



Council of the European Union  
General Secretariat

S6S 19 / 004890

Directorate-General Communication and Information - COMM  
*The Director-General*

Brussels, 27. 05. 2019

Ms Anne Friel

**Subject:** your confirmatory application

Dear Madam,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 5 April 2019.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court<sup>1</sup> or to make a complaint to the Ombudsman<sup>2</sup>. The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,

Reijo KEMPPINEN

<sup>1</sup> For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: [http://curia.europa.eu/jcms/jcms/Jo2\\_7040/en/](http://curia.europa.eu/jcms/jcms/Jo2_7040/en/)

<sup>2</sup> Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

**REPLY ADOPTED BY THE COUNCIL ON 27 MAY 2019  
TO CONFIRMATORY APPLICATION 12/c/01/19,  
made by email on 5 April 2019,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001 and  
Regulation (EC) No 1367/2006.**

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, 31.5.2001, p. 43), under 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 (OJ L 264, 25.9.2006, p.13) and under Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35) and has come to the following conclusions:

**I. Introduction**

1. On 8 February 2019, the applicant submitted a request for access to:
  - [...] the minutes of the Agriculture and Fisheries Council held on 17-18 of December 2018, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2019,
  - all preparative and supporting documents related to this issue, even those dated after the December Council, including any scientific or economic evidence or arguments used and/or referred to by the EU institutions and the Member States, and any correspondence exchanged,

- [...] any additional documents used by Member States to support deviation from the Commission's proposal;
  - records, minutes or notes of the Council Working Party and COREPER discussions held in the lead-up to December Council, including those taken by members of the Council Secretariat,
  - a full table of all proposed and agreed quota adjustments (such as those previously referred to as quota top-ups and/or any deductions) to account for a) catches that could be discarded before the introduction of the landing obligation, but now will have to be landed and b) exemptions from the landing obligation (in tonnes and %) and TACs before the adjustments (top-ups and/or deductions) were applied,
  - detailed description of the methodology used to calculate quota adjustments (top-ups and/or deductions),
  - the calculations that the proposed and agreed quota adjustments (top-ups and or deductions) were based on, ideally in Excel spreadsheet format.
2. The applicant has also pointed out that "[...] for the sake of clarity this request does not cover documents that are available on the Consilium register under inter-institutional code 2018/0380(NLE) on the date of the request, nor those documents already disclosed [...] in response to [...] requests [...] 18/2412, 18/2381, 18/2516 and 18/2518",
  3. To be noted that, in response to requests 18/2412, 18/2381, 18/2516 and 18/2518, the General Secretariat of the Council had transmitted on 4 February 2019 to the applicant 27 documents, some of them covering several elements contained in the specific request's scope of 8 February 2019.

4. In its reply dated 15 March 2019 to the request of 8 February 2019, the General Secretariat of the Council transmitted to the applicant 22 documents, these being all the documents in its possession covering the specific scope of the request.
5. In the confirmatory application dated 8 April 2019, the applicant claims that the "[...] documents in the Council's register and those that were disclosed in response to our request are helpful in gaining an understanding of the positions held by some of the Member States on some of the stocks at various points in the decision-making process. But there is a significant gap in the information available regarding how these positions were reconciled during discussions either in the Council's preparatory bodies or, ultimately, at the Agriculture and Fisheries Council [...]".
6. The applicant contests that the initial list of documents provided in the reply to the initial application was complete and requests the Council to conduct a verification of whether all documents falling under the scope of the request have been identified at the initial stage. As regards in particular "minutes of the Agriculture and Fisheries Council of December 2018 and relevant working party meetings that record the discussions held and the positions defended" as well as "documents related to the agreed quota adjustments" the applicant contends that the confirmation by the Council that it does not hold further documents would "constitute a breach of the Council's duty to document its activities (...) and breach the right to access to documents under article 2 of Regulation 1049/2001)" since "institutions cannot simply frustrate the right to access documents by failing to document their activities in sufficient detail".
7. References are made to Articles 10(3) TEU and 15(3) TFEU, to the Regulation 1049/2001, Article 2 and Recital 2, as well as to the case law, notably the judgments of the General Court in case T-653/16 *Malta v. Commission* and in Case T-264/04, *WWF European Policy Programme v Council*. Other references are made to the Ombudsman requirement of transparency and to the Ombudsman decision in the inquiry on the transparency of the Council legislative process.

8. The applicant further contends that the "records of the deliberations on TACs at the Agricultural and Fisheries Council and relevant meetings of the Council's preparatory bodies constitute «environmental information» and, as such, the obligations contained in Regulation 1367/2006 must also be upheld".
9. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the request and carried out renewed consultations, it has re-assessed the request in full consideration of the principles underlying Regulations (EC) No 1049/2001 and 1367/2006, with the aim of ensuring the widest possible public access to documents and information.

## **II. Request under Regulation (EC) No 1049/2001**

10. As indicated above, in its reply dated 15 March 2019, the General Secretariat of the Council has identified and transmitted to the applicant all the documents in its possession covering the request's scope.
11. In particular, not only the outcome of the "Agriculture and Fisheries" Council meeting of 17-18 December is public (document 15654/18 INIT), but also all written comments by Delegations of Member States were released.
12. After careful re-examination of its files, the Council has not identified any other preparative and supporting documents related to the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2019.

13. According to established case-law of the Court of justice, the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 applies only to existing documents in the possession of the institution concerned<sup>1</sup>. Regulation (EC) No 1049/2001 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist<sup>2</sup>.
14. As a result, the Council has fully complied with its obligations under Regulation (EC) No 1049/2001 by disclosing all documents in its possession falling within the scope of the initial request.

### III. Request under Regulation (EC) No 1367/2006

15. According to Article 3(1) of Regulation (EC) No 1367/2006, "Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies [...]".
16. As indicated above, the Council has fully complied with its obligations under Regulation (EC) No 1049/2001 by disclosing all documents in its possession falling within the scope of the initial request. By doing so, it has also complied with its obligations under Regulation (EC) No 1367/2006.
17. As confirmed by the General Court, Regulation (EC) No 1367/2006 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist<sup>3</sup>.

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<sup>1</sup> Judgment of the Court of justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 38.

<sup>2</sup> Judgment of the Court of justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 46.

<sup>3</sup> Judgment of the General Court of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, T-245/11, ECLI:EU:T:2015:675, paragraph 259.

#### IV. Documentation of the decision-making process

18. Beyond its obligations under Regulations (EC) No 1049/2001 and 1367/2006, the Council can provide the applicant with the following information regarding the documentation of its decision making process, which was done in full compliance with the Council's Rules of Procedure and all other relevant provisions. All the documents mentioned below in *italic* have been communicated/are available to the applicant and are mentioned here for the applicant's convenience.
19. A comprehensive overview of the Council decision making process is shown in the list of procedural steps and documentation set out below.
20. The Commission Proposal of 7 November 2018 for a Council Regulation fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters (*documents 13731/18 + ADD 1 + ADD2+*) was examined during seven meetings of the Working Party (8/9, 15, 21/22 and 29/30 November 2018 and 7 and 13 December 2018) and one COREPER session on 12 December 2018 before a political agreement was reached at the Agriculture and Fisheries Council on 17-18 December 2018.
21. The documentation used in the discussions was the following:
  - a) Subsequent to the receipt and circulation of the proposal, Commission non-papers providing updates to the proposal were circulated to the members of the Working Party on Internal and External Fisheries Policy (*documents 14304/18 of 14 November 2018, 14485/18 of 20 November 2018, 14649/18 of 22 November 2018, 14959/18 of 30 November 2018, 14960/18 of 29 November 2018, 14963/18 of 29 November 2018, 15052/18 of 3 December 2018, 15325/18 of 12 December 2018, 15577/18 of 13 December 2018 and 15597/18 of 13 December 2018*). In addition, the Commission services prepared a document with information on the calculation of 2019 discard plan exemptions and deductions that was equally circulated to the members of the Working Party on Internal and External Fisheries Policy (*document WK 13666/2018*).

- b) Delegations' comments on these proposals, received between 19 November and 14 December 2018, were circulated (*document 14437/18* and its *ADD1 to ADD14*). These comments clearly set out delegations' positions on specific issues of the proposal and some include scientific reports to justify deviation from the Commission proposal.
- c) During the discussions, the delegations and the Commission took into account the scientific analyses available.
- d) Following discussions in the meetings of the Working Party on Internal Fisheries Policy, and taking into account delegations' written comments and Commission non-papers received, the General Secretariat of the Council had prepared an "Outcome of Proceedings" on 27 November 2018 (*doc.14385/18*). This document was complemented and updated until 12 December 2018. Over its 281 pages, it sets out an overview of delegations' positions on the Commission proposal and, where relevant, additional explanations from the Commission regarding the reasons behind its proposal and including all the delegations' positions thereto. One delegation submitted written comments thereto (*document 15124/18*).
- e) To steer the discussion on the full implementation of the landing obligation, the Presidency prepared a non-paper that was distributed to delegations on 5 December 2018 and discussed in the Working Party on Internal and External Fisheries Policy of 7 December 2018 (*document WK 15065/2018*). One delegation submitted written comments thereto (*document WK 15550/2018*).
- f) The Presidency informed on 12 December 2018 the Permanent Representatives Committee (COREPER) on the outcome of the meetings of the Working Party inviting them to address the outstanding issues and outlined some guidelines on which to base a compromise package to the Council (*document 15118/18*). This document was updated in view of the Council (*document 15118/18 REV 1*).
- g) On 13 December 2018, the General Secretariat of the Council transmitted to the Council a consolidated version of the TAC and Quotas Proposal for 2019 prepared in cooperation with the Commission services (*documents 15051/18 + ADD 1 + ADD 2*).



- h) Two delegations submitted a document to invoke Hague Preferences that were transmitted to the members of the Working Party of Internal and External Fisheries Policy (*documents WK 15264/2018 + ADD 1*) on 11 and 17 December 2018 respectively.
  - i) Based on the consolidated version, the Presidency submitted to the Council a compromise proposal on 17 December 2018 (*document 15650/18*).
  - j) This compromise proposal was complemented and modified (*document 15650/18 REV 1 and REV 2*) by the Presidency in view of the Council of 18 December 2018.
  - k) In the light of the political agreement reached at the Agriculture and Fisheries Council on 17-18 December 2018, a consolidated text of the proposal was circulated on 20 December 2018 (*document 15725/18 + ADD1 +ADD2*).
  - l) A list of statements by the Council, the Commission and delegations was published on 22 January 2019 (*document 5692/19*).
22. The Council notes and confirms that taking into account the above, all documents relevant to the initial request of the applicant have been transmitted and have been made public.

## **V: Conclusions**

23. For the above-mentioned reasons, the Council concludes that:
- a) the requirements of Regulation (EC) No 1049/2001, have been fully complied with and all documents relevant to the request of the applicant have been disclosed.
  - b) the requirements of Regulation (EC) No 1367/2006, have been fully complied with and all relevant documents and information have been disclosed.

24. Finally, according to Article 7 of Regulation (EC) No 1367/2006, "[w]here [an Union] institution or body receives a request for access to environmental information and where this information is not held by that [Union] institution or body, it shall, as promptly as possible, but within 15 working days at the latest, inform the applicant of the [Union] institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant [Union] institution or body or the public authority and inform the applicant accordingly."
25. The Council does not have any specific information whether other EU institutions or bodies or a national public authority holds the environmental information sought by the applicant.
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