



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 1 December 2008**

**14814/08**

**INF 225  
API 74  
JUR 455**

**"I/A" ITEM NOTE**

---

from : Working Party on Information  
to : Coreper (part 1)/Council

---

No. prev. doc.: 14813/08

---

Subject : Public access to documents  
- Confirmatory application made by Mr Mark JOHNSTON (18/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 25 November 2008, to confirmatory application made by Mr Mark JOHNSTON (18/c/01/08).

The Swedish delegation indicated that it would vote against the draft reply, and made the following statement:

*"The Swedish delegation agrees to grant the applicant partial access to documents 12617/08 + ADD 1 + ADD 2 + ADD 3 and 12689/08 + ADD 1. However, the Swedish delegation takes the view that the Swedish positions as reflected in documents 12689/08 + ADD 1 must be disclosed in their entirety, since they are already publicly available. Disclosure of document 13502/08 would not seriously undermine the Council's decision-making process. 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 Swedish delegation 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 18/c/01/08**  
**made by Mr Mark JOHNSTON to the Council**  
**by e-mail on 23 October 2008,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to documents**

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 the following documents:
  - a) 12617/08 + ADD 1, ADD 2 and ADD 3: Note and addenda to the note concerning the Proposal for a Directive of the European Parliament and of the Council on the geological storage of carbon dioxide and amending Council Directives 85/337/EEC, 96/61/EC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and Regulation (EC) No 1013/2006;
  - b) 12689/08 + ADD 1: Note and addendum 1 to the note the Proposal for a Directive of the European Parliament and of the Council on the geological storage of carbon dioxide and amending Council Directives 85/337/EEC, 96/61/EC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and Regulation (EC) No 1013/2006; and
  - c) 13502/08: Note from the Presidency to COREPER on the Climate-Energy legislative package (including the Proposal on the geological storage of carbon dioxide as well).
2. In its reply dated 23 October 2008, the General Secretariat refused the applicant access to the above-mentioned documents in their entirety pursuant to Article 4(3) of the Regulation (protection of the Council's decision-making process).

3. In his confirmatory request, the applicant argues that there is a clear and overriding public interest that legislative discussions on the subject are conducted in an open and transparent manner. The applicant requests that access or partial access be granted to the requested documents, taking into account the wish of some delegations not to have their individual positions revealed.
4. The Council has examined the above-mentioned documents in the light of the applicant's arguments and decided as follows:
5. As indicated above, the documents under scrutiny concern the proposal for a Directive of the European Parliament and of the Council on the geological storage of carbon dioxide (and, in the case of document 13502/08, also the whole Climate-Energy legislative package). The Commission submitted its proposal on the Climate-Energy legislative package, which also includes the above-mentioned proposal, on 23 January 2008 (COM(2008) 18 final). The Working Party on the Environment started the first reading of this proposal in February 2008 and has since then met several times to examine it. The proposal is treated by the Institutions using the co-decision procedure.

In its conclusions of 15 and 16 October 2008, the European Council requested the Presidency and the Commission to organise intensive work over the next few weeks in order to enable the European Council of December 2008 to decide on appropriate responses to the challenge of applying the Climate-Energy legislative package in a rigorously established cost-effective manner to all sectors of the European economy and all Member States, having regard to each Member State's specific situation. The negotiations with the European Parliament started in November in the form of informal trilogues, and the major political issues are being analysed by the EU's institutions in order to reach a first reading agreement as soon as possible.

Negotiations on the Climate-Energy legislative package, including the Proposal on the geological storage of carbon dioxide, are thus in a delicate and crucial phase.

6. Taking into account the above, the Council considers that the negotiations have attained a stage in which the efficiency of its proceedings would be seriously undermined by the full release of the documents under scrutiny. The Council holds, therefore, its view that, on balance, all possible factors which would, at the present stage, plead in favour of releasing the documents in question in their entirety are outweighed by the need to protect the Institution's decision-making process. Full access to these documents is, therefore, denied pursuant to Article 4(3), first subparagraph, of the Regulation (protection of the Council's decision-making process).
  
7. However, in the light of new internal consultations with the relevant department of its General Secretariat, the Council re-examined whether partial access could be granted to documents 12617/08 + ADD 1 + ADD 2 + ADD 3 and 12689/08 + ADD 1, pursuant to Article 4(6) of the Regulation. It concluded that the applicant may have access to the content of the documents, including delegations' positions, but excluding those parts which enable the delegations concerned to be identified. The Council considers this to be a good compromise:
  - on the one hand, this allows the applicant to be informed of the arguments raised during discussions on this legislative proposal on which the Institution has not yet taken a decision; and
  
  - on the other hand, the Council considers that protection of the institution's decision-making process outweighs possible public interest in identifying the delegations whose positions are set out in the documents. In the framework of preliminary discussions and negotiations within the Council's preparatory bodies, it is essential that delegations are able to express their views freely so that the Council can find compromise solutions and achieve progress on delicate questions. Full release of these documents could impede the Council's decision-making process if the positions of individual delegations were to be identified. This would, in the Council's view, jeopardise this process since it could seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion. The Council is of the opinion that disclosure of such parts of the documents could undermine the Council's decision-making process.

8. The Council has also examined whether it would be possible to assess, on a deletion-by-deletion basis, whether the name of the Member State 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 Council members concerned from making public their own position, as they see fit.

*Document 13502/08*

9. To rapidly move forward in the negotiations on the Climate-Energy legislative package, the Presidency is presenting data, studies and other pertinent information concerning the different items covered by the individual proposals in the package, in order to clarify the implications of the different policy options and thus to enable the delegations to finalise their positions on the legislative package in question. Document 13502/08 contains such information.
10. Having regard what has been indicated in point 4 of this draft reply, the Council considers that the negotiations have attained a stage in which the efficiency of its proceedings would be seriously undermined by the full release of document 13502/08. The Council holds, therefore, its view that, on balance, all possible factors which would, at the present stage, plead in favour of releasing the document under scrutiny are outweighed by the need to protect the Institution's decision-making process. Full access to this document is, therefore, denied pursuant to Article 4(3), first subparagraph, of the Regulation (protection of the Council's decision-making process).
11. The Council has also looked into the possibility of granting partial access to document 13502/08 as foreseen in Article 4(6) of the Regulation, but concluded that this is impossible since the content of the document forms an inseparable whole.

-----