



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 12 July 2010**

**12065/10**

**INF 91  
API 54  
JUR 296**

**COVER NOTE**

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from : General Secretariat of the Council  
to : Working Party on Information  
Subject : Public access to documents  
- Confirmatory application No 15/c/01/10

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Delegations will find attached:

- A request for access to documents sent to the General Secretariat of the Council on 17 June 2010 and registered on the same day (Annex 1).
- A reply from the General Secretariat of the Council dated 17 June 2010 (Annex 2).
- A confirmatory application dated 8 July 2010 and registered on the same day (Annex 3).

[E-mail message sent on 17 June 2010 - 11:16]

Dear Mr Jiménez Fraile

I work for

This is a request to have access to a document under Regulation 1049/2001.

I would like to have access to the opinion 6865/09 dated 24 February 2009 from the legal service of the Council. The opinion focuses on the admissibility of the amendments of the LIBE Committee of the European Parliament to the Commission's proposal COM(2008)229final for a recast of Regulation (EC) No 1049/2001 regarding access to European Parliament, Commission and Council documents.

The opinion of the Council legal service can be found on the internet. However, only the introduction of it is accessible, the rest is deleted. The content of the opinion is thus totally blanked. Yet, Article 4 paragraph 2 of Regulation 1049/2001 provides that "the institutions shall refuse access to a document where disclosure would undermine the protection of:

...legal advice, ..

unless there is an overriding public interest in disclosure."

The Court of Justice of the EU in joined cases C-39/05P and C-52/05P, Sweden and Turco v Commission, specified the way this provision should be construed and stated in relation to access to opinions of the legal service of the Council that:

"It is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various point of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole".

It added that "in view of those considerations, there appears to be no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issues in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001." And concluded that : "it follows from the above considerations that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to legislative process."

The findings of the court apply to the requested opinion which has been provided within the recast of Regulation 1049/2001, a legislative process. Its disclosure would not in any way undermine the protection of legal advice from the Council legal service, on the contrary it would foster debate and would create good conditions to discuss the recast of Regulation 1049/2001.

In addition, the requested opinion provides a preliminary legal analysis on both procedural and substantial issues raised by the report adopted by the European Parliament LIBE Committee. Following this opinion, the Council considered a series of amendments outlined in this report as inadmissible under the recast procedure. This opinion is of crucial importance since it could prevent the European Parliament from amending the Commission's proposal on certain points that restrict the right of access resulting in less openness and accountability from the institutions and less democracy. The public should have access to the reasons and legal arguments the Council legal service bases its opinion on and use to reject amendments from the Parliament and to limit the right of access to institutions' documents. There is therefore an overriding public interest in disclosure for the purpose of article 4 paragraph 2 last indent of Regulation 1049/2001.

I would appreciate if you could register and handle the request promptly and notify me when the request is registered. The European parliament is going to reconsider these issues, the information is thus needed in a timely way for the legislative process. I would then expect a reply within 15 working days in compliance with Article 7 of Regulation 1049/2001.

I thank you in advance for your help.

Best regards,



**COUNCIL OF  
THE EUROPEAN UNION**

**GENERAL SECRETARIAT**

*Directorate-General F  
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*- Access to Documents/  
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Brussels, 17 June 2010

**e-mail:**

**10/1380-ls/mf**

Dear ,

Your request of 17 June 2010 for access to document 6865/09 has been registered by the "Access to Documents" unit. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

In your application, you request public access to document **6865/09** prepared by the Legal Service on the revision of Regulation 1049/2001.

Document **6865/09** contains an opinion of the Legal Service of the Council concerning the Cashman report including the European Parliament's recommended amendments on the aforementioned recast proposal. The requested document contains legal advice, except for its paragraphs 1-3.

The legal advice contained in the requested document relates to an ongoing legislative procedure.

The legal advice contained in this document is of a particularly sensitive nature since the Legal Service examines in it difficult questions raised in the context of the Parliament's first reading of the proposal. The legal issues raised in the requested document are expected to be subject of intensive discussions within the Council and with the European Parliament. If the internal legal advice given to the Council were made public, it could lead the Council to take into account the risk of a possible disclosure in the future and decide not to request written opinions from its Legal Service.

This would prejudice the Council's ability, in general, to carry out its tasks, by depriving it of an important instrument which ensures the compatibility of its acts with Community law and hence it would undermine the Council's interest in requesting and receiving frank, objective and comprehensive legal advice which is supposed to be internal to the institution. Furthermore and in view of the fact that the decision-making process is currently ongoing, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the legality of the proposed act and would compromise the conclusion of an agreement between the Council and the European Parliament on the dossier. In particular, when the aim or one of the aims of the legal advice is to help the Council in discussing issues with the European Parliament, making that legal advice public and, therefore, accessible to the European Parliament does not seem possible.

Taking into consideration the sensitivity of the dossier, the General Secretariat is unable to grant you full access to the requested document, since its disclosure would prejudice two of the protected interests under Regulation 1049/2001, notably the protection of legal advice under Article 4(2) second indent and the institution's ongoing decision-making process under Article 4(3) first subparagraph of the Regulation. As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above two interests so as to justify disclosure of the document.

However, pursuant to Article 4(6) of the Regulation, you may have access to paragraphs 1-3 of document 6865/09, which are not covered by any of the exceptions under the Regulation.

According to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply<sup>1</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

Enclosure

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<sup>1</sup> Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

**[Confirmatory application sent by e-mail on 8 July 2010 - 16:33]**

Dear Madam, Sir,

Please find attached confirmatory application (10/1380-ls/mf) relating to document 6865/09.

Best regards,

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Brussels, 8 July 2010

**GENERAL SECRETARIAT**

Directorate-General F  
Press, Communication, Transparency - Access to Documents/Archives  
RUE DE LA LOI, 175  
B – 1048 BRUSSELS

Attention: Mr THOMSEN  
By email: [access@consilium.europa.eu](mailto:access@consilium.europa.eu)

**RE: 10/1380-ls/mf - Confirmatory Application for Reconsideration of the  
Council Secretary General's Decision to Deny ' Application  
Requesting Access to a Document Containing Legal Opinion of the Council  
legal service**

submits this confirmatory application for reconsideration of the denial of application dated 17 June 2010 requesting access to a document. The original application requested a document containing the legal opinion of the Council's legal service on the admissibility of the amendments recommended by the European Parliament in the Cashman report on the recast of Regulation 1049/2001.

On 17 June 2010, the General Secretary of the Council ("SG") denied our request. Through this confirmatory application for reconsideration, respectfully requests that the SG reconsiders the denial and grants access to the requested document.

**SUMMARY**

requested access to the Council legal service opinion on the admissibility of the amendments recommended by the rapporteur in the LIBE Committee of the Parliament to the Commission's proposal for a recast of Regulation 1049/2001 on public access to European Parliament, Council and Commission documents.

The disclosure of the requested document would allow the public to understand the reasons why the Council considers the majority of the amendments proposed by the Parliament aiming at widening the scope of the right of access as inadmissible as well as what the Parliament is allowed to propose under the recast procedure. It would also foster a sound discussion between the Council and the Parliament on the future of the regulation. It would therefore fulfil one of the aims of Regulation 1049/2001 to increase openness to enable citizens to participate more closely in the decision-making process and guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

Yet, the Secretariat General (SG) of the Council refused to disclose the requested document on the grounds that it would violate Article 4(2) second indent (protection of legal advice) and Article 4(3) of Regulation 1049/2001 (protection of internal documents).

This confirmatory application demonstrates that the reply from the SG violates these provisions of the regulation for the following reasons:

- The Council blatantly ignores the relevant case-law of the Court of Justice of the EU. According to the Court (see joined cases C-39/05 P and C-52/05P), Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process.
- The Council does not demonstrate how the disclosure of the requested opinion would undermine the protection of legal advice or seriously undermine the Council's decision-making process and only provides for a general and abstract reasoning which could apply to all similar documents.
- The Council does not weigh the different interests at stake to assess whether there is an overriding public interest in disclosure and rejects the request without providing any detailed reasons for withholding the requested document.
- The Council violates Article 4(6) of Regulation 1049/2001 and the principle of proportionality in not providing more comprehensive partial access to the requested document.

## 1. FACTUAL AND LEGAL BACKGROUND

On 30 April 2008, the European Commission ("Commission") adopted proposal COM(2008)229 final for the recast of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. The European Parliament ("Parliament") adopted a first resolution containing amendments to the proposal on 11 March 2009. However, it adjourned its vote on the legislative resolution, and hence, the formal conclusion of its first reading of the legislative proposal. On 6 May 2009, at its plenary session, the Parliament decided to postpone again the vote on the legislative resolution until its next legislative term.

On 12 May 2010, Mr. Cashman, the rapporteur of the LIBE Committee of the Parliament, the leading Committee within the recast proceeding, adopted a draft report on the Commission's proposal<sup>1</sup>.

Although the Parliament had not delivered a formal opinion on the Commission's proposal, the Working Party on Information of the Council decided to proceed to the examination of the text of the proposal as well as the amendments of the Parliament.

In its report of 20 March 2009<sup>2</sup>, the Council considered that the amendments tabled by the Parliament could be divided into three categories:

1. Amendments which, according to the analysis by the Council legal service, fall outside the scope of Article 255 of the EC Treaty which is the legal basis of Regulation

<sup>1</sup> Draft report on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 12 May 2010, PE439.989v01-00.

<sup>2</sup> Note from the General Secretariat of the Council addressed to delegations, 20 March 2009, 7791/09.

1049/2001. These proposals are considered by the Council as inadmissible within the recast of the regulation.

2. Amendments falling within the scope of the recast, which are to be discussed further and which may constitute the basis for negotiations within the EP.
3. The remaining amendments which, although within the scope of Article 255 ECT, fall outside the object of the recast proposal. They may, according to the Council, only be included in future negotiations if they are accepted by the Commission and incorporated into a modified recast proposal.

To determine if an amendment is admissible within the recast process two legal bases must be taken into account, Article 87 of the rules of procedure of the EP and Article 255 EC now Article 15 TFEU.

Article 87 of the Parliament rules of procedure provides that *"...amendments shall be admissible within the Committee responsible only if they concern those parts of the proposal which contain changes.*

*However, if in accordance with point 8 of the Interinstitutional Agreement the committee responsible intends also to submit amendments to the codified parts of the Commission proposal, it shall immediately notify its intention to the Council and to the Commission, and the latter should inform the Committee, prior to the vote pursuant to Rule 54, of its position on the amendments and whether or not it intends to withdraw the recast proposal."*

The Parliament may thus not propose amendments on provisions of the Commission's proposal that haven't been changed in the first place unless the Commission accepts to incorporate them in a new proposal.

Article 255 ECT, now article 15 of the TFEU, sets the legal basis of the Regulation and must therefore also be taken into account.

On 17 June 2010, [redacted] requested to have access to the Council legal service opinion (doc. 6865/09).

On the same day, the SG responded with an effective denial of the request. Although technically a partial denial, the SG substantially denied the application by withholding all consequential information, releasing instead just the introduction of the requested document. For the rest of the document the SG denied the request outright, arguing that the document is covered by two exceptions under Regulation 1049/2001:

*"The disclosure would prejudice two of the protected interests under Regulation 1049/2001, notably the protection of legal advice under Article 4(2) second indent and the institution's ongoing decision-making process under Article 4(3) first subparagraph of the Regulation".*

In relation to the protection of legal advice the SG argues that:

*"The legal advice contains in the requested document relates to an ongoing legislative procedure.*

*The legal advice contained in this document is of a particularly sensitive nature since the Legal Service examines in it difficult questions raised in the context of the Parliament's first reading of the proposal. The legal issues raised in the requested document are expected to be subject of intensive discussions within the Council and with the European Parliament. If the internal legal advice to the Council were made public, it could lead the Council to take into account the risk of a possible disclosure in the future and decide not to request written opinions from its Legal Service. This would prejudice the Council's ability, in general, to carry out its tasks, by depriving it of an important instrument which ensures the compatibility of its acts with Community law and hence it would undermine the Council's interest in requesting and receiving frank, objective and comprehensive legal advice which is supposed to be internal to the institution."*

In relation to the protection of the institution's decision-making process, the SG contends that:

*"Furthermore and in view of the fact that the decision-making process is currently ongoing, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the legality of the proposed act and would compromise the conclusion of an agreement between the Council and the European Parliament on the dossier. In particular, when the aim or one of the aims of the legal advice is to help the Council in discussing issues with the European Parliament, making that legal advice public and, therefore, accessible to the European Parliament does not seem possible".*

As regards the existence of an overriding public interest in disclosure, the SG considers that *"on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above two interests so as to justify disclosure of the document"*.

## **2. VIOLATIONS OF REGULATION 1049/2001 PROVIDING ACCESS TO EUROPEAN PARLIAMENT, COUNCIL AND COMMISSION DOCUMENTS**

We consider the reply from the SG to be incompatible with Article 4(2) second indent, Article 4(3) first subparagraph and Article 4(6) of Regulation 1049/2001. The reply also fails to comply with the findings of the Court of Justice of the EU in joined cases C-39/05 P and C-52/05P (the "Turco case")<sup>3</sup>.

Article 4(2) second indent provides that *"the institutions shall refuse access to a document where disclosure would undermine the protection of: ... legal advice ...unless there is an overriding public interest in disclosure."*

Article 4(3) first subparagraph provides that *"access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

<sup>3</sup> Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, [2008] ECR I-0000.

We will demonstrate in a first section that the reply from the SG violates Article 4(2) second indent.

We will demonstrate in a second section that the reply from the SG violates Article 4(3) first subparagraph.

We will in a third section demonstrate that the SG failed to assess whether there was any overriding public interest in disclosure.

We will in a final section demonstrate that the SG failed to comply with article 4(6) and the principle of proportionality.

## 2.1 VIOLATION OF ARTICLE 4(2) SECOND INDENT (LEGAL ADVICE) OF REGULATION 1049/2001

### 2.1.1 Compliance with the test set out by the Court in Joined cases C-39/05 P and C-52/05P

In Joined cases C-39/05 P and C-52/05P, the Court sets out the examination to be undertaken by the Council where disclosure of an opinion of its legal service relating to a legislative process is requested. This section will examine whether the SG fulfilled the test set out by the Court.

The Court starts by stating that *"first, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception"<sup>4</sup>*.

The SG satisfied itself that the requested document related to legal advice since it stated that *"Document 6865/09 contains an opinion of the Legal Service of the Council concerning the Cashman report..."*. It then considered that the *"requested document contains legal advice, except for its paragraphs 1-3"* and only granted access to these paragraphs. Yet, these paragraphs only contain the introduction to the opinion. Granting access only to the introductory parts of the opinion and keeping the entirety of the legal advice confidential does not demonstrate that the SG examined the opinion in question in a sufficiently detailed manner before refusing to disclose it or examined it in the light of its content. There is no evidence to suggest that the SG checked whether partial access could have been given to some of the arguments in the requested document which express the opinion of the legal service on the legality of the amendments recommended in the Cashman report. The SG thus did not complete the first stage of the examination described by the Court.

Second, the Court requires the Council to *"examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice 'would undermine the protection' of that advice"<sup>5</sup>*.

*"In that regard, it must be pointed out that neither Regulation No 1049/2001 nor its travaux préparatoires throw any light on the meaning of 'protection' of legal advice. Therefore, that term*

<sup>4</sup> Joined cases C-39/05 P and C-52/05P, Ibid, Paragraph 38.

<sup>5</sup> Joined cases C-39/05 P and C-52/05P, Ibid, para. 40

*must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.*

*Consequently, the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.*

*The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical<sup>6</sup>.*

The Court also makes clear that *"if the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution ...<sup>7</sup>".*

The SG first states that *"the legal advice contained in the requested document relates to an ongoing legislative procedure"*. Yet, there would be no sense in requesting such an opinion or, any other document, if the legislative procedure was terminated. On the contrary, Regulation 1049/2001 clearly aims at enabling citizens to participate in the decision-making process of the institutions which implies that documents must be disclosed while proceedings are still ongoing, particularly legislative proceedings. Recital 2 of the Regulation preamble provides that *"openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system"*. Recital 6 adds that *"wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process"*.

Additionally, in the Turco case, the Court considered that there was no *"general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters<sup>8</sup>"* that was ongoing and that such advice had to be disclosed. The Council may thus not rely on this argument to refuse disclosing the requested document.

The SG then argues that *"the document is of a particularly sensitive nature since the Legal Service examines in it difficult questions raised in the context of the Parliament's first reading of the proposal. The legal issues raised in the requested document are expected to be subject of intensive discussions within the Council and with the European Parliament."*

First, the level of difficulty of the questions analysed by the legal service in the requested opinion should not be a criteria used by the Council to assess whether the requested opinion should be publicly accessible. On the contrary, the more difficult the questions are, the more interest there is for the public, particularly for lawyers such as ... staff, in disclosure.

Second, the fact that the questions examined in the opinion are questions raised in the context of the Parliament's first reading of the Commission's proposal stresses the fact that the document should be public as the first reading stage is part of a legislative process. As explained

<sup>6</sup> Joined cases C-39/05 P and C-52/05P, *ibid*, paras. 41-43.

<sup>7</sup> Joined cases C-39/05 P and C-52/05P, *ibid*, para. 49.

<sup>8</sup> *Ibid*, 57.

earlier, Regulation 1049/2001 makes clear that documents within these processes should be easily accessible. The Court also stresses this point in the Turco case. The Court draws from recital 2 and 6 of the Regulation's preamble to conclude that "*openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*"

*It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible<sup>9</sup>.*"

It is thus clear that the Council may not rely on the fact that the questions analysed in the requested opinion will be discussed within the first reading stage of the procedure to deny access to the said opinion.

Third, the first reading stage is decisive as it determines the amendments that will be discussed and negotiated with the Council. It is thus crucial that the public be informed of what is going on at that stage of the procedure and be able to participate in the decision-making process. Members of the public, NGOs and individuals, may decide to draw the attention of MEPs and/or of certain delegations of the Council on issues of their choice.

Fourth, the fact that the legal issues raised in the opinion are going to be the subject of discussions within the Council and between the Council and the Parliament shows that these issues are constitutive of debate between the two institutions on what documents the reviewed regulation should provide access to and deserve therefore to be public. Discussions between institutions and within an institution on the future of a regulation should not be confidential and led behind closed doors. On the contrary, to promote such privacy in proceedings, as the SG does, directly contravenes the principles of openness, transparency and accountability of the institutions underlying Regulation 1049/2001.

The SG further argues that "*if the internal legal advice to the Council were made public, it could lead the Council to take into account the risk of a possible disclosure in the future and decide not to request written opinions from its Legal Service*". The SG does not explain why the Council would decide not to request written opinions anymore from its legal service provided they were public.

We thus have to guess what the reasoning underlying the SG's explanation is. In the Turco case, the Council argued that the disclosure of legal advice from the Council legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned.

However, the Court rejected this plea holding that:

*"...it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing*

<sup>9</sup> Ibid, paras. 46-47.

*divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.*

*Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed.*

*Consequently, to submit, in a general and abstract way that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and cannot, accordingly, provide a basis for a refusal to disclose such advice.<sup>10</sup>*

The SG could not rely on that argument to deny access to the requested document.

In the Turco case, the Council also argued that the independence of its legal service would be compromised by possible disclosure of legal opinions. However, the Court also rejected that plea in stating that *"that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. As is apparent from paragraph 42 of this judgment, that exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.*

*However, in that regard, the Council relied before both the Court of First Instance and the Court on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined.*

*As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it<sup>11</sup>.*

The same reasoning must be applied here.

The SG concludes that *"this would prejudice the Council's ability, in general, to carry out its tasks, by depriving it of an important instrument which ensures the compatibility of its acts with Community law and hence it would undermine the Council's interest in requesting and receiving frank, objective and comprehensive legal advice which is supposed to be internal to the institution."*

<sup>10</sup> Ibid, paras 59-60.

<sup>11</sup> Ibid, paras 62-64.

First, the SG does not explain how the disclosure of an opinion from the Council legal service would prevent the Council from carrying out its tasks. Second, the SG states that it would “*in general*” prejudice its ability “*to carry out its tasks*”. The meaning of the words “in general” is rather obscure and too broad to constitute a sound reason to refuse access. Third, the disclosure of an opinion from the Council legal service would in no way prevent the Council from requiring advice to its legal service to ensure the compatibility of its acts with EU law. Making public an opinion from the Council legal service which confirms the compatibility of one of the Council’s acts with EU law would not be a threat to the protection of legal advice. On the contrary, citizens would be reassured to know that one of the Council’s acts comply with EU law. This would also enable the EU citizens to follow the decision-making process and understand it better.

The adoption of a negative opinion by the Council legal service on a proposed legislative act under discussion subsequently adopted does not either constitute a reason to refuse disclosing the legal opinion. The Court in the *Turco* case held that “*as regards the Commission’s argument that it could be difficult for an institution’s legal service which has initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001*”<sup>12</sup>.

It follows that the SG submits in a general and abstract way that there is a risk that disclosure of legal advice relating to legislative processes would undermine the protection of legal advice. The SG hence does not demonstrate that there is a real risk that is *reasonably foreseeable* and not *purely hypothetical* that the protection of the legal advice would be undermined. It does not either establish that public access to the opinion would *specifically* and *effectively* undermine the protection of legal advice. The SG thus fails to provide detailed reasons for withholding the requested document as it only gives a general reason which could apply to all legal opinions from the Council legal service.

Yet, if “*it is, in principle, open to the Council to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose*”<sup>13</sup>.

However, the SG does not in any way examine whether the general reasons invoked are applicable to the specific legal opinion on the admissibility of the Parliament’s amendments to the recast proposal of the Commission. As explained above, the difficulty of the questions raised and the fact that they are subject of discussions within the Council and between the Council and the Parliament are not reasons to justify confidentiality under Article 4(2) second indent. Indeed, these arguments apply to most of legal opinions drafted by the Council legal Service within a legislative process. The examination of the council is thus not carried out in respect of the document requested as it does not explain how the disclosure of the legal arguments according to which amendments recommended in the Cashman report are inadmissible would undermine the protection of the legal advice provided to the Council and would thus prevent it from seeking frank, objective and comprehensive advice.

<sup>12</sup> Ibid, para 65.

<sup>13</sup> Ibid, para 50.

The arguments of the SG thus do not suffice to establish that the disclosure of the requested document would undermine the protection of legal advice for the purposes of the second indent of article 4(2) of Regulation 1049/2001.

## **2.2 VIOLATION OF ARTICLE 4(3) FIRST SUBPARAGRAPH (INTERNAL DOCUMENTS) OF REGULATION 1049/2001**

### **2.2.1 Article 4(3) is not applicable to legal advice provided within legislative process**

The SG cannot invoke the exception set out under Article 4(3) first subparagraph of Regulation 1049/2001 in addition to the one provided under Article 4(2) second indent of the Regulation. In the *Turco* case, the Court considered that the legal advice from an institution's legal service provided within a legislative process should be publicly accessible under Article 4(2) second indent unless of a particularly sensitive nature or having a wide scope that goes beyond the context of the legislative process. In the latter case, it is incumbent on the institution concerned to give a detailed statement of reasons for a refusal<sup>14</sup>. The Court thus impliedly ruled that Article 4(2) second indent is the relevant provision of Regulation 1049/2001 which applies to the disclosure of institutions' legal advice relating to legislative procedures. It follows that if legal advice from a legal service of an institution shall be deemed publicly accessible under Article 4(2) second indent, it cannot be refused under another provision of the Regulation, namely Article 4(3). This would directly contravene the findings of the Court and would empty Article 4(2) second indent of its substance.

In addition, if Article 4(3) of the Regulation was to apply to legal advice provided within legislative processes, Article 4(2) and Article 4(3) would refer to each other specifying how the two provisions were supposed to apply without contradicting each other.

The access provided under Article 4(2) in the case of legislative process should thus not be hampered under Article 4(3) of the Regulation.

The argument of the SG must thus be rejected.

### **2.2.2. The public accessibility of the opinion would not seriously undermine the Council's decision-making process**

Even if Article 4(3) of Regulation 1049/2001 applied to the disclosure of the Council legal service advice, the disclosure of the requested document would not undermine the Council's decision-making process.

The SG argues that "*... in view of the fact that the decision-making process is currently ongoing, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the legality of the proposed act and would compromise the conclusion of an agreement between the Council and the European Parliament on the dossier. In particular, when the aim or one of the aims of the legal advice is to help the Council in discussing issues with the European Parliament, making that legal advice public and, therefore, accessible to the European Parliament does not seem possible*".

<sup>14</sup> Ibid, para. 69.

However, the SG does not demonstrate how that would be the case. The SG does not demonstrate how the public accessibility of the opinion would prevent the Council from having internal discussions on the legality of the proposed act and from concluding an agreement with the Parliament.

Moreover, as already explained above, the fact that the decision-making process is ongoing is specifically the reason why the public should have access to the opinion of the Council legal service. Granting access to the legal opinion only once the decision-making process is terminated would not allow the public to participate in this process and would thus directly contravene the principles underlying Regulation 1049/2001 and provided in recitals 2 and 6 of the Regulation's preamble already referred to above.

The fact that the opinion has been drawn up in the course of a procedure for the adoption of a legislative act also stresses the need for its public accessibility.

Besides, the SG confuses two things: the opinion of the Council legal service on the admissibility of the amendments under the recast procedural rules of the Parliament and under Article 15 TFEU which is a purely legal question, on the one hand, and the negotiating/strategic position of the Council within the recast process, which is a political question, on the other hand. The discussions within the Council on the strategy to adopt within the recast and the negotiations between the Council and the Parliament which would need to be confidential, could still remain confidential. It is the opinion on the legal issues raised within the recast process, the admissibility of the amendments under Article 87 of the Parliament Rules of Procedure and Article 15 TFEU, which is requested by \_\_\_\_\_ and which should be disclosed.

The public accessibility of the requested advice would thus in no way *"adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the legality of the proposed act and would compromise the conclusion of an agreement between the Council and the European Parliament on the dossier"*.

Making the legal advice accessible to the Parliament would not undermine the decision-making process of the Council either. On the contrary, providing the Parliament with the reasons why the Council considers some of the amendments proposed in the Cashman report as inadmissible would lay down the right basis for a sound discussion between the two institutions. It is especially the case if, as the Council claims, one of the aims of the legal advice is to help the Council in discussing issues with the Parliament. Moreover, it seems to be difficult to discuss something without knowing its content. One can thus wonder how the Parliament could enter into a discussion with the Council on the issues analysed by the legal service without having access to the legal opinion. Furthermore, provisions of legal texts may be subject to different interpretations and interpretations should be debatable.

The SG thus does not demonstrate that its decision-making process would be undermined, let alone that it would be *seriously* undermined as required by Article 4(3) first subparagraph, by the disclosure of the requested opinion. Provided the requested legal opinion was public, the Council could still adopt its decisions without any serious obstacles or difficulty. And according to the Court in the Turco case *"as regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions,*

*which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent to the Council to take the necessary measures to put a stop to it<sup>15</sup>.*" The SG cannot thus refer to a potential external pressure on its legal service to refuse access.

It follows that the SG did not carry out an examination which is specific in nature nor did it assess whether access to the requested document would specifically and effectively undermine the Council's decision-making process. The risk of the Council's decision-making process being undermined was thus purely hypothetical and not reasonably foreseeable.

### **2.3 VIOLATION OF ARTICLE 4(2) LAST INDENT AND ARTICLE 4(3): THE EXISTENCE OF AN OVERRIDING PUBLIC INTEREST**

The Court, in the Turco case, outlines the arguments the Council has to take into account when assessing whether there is a public interest in disclosure under Article 4(2) second indent of Regulation 1049/2001. The Council also has to assess whether there is such an overriding public interest under Article 4(3).

The Court provides that *"if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.*

*In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*

*Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*

*It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by*

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<sup>15</sup> Ibid, para. 64.

*providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible*<sup>16</sup>.

It is clear that the SG does not fulfil the test set out by the Court. The SG did not ascertain whether there was an overriding public interest in disclosure, justifying disclosure, despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined. The SG did not balance the protection of legal advice against the public interest in the document being made accessible in the light of the advantages stemming from increased openness.

The SG only stated that *"as regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above two interests so as to justify disclosure of the document"*.

The SG thus does not explain why or how the protection of its legal service opinion prevailed over transparency, openness and increasing democracy and its accountability to the citizens.

The SG did not either explain how Article 12(2) of Regulation 1049/2001 applies in this case.

Yet, because the Council legal service opinion will form one of the legal bases of Regulation 1049/2001 and enshrine considerations underpinning legislative actions, wider access must be afforded.

The Court further argued that *"in any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie regulation No 1049/2001. .... Such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of Preamble to Regulation No 1049/2001.*

*It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process.*

*That finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.*<sup>17</sup>

The SG argues that *"the legal advice contained in this document is of a particularly sensitive nature since the Legal Service examines in it difficult questions raised in the context of the Parliament's first reading of the proposal"*. However, neither the fact that difficult questions are analysed in the opinion nor the fact these questions are raised in the context of the Parliament's

<sup>16</sup> Ibid, paras. 44-47

<sup>17</sup> Ibid, paras 67-69.

first reading of the proposal demonstrate that the opinion is of a particularly sensitive nature. Indeed, a considerable number of legal opinions from the Council legal service provided within a legislative process are necessarily and by definition provided in the context of the Parliament first reading of a Commission's proposal.

The opinion does not have either a particularly wide scope that goes beyond the context of the legislative process in question as the opinion specifically bears on the admissibility of the amendments proposed by the Parliament. It is thus particularly on the legislative process in question that is the recast of Regulation 1049/2001.

The SG should thus consider that there is an overriding public interest in disclosure.

Moreover, even if the legal opinion was "*of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question,*" it would "*be incumbent on the [council] .. to give a detailed statement of reasons for such a refusal.*" Yet, it follows from all the above considerations that the SG did not give such a detailed statement of reasons for its refusal.

Disclosure of the requested legal opinion would enable the public to be part of the discussion on the type of amendments which may be proposed by the Parliament within the recast procedure. The admissibility of the amendments proposed by the Parliament within the recast procedure is subject to two sets of rules, Article 87 of the Rules of Procedure of the Parliament and Article 15 of the TFEU, former Article 255 EC, which is the legal basis of Regulation 1049/2001. Whether some amendments of the Parliament go beyond the scope of article 15 TFEU or of the recast process as argued by the Council's legal service may not be crystal clear for all amendments and therefore be the subject of discussions. Moreover, the amendments tabled in the Cashman report will be the basis for discussion with the other Committees of the Parliament and will thus determine the amendments which will be tabled by the Parliament as a whole. The decision of the Council on their admissibility is thus critical for the future of the Regulation on access to documents. The Council should thus not be able to decide on its own to reject the amendments of the Parliament, in this case, almost the majority of them, without submitting its analysis to public scrutiny.

The requested legal opinion is not only for internal use within the Council but on the contrary provides for an interpretation of the legal rules that apply to the recast procedure. This information is very valuable for the public in general to understand the recast procedure better and particularly for people, like lawyers and NGOs, working on the decision-making process of the EU institutions. It is also very useful for the Parliament which needs to know what amendments will be considered as inadmissible by the Council within this type of procedure for future recasts.

The process will result in the new regulation on access to documents which provides a right to the public, the right to have access to documents held by EU institutions. The right of the public to participate in the recast of the regulation should thus be facilitated by the institutions.

Despite this, the Council decides to conduct discussions behind closed doors which invariably results in less democracy and less public participation in the decision-making process. Such opacity contravenes the principles underlying Regulation 1049/2001, enshrined in recital 2 and 6 of the Regulation's preamble and of article 15 TFEU.

It follows from all the foregoing that there is an overriding public interest in disclosing the requested legal opinion for the purposes of Article 4(2) second indent and Article 4(3) of Regulation 1049/2001.

#### **2.4 VIOLATION OF ARTICLE 4(6) OF REGULATION 1049/2001: PARTIAL ACCESS**

Article 4(6) of Regulation provides that "*if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*".

The SG decided to grant access only to the introductory parts of the document and to keep the whole reasoning of the legal service confidential.

The SG thus failed to comply with the principle of proportionality and Article 4(6) of Regulation 1049/2001 by refusing partial access to the legal opinion.

#### **CONCLUSION**

With this confirmatory application for reconsideration, the applicant respectfully requests that the General Secretary grant access to the requested document.