



**CONSEIL DE
L'UNION EUROPÉENNE**

**Bruxelles, le 13 décembre 2010 (14.12)
(OR. en)**

**16981/1/10
REV 1**

**INF 171
API 91
JUR 500**

NOTE POINT "I/A"

du: groupe "Information"
au: Coreper (1^{ère} partie)/Conseil

n° doc. préc.: 16980/10

Objet: Accès du public aux documents
- Demande confirmative n° 25/c/01/10

Les délégations trouveront en annexe le projet de réponse du Conseil à la demande confirmative n° 25/c/01/10, tel qu'il résulte de l'examen effectué par le groupe "Information" lors de sa réunion du 10 décembre 2010.

La délégation suédoise a indiqué qu'elle voterait contre le projet de réponse et a fait la déclaration suivante:

"Étant donné que le document est déjà aisément accessible au public dans son intégralité, sa divulgation ne porterait pas gravement atteinte au processus décisionnel de l'institution."

La majorité des délégations a marqué son accord pour que le résultat du vote soit rendu public.

Le Comité des représentants permanents est donc invité à suggérer que, lors de sa prochaine session, le Conseil:

- approuve, en point "A", le projet de réponse figurant à l'annexe du présent document, la délégation suédoise votant contre;
- décide de rendre public le résultat du vote.

L'annexe n'est disponible qu'en anglais.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 24/c/01/10,
made by e-mail on 24 November 2010,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 10859/1/09 REV 1

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 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 10859/1/09 REV 1, a note from the General Secretariat to delegations concerning the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. The document contains proposals by various delegations for modifications as regards the Commission proposal.
2. In its reply dated 11 November 2010, the General Secretariat granted public access to the document, including delegations' positions but excluding those parts which enable the delegations concerned to be identified. Public access to these parts was refused pursuant to the first subparagraph of Article 4(3) of the Regulation (protection of the Council's decision-making process).
3. In the confirmatory request, the applicant explains that the document in question is available in its entirety on the internet. The applicant therefore considers that the General Secretariat does not treat all applicants equally and requests to have reasons for this.
4. The Council has examined the above-mentioned document in the light of the applicant's arguments and decided as follows:

5. As indicated above, the document under scrutiny concerns a proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. Although the Commission submitted the recast proposal in April 2008, the decision-making procedure is still at an early stage: the European Parliament has not yet adopted its position at first reading in accordance with Article 294(3) TFEU and is currently examining the proposal in first reading. Negotiations on the proposal between the European Parliament and the Council have not yet started.

6. The Working Party on Information, the Council's preparatory body responsible for the proposal, has met several times to carry out a thorough examination of the proposal. In the framework of these discussions, delegations have put forward preliminary views on the modifications contained in the Commission proposal. However, no convergence of views has been recorded and no final conclusions have been drawn on the issues raised. The decision-making process remains thus at an early stage, and a clear approach has so far not emerged on the issues raised in the requested document. Moreover, the discussions within the Council will be followed by upcoming negotiations between the Council and the European Parliament, once the European Parliament has finalised its first reading of the proposal. Disclosure of the names of the delegations that have made the proposals contained in the document would therefore adversely affect the efficiency of the Council's decision-making process at this stage, by compromising the Council's ability to reach an agreement on the dossier, and, in particular, narrow those delegations' room for compromise within the Council.

7. Hence, the risk of seriously undermining the Council's decision-making procedure is reasonably foreseeable and not purely hypothetical. If it were to be accepted that such documents containing the written position of delegations on particularly sensitive issues were to be disclosed in their entirety in an ongoing decision-making procedure, delegations would be induced to cease submitting their views in writing, and instead would limit themselves to oral exchanges of views in the Council and its preparatory bodies, which would not require the drawing up of documents. This would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be seriously prejudicial to the overall transparency of the Council's decision-making.

8. The Council has weighed the public interest relating to the efficiency of its internal decision-making against the public interest in increased openness, which guarantees that the EU institutions enjoy greater legitimacy and are more accountable to the citizens, in particular when they act in their legislative capacity. It was as a result of this balancing that the General Secretariat decided, in reply to the applicant's initial request, to release the contents of the requested document, whilst withholding the names of the respective delegations. This solution enables, on one hand, citizens to scrutinise, in accordance with the democratic principles, the information which forms the basis of the proposed legislative act under discussion within the Council, and on the other, to preserve the effectiveness of the Council's decision-making process.
9. The Council has also examined whether it would be possible to assess, on a deletion-by-deletion basis, whether the name of the Member States concerned could be released. However, this option was rejected because it would lead to very arbitrary assessments which themselves could be challenged. This approach does not, of course, prevent the Member State delegations concerned from making public their own position, as they see fit.
10. The Council recalls that this document and any other legislative document relating to the proposed Regulation will be made available to the public after the final adoption of the act in accordance with the rules laid down in Article 11(6) of Annex II to the Council's Rules of Procedure.
11. Taking into account the above, the Council holds its view that, on balance, all possible factors which would, at the present stage, plead in favour of releasing the document in question in its entirety are outweighed by the need to protect the Council's decision-making process. Therefore, the Council confirms the decision of the General Secretariat in reply to the initial application, whereby it granted, in accordance with Article 4(6) of Regulation 1049/2001, partial access to document 10859/1/09 REV 1, excluding those parts of the document which enable the delegations concerned to be identified. Public access to those parts has to be refused pursuant to Article 4(3), first subparagraph, of the Regulation (protection of the Council's decision-making process).

12. Finally, regarding the applicant's argument that the document under scrutiny has already been fully disclosed on the internet, it should be pointed out that the Council has never made the requested document public in its entirety nor has it authorised the publication of the full content of the document on the internet. Consequently, the Council's decision-making process for processing the present or any future application for public access to documents, as provided for in Articles 7 and following of Regulation 1049/2001 and in Annex II to the Council's Rules of Procedure, cannot be prejudiced by any unauthorised disclosure of the full content of the document.
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