



**COUNCIL OF
THE EUROPEAN UNION**

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"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 16844/08

Subject : Public access to documents
- Confirmatory application 23/c/01/08

Delegations will find enclosed a draft reply from the Council, as it stands after examination by the Working Party on Information at its meeting on 16 December 2008, to confirmatory application 23/c/01/08.

The Danish, Finnish, Slovenian and Swedish delegations indicated that they would vote against the draft reply. Furthermore, these delegations made the following statements:

- DK and FI:

"Denmark and Finland cannot concur with the given interpretation of the "particularly sensitive nature of a document" nor the definition given to a "particularly wide scope". "

- SI: *" Slovenia believes that the term "sensitive in nature" as one of the reasons for denying access to legal advice of the Council on legislative acts could not depend on the fact that the validity of the Regulation is or could be raised in the future in front of the ECJ. Disclosure of this document would, in its opinion, not undermine the protection of legal advice and should therefore be disclosed in its entirety."*

- **SE:** *"There is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of the requested document might undermine the protection of legal advice within the meaning of the second indent of Article 4(2). Consequently, the document should be released in its entirety."*

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the Danish, Finnish, Slovenian and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION 23/c/01/08
made by e-mail on 3 December 2008 to the Council,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 13457/06

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 (OJ L 145 of 31.5.2001, p. 43) and Annex II to the Council's Rules of Procedure (Council Decision 2006/683/EC, Euratom - OJ L 285 of 16.10.2006, p. 47) and has come to the following conclusion:

1. The applicant refers to document 13457/06, an Opinion of the Legal Service of the Council which comprises an analysis by the Legal Service of the legal framework of the principle of proportionality raised in the context of the examination in the Council of the Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.
2. In its reply to the applicant dated 19 November 2008, the General Secretariat refused to grant full access to this document pursuant to Article 4(2), second indent (protection of legal advice), of the Regulation. Access was, however, granted to those parts which were considered by the General Secretariat not to be covered by any of the exceptions of Regulation 1049/2001 (points I and II on pages 1-2).
3. In his confirmatory request filed on 3 December 2008, the applicant refers to the judgment of the Court of Justice of 1 July 2008 in the joined cases C-39/05 and C-52/05 P. The applicant points out that in this judgment, the Court highlights the need for the Council, when requested to disclose a legal advice, to balance the need for protection of its interest in seeking and receiving valuable legal advice against any overriding public interest justifying disclosure.

The applicant argues that disclosure of Legal Service's legal advice would actually *"increase transparency, openness and legitimacy of the legislative process"* as well as enable him *"to better assess and understand the legal basis for adoption of such measures as well as the considerations underpinning legislative action"*. The applicant therefore argues that this overriding public interest outweighs the Council's interest in protecting legal advice.

4. The Council has examined the above-mentioned document in the light of the applicant's arguments and decided as follows:
5. At the outset, it is recalled that Regulation (EC) No 1049/2001 seeks to give the public the widest possible right of access to documents of the institutions, subject to the principles, conditions and limits defined in that Regulation. Article 4 of the Regulation defines exceptions to the general principle of transparency. Accordingly, the second indent of Article 4 provides that the institution shall refuse access to a document where disclosure would undermine the protection of *"court proceedings and legal advice"*, unless there is an overriding public interest in disclosure.
6. As the applicant observes, the Court of Justice clarified the scope of the exception relating to the protection of legal advice in its judgment of 1 July 2008 (Joined Cases C-39/05 and C-52/05 P). In that judgment, the Court has held that the principle of increased openness, which enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy, is of particular relevance when the institution is acting in its legislative capacity. Consequently, documents containing legal advice relating to legislative procedures are, in principle, to be disclosed, unless they are *"particularly sensitive [in] nature"* or *"particularly wide [in] scope that goes beyond the context of the legislative process in question"*.
7. As set out in the initial reply to the applicant, document 13457/06, identified by the General Secretariat as falling under the applicant's request, contains legal advice, except for its paragraph 1, and therefore comes under the scope of the exception in Article 4(2), second indent related to the protection of legal advice.

8. The Council considers that full disclosure of the requested document would undermine the protection of legal advice under Article 4(2) second indent of the Regulation, and as interpreted by the Court of Justice in the case referred to above.
9. Firstly, the question of the conformity of the proposed Regulation with the principle of proportionality, which was at the origin of the legal analysis by the Legal Service in the requested document, is precisely the subject-matter of a preliminary reference procedure before the Court of Justice (C-58/08)¹. The Council has submitted written observations on this case on 29 May 2008. The procedure before the Court of Justice is currently ongoing and an oral hearing has not yet been fixed.
10. In these circumstances, the Council considers that the requested legal advice is particularly sensitive in nature, and its disclosure would undermine the protection of legal advice since it would make known to the public an internal opinion of the Legal Service, intended for the members of the Council, on the legality of the legal act to be adopted. In particular, it would allow an insight by the parties to the proceedings currently ongoing before the Court of Justice to an internal opinion of the Council Legal Service on the legal framework of the principle of proportionality, this principle being precisely one of the grounds of invalidity invoked by the plaintiffs to the main proceedings before the Court. Were internal discussions within the Council on the legality of a proposed act to be released to the public, including thus also the adverse parties in a pending court proceeding, it would be highly detrimental to the Council's capacity to present and defend its position before the Court of Justice free from external influences, like the other parties to the proceedings. More generally, the disclosure of legal opinions relating to questions subject to legal proceedings may lead the Council to lose all interest in requesting its Legal Service for written opinions, and would thereby deprive the Council of an important instrument in assuring the legality of its acts with Community law.

¹ Reference for a preliminary ruling from High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court (United Kingdom) made on 13 February 2008 - Vodafone Ltd, Telefonica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform, OJ C 107, 26.04.2008, p. 17.

11. The applicant argues that the justification invoked by the Council on the sensitivity of the legal advice would virtually apply to any act, since the validity of a legal act could be challenged at any moment before the Court. In this relation, the Council would recall that when providing statements for refusal to public access, the institution is allowed to rely on *"general presumptions which apply to certain categories of documents"*, on condition that it *"establishe[s] in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose"* (Joined Cases C-39/05 P and C-59/P, paragraph 50). Above, it has been demonstrated that the confidentiality of the legal advice is necessary, given the specific circumstances of the case, notably that the legal question dealt with in the requested document is subject to an ongoing preliminary reference procedure before the Court of Justice.
12. Furthermore, disclosure of the legal advice would be prejudicial to the ability of the Legal Service to effectively defend the legality of the acts adopted by the Council in the future, on an equal footing with the other legal representatives of the various parties to the legal proceedings, if the position it has taken on the legality of the proposed act during the legislative procedure would be released.
13. The applicant argues that there is no reason why the Council's legal defence before the Court would be affected by the disclosure of a previous opinion of its Legal Service on the matter. In this relation, it must be remembered that the legal services of the institutions do not only represent the institutions before the Community courts, but, prior to that, they assist the institutions in assuring the legality and the drafting quality of the acts adopted. If a legal advice given by the Legal Service in the decision-making process was disclosed to the public when the matter is pending before a court and where the Legal Service represents the institution, it would undermine the protection of the Council's internal exchanges with its Legal Service and would limit the freedom of the Legal Service to defend the legal position taken by the Council before the court where it differs from what has been recommended by its Legal Service. In addition, the Legal Service would, in the future, need to take into account the possibility that its opinions would be disclosed to the public, which may affect the way legal advice is drafted.

14. Secondly, as has been pointed out by the General Secretariat in the initial reply, the legal advice is particularly wide in scope going beyond the specific legislative procedure in question, since it provides a general analysis of the principle of proportionality in Community law. For the applicant, the parts of the document released to it in the initial stage demonstrate that the scope of the legal advice is *"in fact limited to the interpretation of the principle of proportionality, if not to the even narrower scope of the proportionality of just the proposed regulation"*. In this context, it is recalled that the principle of proportionality, enshrined in Article 5 TEC, is a general principle of Community law that applies to all Community measures. Since the analysis provided by the Legal Service is drafted in very general terms, it could be applied not only in the specific legislative context but in any area subject to Community action.

15. As regards the existence of an overriding public interest in disclosure, the applicant argues that pursuant to the the Court of Justice in Joined Cases C-39/05 and C-52/05 P, an overriding public interest is constituted by the fact that the disclosure of legal advice relating to legislative matters increases openness and transparency. The Council would recall that in the said judgment, the Court balanced these two conflicting interests, and concluded that the principle obligation to disclose legal opinions relating to a legislative process does not preclude refusal on account of the protection of legal advice, if the opinion is particularly sensitive in nature or particularly large in scope. As demonstrated above, both of these criteria are fulfilled in the present case.

16. On the basis of the foregoing, the Council confirms the General Secretariat's initial reply to the applicant, whereby it refused full access to document 13457/06 on the basis of Article 4(2), second indent (protection of legal advice) of Regulation 1049/2001.
