurred in the first application) cannot be justified.

In view of the content and circumstances of this application and in view of the overriding public interest described above, the receipt of a reply to this application within the normal deadlines in Regulation 1049/2001 is of secondary concern to WWF when compared to the substantive procedural issues at hand. Consequently, WWF will not act on any inaction (i.e. late-reply or non-reply) by the Council after the normal deadlines without first giving a reasonable period of notice.

Disclosure

This application and the applicant's identity may be publicly disclosed without prior recourse to WWF.

Thank you for your kind attention to this important matter.

Kind regards,

Sam Van den plas

Policy Officer, Climate & Energy Programme

WWF European Policy Office
