



**COUNCIL OF
THE EUROPEAN UNION**

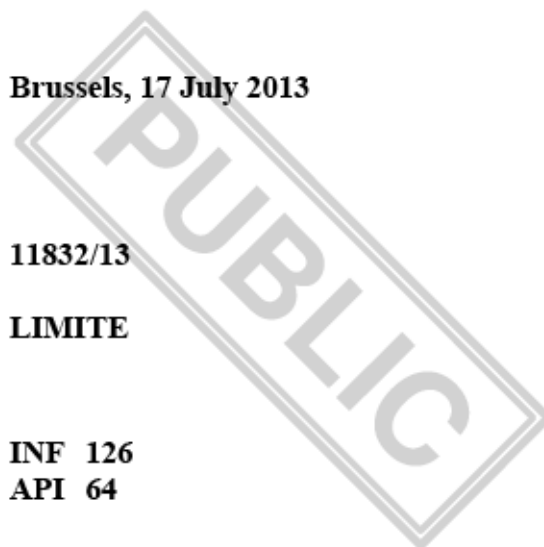
Brussels, 17 July 2013

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"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (part 2)/Council

No. prev. doc.: 11831/13

Subject : Public access to documents

- Confirmatory application made by Mr Maarten Hillebrandt (No 15/c/01/13)

Delegations will find enclosed a draft reply from the Council to confirmatory application made by Mr Maarten Hillebrandt (No 15/c/01/13), approved by the Working Party on Information by written consultation which ended on 17 July 2013.

The Danish, Estonian, Dutch, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

DK, EE, NL, FI and SE: *"DK, EE, NL, FI and SE are of the opinion that the remaining parts of the document do not entirely come under the exception of protection of legal advice."*

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, Estonian, Dutch, Finnish 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 No 15/c/01/13,
made by e-mail on 1 July 2013 and registered on 2 July 2013,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 9692/95

The Council has considered this confirmatory application under 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 (OJ L 145 of 31.5.2001, p. 43) (hereafter referred to as "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. The applicant refers to document 9692/95 which is a note from the Council Legal Service on the question whether statements entered in the Council minutes can give rise to legitimate expectations taking into account considerations relating to transparency.
2. In its reply dated 13 June 2013, the General Secretariat of the Council recalled that a partially accessible version of the document was already publicly available. It refused public access to the remaining parts of the document pursuant to the second indent of Article 4(2) (protection of legal advice) of the Regulation.
3. In his confirmatory application dated 1 July 2013, the applicant contests the decision of the General Secretariat of the Council. He argues that its reasoning is vague and does not demonstrate a concrete risk in disclosure. He also argues that the General Secretariat of the Council has failed to properly balance reasons for non-disclosure with the public interest in disclosure. Finally he contends that no detailed assessment of the document has been carried out.

4. The Council has considered the confirmatory application in the light of the applicant's arguments and has concluded as indicated below.

I. Assessment of the requested document

5. Except for its first paragraph, which contains an introductory statement, the requested note contains legal advice. It examines the question whether statements entered in the Council minutes can give rise to legitimate expectations.

6. The Council has assessed the request for access in full consideration of the principle of transparency underlying Regulation (EC) No 1049/2001 and the aim of ensuring the widest possible public access to documents. In so doing it has again carefully considered the content of the document.¹

7. It is recalled as a preliminary point that the requested document was not given in the context of a legislative procedure or indeed any specific decision-making process. The wider access to documents which is established with regard to documents relating to legislative acts therefore does not apply.

8. Regulation (EC) No 1049/2001 provides, in its Article 4, for exceptions to the right of public access to documents in cases where such public access would undermine, *inter alia*, the protection of the legal advice (second indent of Article 4(2)), unless there is an overriding public interest in disclosure. That exception is engaged in this case.

9. As mentioned above, the legal advice contained in the requested document was not given in the context of a specific decision-making process. It was drafted in reply to a request for general guidance on the issues covered.

¹ The Council underlines that the single reference to "documents" in the plural in paragraph 3 of the reply to the initial application is purely due to a formatting error and cannot in any way be construed so as to imply that no detailed assessment has been carried out by the General Secretariat.

10. The legal advice is of horizontal relevance. It analyses the legal issues determining whether statements entered in the Council minutes can give rise to legitimate expectations. Statements are frequently entered in Council minutes and are used across all areas of Council activity. The advice contained in the requested document therefore remains relevant for current and future practice across a wide range of Council work and is applicable to all situations where there is recourse to such statements. Such statements are moreover often a matter of great political sensitivity.
11. Given the exceptionally broad nature of the legal advice and its sensitive subject-matter there is a concrete risk that its disclosure would therefore undermine the protection of legal advice. The European Court of Justice has specifically recognised the possibility to withhold legal advice of such particularly sensitive and broad character². Disclosure of such a document would undermine the protection of legal advice and would create a particular risk that Member States and the Council would be deterred from requesting advice of such a sensitive and broad nature in similar situations in the future.
12. As noted above, this advice is relevant to all current and future cases in which statements are entered in Council minutes, irrespective of the subject matter of a file. The risks arising from disclosure, far from being purely hypothetical, are real, concrete and of wide impact.
13. The Council also reiterates that, due to the specific subject-matter of the advice, i.e. whether third parties can claim legitimate expectations on the basis of statements entered in the Council minutes, there is a real risk that the advice and the aspects dealt with therein could become subject to litigation. The very subject-matter of the advice is thus such as to involve a considerable risk of litigation. In such case disclosure of the advice would negatively impact the possibility of the Council to defend its position in Court which would not be in keeping with the principle of equality of arms.

² Judgment of the European Court of Justice of 1 July 2008 in joint cases C-39/05 and C-52/05P, *Sweden and Turco/Council*, point 69.

14. Whereas a concrete risk of litigation must indeed be demonstrated, it is not required that litigation is already on-going. It is sufficient rather to demonstrate by reference to the specific subject-matter or to the contentiousness of the issue that there is a concrete risk of litigation. As shown above, in this case the specific subject-matter of the opinion, concerned as it is with whether third parties can raise a claim of legitimate expectations across a wide range of potentially sensitive subject-areas, is one on which there is a real risk of future litigation.
15. Finally it is noted that the passing of time has no influence on the concrete risk of disclosure in this specific case where the advice remains fully relevant and is of such a broad scope that it may be invoked in all instances where statements are entered into Council minutes.
16. By reference to the above the Council therefore confirms and reiterates what is already stated in its reply to the initial request for access as regards the applicability of the exception related to the protection of legal advice pursuant to Article 4(2), second indent of Regulation No 1049/2001.

III. Assessment of the public interest in disclosure

17. The Council has thoroughly examined whether there is an overriding public interest in disclosure of the requested note, taking into account the arguments provided by the applicant and the need to ensure transparency and public participation. In this context, the Council again recalls that the legal advice in question was not given in the context of a legislative procedure.
18. In the light of its examination, the Council concluded that on account of the particularly sensitive and contentious nature, as well as the horizontal and broad scope of the legal advice in question, in the specific case at hand, the public interests invoked by the applicant do not outweigh, the interest in protecting that legal advice under Article 4(2), second indent, of Regulation No 1049/2001.

IV. Extended partial access (Article 4(6) of Regulation No 1049/2001)

19. The Council has also examined, pursuant to Article 4(6) of Regulation No 1049/2001, the possibility of granting extended partial access to the document under scrutiny. It confirmed that all parts of the document, with the exception of its first paragraph which is already public, contain legal advice or indications allowing to second-guess the content of the legal advice. For those reasons and by reference to the argumentations above it concluded that all remaining parts of the document are covered by the exception invoked in the initial reply and it therefore maintained the partial access referred to therein.

V. Conclusion

20. For the abovementioned reasons, the Council concluded that, except for the first paragraph that is already public, full public access to the requested document must be refused pursuant to the second indent of Article 4(2) of Regulation No 1049/2001 (protection of the public interest as regards legal advice).
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