Delegations will find enclosed a draft reply from the Council to confirmatory application No 24/c/01/11, as it stands after examination by the Working Party on Information at its meeting on 24 November 2011.

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

DK, EE, FI and SE: "We cannot concur with the interpretation of regulation 1049/2001 referred to in the draft reply, especially in light of the judgment in the Turco-case (C-39/05 and C-52/05 P).

NL: "The NL agrees with the conclusion of the draft reply. However, in the light of the arguments made by the applicant, and specifically his reference to the Turco case, some of the arguments used by the Council seem too general and abstract to justify refusal of access to the 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, Finnish and Swedish delegations voting against,

- decide to publish the result of the vote.

The Annex is available in English only.
DRAFT REPLY

Subject: Confirmatory application No 24/c/01/11 for access to documents under Regulation (EC) No 1049/2001
- Request for re-assessment of the Council’s decision of 26 July 2010

1. The applicant refers to document 6865/09 which is an opinion of the Council Legal Service concerning the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) and in particular the European Parliament’s recommended amendments contained in the Cashman report.

2. In its reply of 12 October 2011, the General Secretariat qualified the applicant’s request as a renewed request under Regulation 1049/2001 to the same document covered by a previous application by the latter. Since the General Secretariat could not identify any change in the legal or factual situation underlying the Council’s previous decision in regard of the applicant’s previous request, it confirmed the said decision. Consequently, full public access was refused to document 6865/09.

3. By confirmatory request made by email on 26 October 2011, the applicant challenges the General Secretariat’s refusal to fully disclose the document concerned. The arguments brought in favour of the applicant’s confirmatory request correspond essentially to those set out in the latter’s earlier application.

4. The Council has come to the following conclusion on the applicant’s confirmatory request:

---

5. In June and July 2010, the applicant requested, for a first time, public access to the document 6865/09. On 26 July 2010 the Council adopted a confirmatory decision regarding this application, by which it refused public access to that document on grounds of the protection of legal advice under the second indent of Article 4(2) and the institution’s ongoing decision-making process under the first subparagraph of Article 4(3) of Regulation 1049/2001, for the reasons set out in the said decision. On 24 September 2010, the applicant brought an action against the Council before the General Court for annulment of this confirmatory decision (Case T-452/10, ClientEarth vs. Council). By order of 6 September 2011, the General Court dismissed this action as manifestly inadmissible.

6. The applicant’s present application constitutes a renewed request under Regulation 1049/2001 relating to the same document covered by the Council’s decision of 26 July 2010. In substance, it amounts to requesting re-assessment of the Council’s aforementioned decision refusing public access to document 6865/09.

7. The Council could not identify any change in the legal or factual situation as compared to the situation underlying the Council’s decision of 26 July 2010, nor did the applicant refer to any such element. Accordingly, the Council considers that the conditions under which it refused the applicant’s earlier application are still present.

8. The Council therefore confirms its earlier decision taken in regard of the applicant’s previous application, as set out in Annex to document 12068/10. For the reasons set out in that decision, it is unable to provide full public access to document 6865/09.

---

2 Cf. initial request of 17 June 2010 (ref. no. 10/1380-ls-mf) and confirmatory request of 8 July 2010 (ref. no. 15/c/01/10) to document 6865/09.
3 Cf. reply from the Council to confirmatory application No 15/c/01/11, as set out in Annex to document 12068/10, adopted by the Council on 26 July 2010.
4 Order of the General Court (Sixth Chamber) of 6 September 2011 in Case T-452/10 ClientEarth vs. Council (not yet reported).