



**COUNCIL OF  
THE EUROPEAN UNION**

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from : Working Party on Information

to : Coreper (part 2)/Council

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No. prev. doc.: 9703/11

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Subject : Public access to documents

- Confirmatory application made by Mr Ronny PATZ (No 11/c/01/11)

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Delegations will find enclosed a draft reply from the Council to confirmatory application made by Mr Ronny PATZ (No 11/c/01/11), as it stands after examination by the Working Party on Information at its meeting on 20 May 2011.

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

BG: *"The Bulgarian delegation is in favour of the document being released in full. We do not share the Council Legal service's concerns that disclosing the document in question would undermine the Council's decision-making process."*

DK: *"Denmark welcomes the fact that partial release is granted. However, Denmark does not agree with the conclusion in paragraph 10 regarding the judgment in case T-233/09 (Access Info Europe v. the Council of the European Union)."*

EE: *"EE does not agree with the conclusion in paragraph 10 of the draft reply regarding the judgment in case T-233/09 (Access Info Europe v. Council of the European Union)."*

FI: *"FI cannot agree with the reasoning in the draft reply. Especially the reasoning in paragraph 10 regarding the judgment in case T-233/09 (Access Info Europe v. Council) is inadequate."*

SE: *"SE welcomes that partial release is granted. However, as regards the identities of the Member States, SE takes the view that at least the Swedish positions as reflected in the document should be fully disclosed, since they are already publicly available. Furthermore, SE does not agree with the conclusion in paragraph 10 regarding the judgment in case T-233/09 (Access Info Europe v. the Council of the European Union). For these reasons, SE cannot agree with the reply."*

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 Bulgarian, Czech, 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 ADOPTED BY THE COUNCIL ON .....**  
**TO CONFIRMATORY APPLICATION No 11/c/01/11,**  
**made by Mr Ronny Patz by e-mail on 26 April 2011,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to document 8661/11**

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 "Regulation (EC) 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 8661/11 which is a note from the General Secretariat of the Council to delegations and concerns a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency.
2. In its reply dated 18 April 2011, the General Secretariat granted partial access to the above-mentioned document. Access to the remaining parts, notably those parts which would enable the delegations whose positions are reflected in the document to be identified, was refused pursuant to the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 (protection of the Council's ongoing decision-making process).

3. In his confirmatory application dated 26 April 2011, the applicant points out that an earlier document concerning the same proposed legislative act is already in the public field (doc. 5172/11). He claims that no reasons were given in the reply to the initial request as to why in this particular case the General Secretariat considers that making the delegations' names public would cause problem to the Council's decision-making process. Referring to the recent judgment of the General Court in case T-233/09 (Access Info Europe v. Council), he argues that the General Secretariat ignored the General Court's judgment. Moreover, the applicant contends that, because the European Maritime Safety Agency ( hereafter "EMSA") deals regularly with environmental questions, access to the document under scrutiny should have been considered under the Aarhus Convention/Regulation. According to the applicant, this also means that there is an overriding public interest in releasing the delegations' positions.
4. The Council has examined the above-mentioned document in the light of the applicant's arguments and has come to the following conclusion:
5. The document under scrutiny concerns a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency. The Shipping Working Party, the Council's preparatory body responsible for this proposal, started the examination of the Commission proposal in November 2010 and has since then examined the proposal at several meetings.
6. In the course of the examination of the proposal by the Shipping Working Party, a majority of delegations have raised serious concerns about certain aspects of the Commission proposal, especially as regards the extension of the tasks of EMSA, including the impact the increasing tasks would have on that Agency's budget. In the end of March 2011, a general progress report<sup>1</sup> containing the Presidency's conclusions of the state of play as regards the proposed legislative act in question was submitted to the Council (Transport, Telecommunications and Energy)<sup>2</sup>. Since then, discussions at the Shipping Working Party have continued with a view to reaching an agreement on the pending issues.

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<sup>1</sup> doc. 7644/11, publicly available in the Council's public register.

<sup>2</sup> see press release, doc. 8395/11.

7. Negotiations in the Shipping Working Party have recently reached a sensitive stage since they have now been concentrating on the most conflicting issues as regards the Commission's proposal. Disclosure of the names of delegations in relation to their recent positions recorded in the requested document, dating back to 6 April 2011, risk to considerably reduce the flexibility for those delegations to formulate and reconsider their positions in the light of the arguments exchanged in the debate and thwart their efforts to overcome the outstanding points. This risks seriously affecting the chances of finding a compromise on the legislative proposal within the Council and could also have a negative impact on future contacts with the European Parliament.
8. In addition, if the Council had to take into consideration the possibility of having delegations' names revealed in relation to their positions on outstanding issues during this ongoing decision-making procedure, there is a risk that delegations request that future discussions on remaining sensitive issues be held without the production of further documents recording the different positions of delegations. This would cause significant damage to the efficiency of the Council's work on the file, which is based on continuous coordination among the twenty-seven delegations and where the precise knowledge of the different positions is essential to allowing progress on complex outstanding issues.
9. It remains that, as the applicant correctly points out, a previous document concerning the same draft legislative act, document 5172/11, has been made fully accessible to the public, without deletion of the passages permitting identification of delegations. However, an inquiry into the circumstances of the publication of that document lead to the conclusion that it had been released in its entirety due to a clerical error and not because of a change of the Council's transparency policy as regards disclosure of delegations' identities in documents relating to a proposal for a legislative act which is still under discussion within the Council. Moreover, document 8661/11 was issued three months after the release of document 5172/11. During that three months' period delegations' positions have evolved considerably and become more detailed. A comparison between the two documents would allow targeted interference with the ongoing, sensitive decision-making process described above.

10. Moreover, the applicant refers to judgment T-233/09 of 22 March 2011, by which the General Court annulled the Council's decision of 26 February 2009 refusing public access to certain parts of a note from the General Secretariat of the Council concerning a proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, notably those parts which enabled the delegations which submitted proposals for amendments to be identified. As things stand, the judgment has no legal implications for the present case. Moreover, it should be pointed out that the Council has decided to appeal the judgement in question before the Court of Justice.
11. Finally, the applicant maintains that, because EMSA deals with environmental questions, access to the document under scrutiny should have been considered under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>3</sup> (hereafter the "Aarhus Convention") and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies<sup>4</sup> (hereafter "Regulation (EC) No 1367/2006").
12. The requested document concerns proposed amendments to EMSA's institutional framework and the transferral of additional tasks to EMSA, including, among others, prevention of and response to pollution caused by ships as well as response to marine oil pollution caused by oil and gas installations. Beyond the transferral of tasks, however, the proposal in question does not foresee itself any measures affecting, likely to affect or protecting elements of the environment. The requested document therefore does not concern environmental information within the meaning of Article 2(1)(d) of Regulation (EC) 1367/2006. Moreover, it follows from Article 6 of Regulation (EC) No 1367/2006 that the exceptions under Article 4 of Regulation (EC) No 1049/2001 remain in any event applicable. In the same context, an assessment of the public interest in the release of the requested document does concern information relating to emissions into the environment within the meaning of Article 6 of Regulation (EC) No 1367/2006. The applicants request cannot therefore be based neither on the Aarhus Convention nor on Regulation (EC) No 1367/2006.

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<sup>3</sup> OJ L 124, 17.5.2005, p. 4.

<sup>4</sup> OJ L 264, 25.9.2006, p. 13.

13. The applicant invokes a journalistic interest to write about the position of Member States vis-à-vis EMSA and its reform. There is, however, as stated above, a concrete risk that currently ongoing efforts to reach agreement within the Council would, at a sensitive stage, be negatively affected. In view of the fact that the Council's policy on legislative transparency, as set out in Article 7 of the Council's Rules of Procedure and Article 11(5) and (6) of Annex II thereto, provides citizens with ample and timely information on the Council's legislative process, the Council concluded that the advantages stemming from the openness of the Council's legislative process do not prevail in the present case over the public interest in protecting the Council's decision-making process.
  
14. In the light of the above, the Council considers that, on balance, all possible factors which would, at the present stage, plead in favour of releasing document 8661/11 in its entirety are outweighed by the need to protect the Council's decision-making process. The Council has therefore concluded that full public access to the above-mentioned document has to be refused pursuant to the first subparagraph of Article 4(3) of Regulation 1049/2001 (protection of the Council's decision-making process).
  
15. Finally, the Council recalls that, in accordance with the rules laid down in Article 11(6) of Annex II to the Council's Rules of Procedure, this document, and any other document relating to the proposed act, will be made available to the public after adoption of one of the acts referred to in paragraph 5(d) of Annex II of the Council's Rules of Procedure or final adoption of the act concerned.

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