



**Council of the European Union**  
General Secretariat

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

Brussels, 22. 05. 2019

**Ms Vicky Cann**

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**Subject:** your confirmatory application

Dear Madam,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 4 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,

p.o. 

Reijo KEMPPINEN

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<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 22 MAY 2019**  
**TO CONFIRMATORY APPLICATION 11/c/01/19,**  
**made by email on 4 April 2019,**  
**pursuant to Article 7(2) of Regulation (EC) No 1049/2001,**  
**for public access to certain documents related to the discussions**  
**on legislative transparency in the Council**

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 referred to as "Regulation 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. On 11 February 2019, the applicant submitted a request for access to the following documents:
  - «- the questionnaire to member states' delegations on Council legislative transparency from Autumn 2018*
  - all member states' delegations' responses to the questionnaire*
  - all minutes from Council meetings which discuss Council legislative transparency in the past 2 years*
  - all discussion or other papers from the General Secretariat or member states' delegations which discuss Council legislative transparency in the past 2 years »*
2. In its reply dated 25 March 2019, the General Secretariat of the Council identified several relevant documents that had been discussed in the preparatory bodies of the Council and gave full public access to a great number of them (a scene setter of the Austrian Presidency for the Antici+1 meeting on legislative transparency of 4 September 2018, a document describing the legal framework of legislative transparency, a case study on legislative transparency and a legislative transparency questionnaire to Member States).
3. In a confirmatory application dated 4 April 2019 and registered on 5 April 2019, the applicant asks the Council to grant access to the following documents that have not been (fully) disclosed at the stage of the initial reply of the General Secretariat of the Council (GSC):
  - a) a GSC internal note of 4 September 2018 on current practice on access to documents at the General Secretariat of the Council

Access to the greatest part of this document has been granted at the stage of the initial reply. Full access has been refused pursuant to the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001, since the GSC considered that certain parts of the document contain information that, if released to the public, would seriously undermine the decision-making process of the Council.

b) the comments received from the Member States and notably their replies to the Legislative transparency questionnaire

Access to those comments has been refused pursuant to the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001 so as to protect the decision-making process of the Council.

c) a table on legislative transparency in two versions, the first describing current practices also accompanied by statistics and the second further presenting possible options

Access to this table has been refused pursuant to the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001 so as to protect the decision-making process of the Council.

d) a document containing replies from the General Secretariat of the Council to some questions from Member States in their written comments.

Access to this table has been refused pursuant to the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001, so as to protect the decision-making process of the Council, and to the second indent of Article 4(2) of Regulation (EC) No 1049/2001, certain parts of this document also containing legal advice.

4. The applicant claims the following:

*«- Matters pertaining to lobby transparency, access to documents, transparency of decision-making are very relevant and there is a significant public interest in them. I note Article 10 of the Lisbon Treaty which says: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."*

*- It seems that my request is very similar to Case 280/11 P – 17/10/2013, AccessInfo Europe vs. the Council of the EU and I wondered why you had not applied the Court's ruling in my case. After all, the Court did not accept the Council's argument for withholding access to negotiating positions ("it makes it harder to reach compromise"). I ask you to reconsider your response to my request in the light of that Court ruling.*

*- With regard to the note "GCS internal note of 4 September 2018" and "Table on legislative transparency in two versions", given the document titles and their descriptions, one is led to assume that these documents particularly offer an insight into existing policy practices. Why disclosure of information concerning existing policy practices would specifically, actually and seriously undermine the decision-making process is unclear. It particularly is not clear why the public is to be denied the right to know how the Council precisely implements its transparency duty to provide access to documents.*

*- With regard to the document "GSC replies to the questions contained in the written comments of MS", there is a rather similar policy precedent where such answers to a survey were in fact made public while the negotiations were still ongoing (namely, in 2008/2009, on the revision of Regulation 1049/01). It is not clear why release cannot go ahead in this case.*

*- With regard to the non-disclosure of legal advice, it is not credibly explained why partial access would not be possible. Moreover, the jurisprudence concerning legal advice in non-legislative decision making is somewhat open-ended. The Court held in In 't Veld that legal advice in non-legislative decision making cannot a priori be excluded from the scope of the access to documents rules, and could in some situations pertain to decision-making procedures with a semi-legislative character (such as trade agreements). »*

5. 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 for access in full consideration of the principles underlying Regulation No 1049/2001, with the aim of ensuring the widest possible public access to documents.
6. In so doing the Council has carefully scrutinized the content of the documents, having due regard to the arguments of the applicant and to the current state of play on negotiations related to the issues.
7. The Council has also taken into account the public release of document 7888/19 and the deliberations in the Committee of Permanent Representatives on 2 May 2019.

### **General context**

8. In order to review its internal rules on legislative transparency, the Council launched a debate with a first discussion at the level of Ambassadors in the Committee of Permanent Representatives on 18 July 2018. The basis for this debate was document **11099/18** of 13 July 2018 which is publicly available in the Council's Register. Since progress and conclusions on such complex questions could not be achieved in one meeting, the Committee of Permanent Representatives has decided to mandate a Working Party of the Council to examine all details and to come-up with concrete ideas and suggestions.
9. The requested documents concern the discussions in this Council's preparatory body that held three meetings on 4 September, 11 October and 4 December 2018 discussing the aforementioned document **11099/18** as well as the possible options for evolution of current practices notably on the basis of a case study and a questionnaire prepared by the General Secretariat of the Council (GSC).

### Prejudice to the decision making-process of the Council.

10. From the general context described above, it is clear that the decision-making process at hand is not a legislative one, but one that pertains to the Council's internal procedural and administrative policy making. If the public interest in transparency is particularly strong when institutions act in their legislative capacity, it does not bear the same relevance as regards their decision-making in the administrative domain. In such an area, the interest of the public in the openness and transparency carries a lesser weight than in case of law making.
11. The Council therefore considers that the applicant's reference to the decision of the Court of Justice in case C-280/11 P *Access Info Europe vs the Council*, which was a judgement on a request for access to documents drawn-up by the Council in its legislative capacity, is not of direct relevance in this case.
12. The Council has re-assessed, also in view of the above considerations, the initial refusal of the GSC to grant (full) access to the documents mentioned above under point 3), which was notably justified on the ground that such disclosure would seriously undermine the decision-making process of the Council.
13. Taking into account the developments since the introduction of the initial request by the applicant as described under point 7, the Council believes that some requested documents do no longer need to be protected and can additionally be fully released. This is the case as regards documents under 3 a) and c) above.
14. As regards, however, the contributions of Member States and their replies to the questionnaire on legislative transparency, the Council reiterates that their disclosure would adversely affect the effectiveness of the ongoing decision-making process. It is to be noted that current discussions are complex, in a file where Member States have expressed very different positions and sensibilities. What is more, the Council considers that the documents in question do not reflect the views of all Member States and do not fully represent the ongoing debates.

Disclosure of provisional views and positions which ultimately may not be agreed could increase the risk of misperception, and/or create expectations by the public and stakeholders. These could be incited to launch interventions and/or actions that would put the Presidency and Member States under additional pressure. The discussions on Council internal procedural and organisational issues require the Presidency to be able to present all possible options without additional external pressure which is real and can be established with certainty<sup>1</sup>.

15. In case comments and opinions of delegations which are still under discussion were to become public, this may moreover refrain them from expressing or adjusting their opinions which would diminish the chances of reaching an agreement.
16. The above considerations also hold true as regards the document containing replies from the General Secretariat of the Council to some questions from Member States in their written comments. This document comments on specific questions raised by the Member's States and palliates matters having raised hesitation during the debates. The issues discussed therein are essential for ongoing discussions and their disclosure would adversely affect the decision-making for the same reasons developed above.
17. Therefore the Council considers that disclosure of the documents containing Member States' comments and replies to the questionnaire on legislative transparency as well as of the GSC document which replies to the Member States' questions would impede the proper conduct of the negotiations and compromise the conclusion of an agreement on this file and thus seriously undermine the Council's decision making process pursuant to the first sub-paragraph of Article 4(3) of Regulation (EC) No 1049/2001.

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<sup>1</sup> See for example docs. 8064/18, 12074/18, European Parliament resolution of 17 January 2019 on the Ombudsman's strategic inquiry OI/2/2017 on the transparency of legislative discussions in the preparatory bodies of the Council of the EU (2018/2096(INI)) and "Captured States" by Corporate Europe Observatory February 2019



### The overriding public interest in disclosing the requested documents

18. The Council notes that the arguments of the applicant in order to support the public interest in disclosure merely rely to the principle of transparency and its importance and generally refer to the Treaty provisions regarding the openness of the decision-making. They are non-detailed considerations which substantially amount at alleging that the topic is somehow being discussed by the general public. Based on the settled case law<sup>2</sup>, the Council considers that these considerations fail to show that the need for the public to have access to the requested documents is particularly pressing in the present case and that it should override the interest in protecting the ongoing decision making process.
19. This is all the more so in relation to the fact that the decision-making process at hand is not a legislative one but one that pertains to the Council's internal decision making process. The Council has already recalled (see above under point 10), that when discussing the mechanisms of proactive publication of the documents it holds, it is not acting in its legislative capacity according to Article 289 TFUE but in its administrative function and that, in such a domain, the public interest in transparency does not bear the same weight as in case of law making.
20. In light of its examination, the Council considers that protecting the effectiveness of its decision-making concerning the review of its policy on legislative transparency better serves the general interest than granting immediate public access to the requested documents. Thus, in its view, the public interest invoked by the applicant does not outweigh, in the particular case at hand, the interest in protecting the decision-making procedure under Article 4(3), first subparagraph, of Regulation No 1049/2001.
21. The Council therefore concludes that no overriding public interest in the disclosure of the documents related to Member States' comments and replies to the questionnaire on legislative transparency as well as to the GSC document replying to the Member States' questions, has been demonstrated.

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<sup>2</sup> See notably judgment of the Court of Justice in joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden and Others v. API and Commission, EU:C:2010:541; paras 157-158.



### Partial access to the documents

22. Pursuant to Article 4 (6) of Regulation 1049/2001, the Council has re-assessed the possibility of granting partial access to the documents to which access is refused.
23. Following this examination, the Council concludes that there are no parts of these documents to which the exception mentioned above would not apply.
24. The Council therefore maintains that it is not possible to give partial access to the documents that relate to Member States' comments and replies to the questionnaire on legislative transparency as well as to the GSC document replying to the Member States' questions.

### Conclusion

25. For the above-mentioned reasons, the Council concludes that:
  - Disclosure of the requested documents that relate to Member States' comments and replies to the questionnaire on legislative transparency as well as of the GSC document which contains replies to the questions raised by the Member States in their written comments would seriously undermine the decision making-process of the Council and, as a consequence, confirms that pursuant to Art.4(3) first subparagraph of Regulation (EC) No 1049/2001, access to these documents is refused.
  - However, in light of the considerations developed above and in particular those under point 7, full public access can be granted to following documents:
    - a) GSC internal note of 4 September 2018 on current practice on access to documents at the General Secretariat of the Council, and
    - b) table on legislative transparency (two versions).

The Council notes however, that as regards the positive decision, this is based on the specific examination of the requested documents and that it can under no circumstances constitute a precedent for the future, since each application shall be assessed and judged on its own merit, pursuant to the established practice of the Council.

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