



Council of the European Union
General Secretariat

Directorate-General Communication and Document Management
The Director-General

SGS16/06287

Brussels, 13 -07- 2016

Ms Helen Darbshire
Executive Director, Access Info Europe
Cava de San Miguel 8, 4C
28005 Madrid
Spain

Subject: Your confirmatory application

Dear Madam,

Please find enclosed the reply from the Council to your confirmatory application dated 24 March 2016.

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 or to make a complaint to the Ombudsman. 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

**REPLY ADOPTED BY THE COUNCIL ON 12 JULY 2016
TO CONFIRMATORY APPLICATION 13/c/01/16,
made by email on 24 May 2016,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to all the opinions issued by the Panel provided for
by Article 255 of the Treaty on the Functioning of the European Union**

A. INTRODUCTION

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) (hereinafter "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 19 February 2016, the applicant submitted a request for public access to all the opinions issued by the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union ("the Panel") since its establishment.
2. Upon receipt of the request, the General Secretariat of the Council consulted the Panel pursuant to Article 4(4) of Regulation 1049/2001 as to whether or not the requested opinions could be disclosed and the Panel expressed its opinion that, in the light of the applicable exceptions provided for in Regulation No 1049/2001, the opinions should not be disclosed.

3. Following the consultation of the Panel, the General Secretariat of the Council carried out its own assessment of the requested documents and on 4 May 2016 rejected the applicant's request for full public access on the basis of the exception concerning the protection of personal data (Article 4(1)(b) of Regulation No 1049/2001), the exception concerning court proceedings and legal advice (Article 4(2) second indent of Regulation No 1049/2001), the exception concerning the protection of commercial interests (Article 4(2) first indent of Regulation No 1049/2001), and the exception concerning the risk of seriously undermining the decision-making process (Article 4(3) of Regulation No 1049/2001). However the General Secretariat of the Council provided partial access to those parts of the Panel's opinions which were not covered by the above mentioned exceptions.
4. In its confirmatory application of 24 May 2016, the applicant asks the Council to reconsider this position. The applicant is of the view that:
 - A. Disclosure of the opinions would not undermine the privacy of the candidates. In particular, the applicant points out that:
 - (i) much of the information contained in the Panel's opinions, and notably both the candidates' "public credentials" and the Panel's assessment, would not be covered by the data protection exception since such information would not constitute "personal data";
 - (ii) the public interest in having access to the personal information contained in the opinion would outweigh any potential privacy concern of the candidates;
 - (iii) and in any event, the disclosure of the opinions would not prejudice any legitimate interests of the candidates assessed by the Panel;

B. Disclosure of the Panel's opinions would not jeopardize the candidates' commercial interests since:

- (i) candidates apply to become members of the Court on a voluntary basis;
- (ii) the assessment carried out by the Panel does not consist of an analysis of the general competences of the candidate as a lawyer or legal adviser but of a narrower set of skills required for the performance of a specific job.

C. Disclosure of the Panel's opinions would not jeopardize the Panel's functioning because:

- (i) the secrecy of deliberation of the Panel or its working method (e.g. level of detail of Panel's opinions) would not be automatically compromised by the publication of an opinion and the Council failed to provide arguments in support of the opposite view;
- (ii) it is not clear in what way disclosure of the Panel's opinions would affect the chances to reach an agreement by Member States;
- (iii) the argument based on the risk of a chilling effect on potential candidates is flawed;

D. The public has a legitimate, overriding interest in seeing all Panel's opinions, including the names of judicial candidates to the Courts and the reasons why they were recommended by the Panel.

5. The Council has reassessed, in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comments, whether public access can be provided to the requested documents and has come to the conclusions set out below.

B. THE CONTEXT

6. According to Article 255, first paragraph, of the Treaty on the Functioning of the European Union (TFEU), "[a] panel shall be set up in order to give an opinion on candidates" suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court".
7. The Panel - which is composed by seven members chosen among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence - provides its opinions to the intergovernmental conference that according to Articles 253 and 254 appoints the Judges and Advocates-General of the Court of Justice and of the General Court by common accord.
8. The Panel operates according to operating rules that have been laid down by Council Decision 2010/124/EU of 25 February 2010, in line with Article 255(2) TFEU. The operating rules establish a principle of confidentiality of the activity of the Panel and one of limited circulation of the relevant Panel documents (candidatures submitted to the Panel and Panel's opinions):
 - i. According to point five of the rules, "the deliberations of the Panel shall take place *in camera*";
 - ii. Point seven makes clear that "except where a proposal relates to the reappointment of a Judge or Advocate General, the Panel shall hear the candidate; the hearing shall take place in private";
 - iii. Point six provides that as soon as a Government of a Member State proposes a candidate, the General Secretariat of the Council shall send that proposal to the President of the Panel;
 - iv. Point eight states that the Panel's reasoned opinions "shall be forwarded to the Representatives of the Governments of the Member States". Moreover, at the request of the Presidency, the President of the Panel shall present an opinion to the Representatives of the Governments of the Member States' meeting within the Council.

9. The above provisions rule out that the assessments carried out by the Panel are carried out in public or addressed to the public; on the contrary, they make clear that the Panel's opinions are intended exclusively for the Member State governments in the context of the appointment procedure carried out by the intergovernmental conference.
10. As a consequence, the Panel's opinions are not proactively made accessible to the public. However, the Council stresses that the Panel has taken significant steps to make the public at large more acquainted with its activities. In particular, it submits to the Council activity reports with the aim of providing an overall view of the work carried out and a better understanding of its procedures. These reports are issued as public documents, directly accessible from the Council's public register of documents and on the website of the Court of Justice.¹
11. As regards the handling of requests for access submitted under Regulation 1049/2001 by a member of the public, the Council considers that the legal framework established by Council Decision 2010/124/EU has to be duly taken into account when interpreting the relevant provisions of Regulation 1049/2001 and assessing whether access to the Panel's opinions can be given.

C. THE REQUESTED DOCUMENTS

12. Point four of the Panel's operating rules stipulates that "[t]he General Secretariat of the Council shall be responsible for the panel's secretariat. It shall provide the administrative support necessary for the working of the panel, including the translation of documents".

¹ Activity Report of the Panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 17 February 2011, documents ST 6509/11

13. It follows from the functional link thus established between the General Secretariat of the Council and the secretariat of the panel provided for by Article 255 TFEU that the opinions issued on the candidates proposed to perform the duties of Judge and Advocate-General are prepared and drawn up by the members of that panel, with material assistance from the administrative services which the Council oversees and for which it is responsible. The opinions are subsequently forwarded by those services to the governments of the Member States; for the purposes of such transmission, therefore, the General Secretariat of the Council holds the opinions from the Panel, even though it is not the final recipient of those opinions.
14. It results from the above that the requested documents are held by the General Secretariat of the Council in execution of the tasks of administrative support to the Panel entrusted to it by the Council Decision 2010/124/EU, and therefore falling within the Institution's sphere of responsibility. As a consequence the Council considers that the applicant's request falls within the scope of application of Regulation 1049/2001.
15. The requested documents contain the opinions of the Panel on the suitability of the candidates proposed by the Member States to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court of the European Union. As the Panel has pointed out in its various activity reports, its opinions consist of an assessment of the candidates' legal expertise, professional experience, ability to perform the duties of a judge, language skills, aptitude for working in an international environment in which a number of legal traditions are represented and, finally, an assessment of the guarantees of the candidates' independence and impartiality.
16. In light of the content of the Panel's opinions, they can be classified in two different categories: a) opinions on new nominations, and b) opinions on renewals of mandates. Within each of these categories, both positive (in favour of the appointment of a candidate) and negative opinions (against the appointment of a candidate) can be found.

17. Both document categories follow a common structure and contain the same type of information. In particular:

a) Opinions on new nominations. In their first section, the opinions on new nominations contain some introductory paragraphs describing the main chronological and procedural milestones of the application submitted by the Member State concerned to the General Secretary of the Council. Reference is also made to the communications exchanged between, on the one hand, the permanent representation of the Member State concerned and the applicant himself, and, on the other hand, the secretariat of the Panel in preparation of the Panel's hearing. Second, the document provides a short description of the mandate of the Panel and of the requirements set up by the Treaty for the appointment to the post of Judge or Advocate-General of the Court of Justice or the General Court, as the case may be. The third section of each document contains the assessment of the candidate in the six areas identified by the Panel as relevant in light of the relevant provisions of the Treaties,² and notably: the candidate's legal expertise, his/her professional experience, his/her ability to perform the duties of Judge; the assurances of independence and impartiality and the aptitude for working in an international environment in which several legal systems are represented, including the candidate's linguistic skills. For each of these areas, the opinion includes an analytical assessment of the elements resulting from the dossier submitted in support of the candidature (including a detailed candidate's CV which enumerates his/her academic qualifications, the different posts he/she has held during his/her career, as well as his/her relevant publications), as well as the elements resulting from the hearing of the candidate. In light of the result of these analytical assessments, the document finally reports the global assessment of the candidate and the conclusion of the Panel on his/her suitability to perform the duties of Judge and Advocate-General.

²

See section III of the Activity Report of the Panel mentioned in the previous note.

b) Opinions on renewals of mandates. According to point 7 of the Panel's operating rules, opinions on the reappointment of a Judge or Advocate-General are adopted without a hearing of the candidate but only on basis of an assessment of his/her dossier. Such a difference is reflected in the structure and content of the opinion, which is therefore more concise. In their first section, the opinion contains some introductory paragraphs describing the main chronological and procedural milestones of the application for a mandate renewal submitted by the Member State concerned to the General Secretary of the Council. Second, as in the case of opinions on first or new nominations, the document provides a short description of the mandate of the Panel and of the requirements set up by the Treaty for the appointment to the post of Judge or Advocate-General of the Court of Justice or the General Court, as the case may be. The third section of each document contains the assessment of the candidature on the basis of his/her dossier and of the list of cases dealt with by the candidate during its term of office. In light of the result of these analytical assessments, the document finally reports the global assessment of the candidate and the conclusion of the Panel on his/her suitability to be renewed in the function of Judge or Advocate-General.

18. Considering that the requested documents follow the same structure and contain the same type of information depending on the category they belong to, the Council, in line with the relevant case law,³ will consider similar documents together and will provide a single justification applicable to all the documents belonging to the same category.

³ Judgment in *EnBW Energie v Commission* (T-344/08, ECLI:EU:T:2012:242, paragraph 46).

D. ASSESSMENT OF THE REQUESTED DOCUMENTS IN VIEW OF THE APPLICABLE EXCEPTIONS

19. The Council considers that the requested documents fall within the remit of the exceptions relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation No 1049/2001), the protection of commercial interests (Article 4(2), first indent of Regulation No 1049/2001), and the protection of the decision-making process (Article 4(3), first subparagraph of Regulation No 1049/2001). The Council will analyse the various exceptions in order.

D.1. The protection of the privacy and the integrity of the individuals concerned

20. The Council considers that the requested opinions contain for most of their parts personal data of the candidates to the posts of Judge and Advocate-General to which they refer.⁴ In particular, the Council considers that the notion of personal data manifestly covers both the factual elements concerning the candidates' professional experience and qualifications and the Panel's assessment of the candidate's competences.
21. The much narrower interpretation of the notion of personal data proposed by the applicant in its confirmatory application (see above para. 4A) cannot be shared. The idea that very much personal information such as information on the candidates' professional experience or qualifications would not qualify as personal data in light of the fact that such information is at least partially in the public domain is manifestly contradictory, since the nature of a piece of information is not altered by its public character. Similarly, the Council fails to see how assessments that concern the personal qualities of the candidates could be excluded from the notion of personal data. Furthermore, the fact that the personal data contained in the requested documents do not belong to a special category of sensitive data, such as health data, does not mean that such data do not deserve the protection conferred by the applicable norms. In this sense, the applicant's attempt to differentiate between different categories of personal data for the purpose of avoiding the application of the relevant exception must be rejected.

⁴ The parts of the opinions which do not contain personal and which mainly provide a description of the procedure followed by the Panel have been released in the framework of the partial access to the requested documents.

22. As a matter of fact, the applicant's point of view contrasts clearly with the applicable legislative texts and the relevant case law. According to Article 2 of Regulation 45/2001, personal data is in broad terms "any information relating to an identified or identifiable natural person". Moreover, the Court of Justice has constantly rejected any attempt to interpret restrictively the notion at issue. In particular, it has stressed that professional data or information provided as part of a professional activity may well be characterised as personal data;⁵ it has pointed out that objection or the agreement to disclosure is not a constituent part of the concept;⁶ it has further stressed that the fact that certain information has already been made public does not exclude its characterisation as personal data;⁷ finally, names and forenames, even when alone, qualify as personal data.⁸
23. In light of the above, the Council considers that the refused parts of the requested documents contain personal data and therefore fall within the remit of the exception provided for by Article 4(1)(b) of Regulation No 1049/2001.
24. According to established case law, where an application is made seeking access to personal data within the meaning of Article 2(a) of Regulation 45/2001, the provisions of that Regulation become applicable in their entirety.⁹ More specifically, according to Article 8(b) personal data may be transferred to a third party only if two cumulative conditions are met: (a) the recipient establishes the necessity of having the data transferred and (b) there is no reason to assume that the transfer might prejudice the legitimate interests of the data subject.¹⁰ If such a reason exists, the Institution concerned must weigh the various competing interests in order to decide on the request for access.¹¹

⁵ Judgment in *Commission v Bavarian Lager* (C-28/08, ECLI:EU:C:2010:378, paragraphs 66 to 70).

⁶ Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 33).

⁷ Judgment in *Satakunnan and Satamedia* (C-73/07, ECLI:EU:C:2008:727, paragraphs 48 and 49).

⁸ Judgment in *Commission v Bavarian Lager* (C-28/08 P, ECLI:EU:C:2010:378, paragraph 68.)

⁹ Ibidem, paragraph 63.

¹⁰ Judgment in *ClientEarth et al. v European Food Safety Authority* (C-615/13 P, ECLI:EU:C:2015:489, paragraph 45).

¹¹ Ibidem paragraph 47.

The necessity and proportionality of the transfer

25. It is up to the applicant to show whether the transfer of the requested personal data is necessary, that is to say, whether it is the most appropriate measure to achieve the objective pursued by the applicant and if it is proportional to that objective.¹²
26. In that regard, the applicant argues that having access to the names and credentials of judges is essential to comply with the principles of transparency and openness, to ensure trust in the EU Institutions and in the EU Courts in particular,¹³ and more specifically to allow the public to verify the fairness of the selection procedure and the qualifications and independence of the members of the EU Courts.¹⁴
27. The Council does not consider that the applicant's arguments are sufficient to establish the necessity of the transfer of the requested personal data.
28. To start with, as far as the applicant generally refers to the principles of transparency and openness of the EU Institutions, it should be stressed that Regulation 1049/2001 only provides a right of public access to the extent that none of the exceptions provided by said Regulation applies. The automatic prevalence of the principle of transparency over data protection has been expressly ruled out by the Court.
29. As regards the objective to ensure the public trust in the EU courts and more specifically to allow public control on the competence and qualifications of the members of the EU judiciary, the Council stresses that these are exactly the objectives that have led to the establishment of the Panel in the first place and have inspired the Panel's operating rules, which foresee *inter alia* the confidentiality of its activities (see above).

¹² Judgment in *Dennekamp v European Parliament* (T-115/13, ECLI:EU:T:2015:497, paragraphs 59, 77 and ff.).

¹³ See confirmatory application page 3.

¹⁴ See confirmatory application page 4 and 7.

30. In that regard, the Council further stresses that if transparency is crucial to allow the citizen to hold accountable the political decision-makers and therefore to strengthen the democratic legitimacy of the EU Institutions having a representative nature, it plays a very different role in relation to the EU judiciary. The legitimacy of the Judges and Advocates-General is first and foremost assured by their independence, objectivity and professional competence and not by the control of the public opinion. It is not for the member of the public to assess the suitability of the candidates to the post of Judge or Advocate-General.
31. In this context, the disclosure of personal data requested by the applicant would, for the reasons that will be set out in section D.3 below, risk compromising the effective selection of suitable candidates to the post of Judges and Advocates-General and therefore undermine, rather than pursue, the objective of ensuring the public's trust in the EU Courts.
32. In any event, the Panel already publishes detailed reports of its activities which provide an accurate account of its working methods and of the criteria for the assessment of the candidates. The Council considers that this information suffices to reassure the public on the fairness of the selection procedure and guarantees that the best candidates will be retained. However, the applicant has not taken this circumstance into account and has failed to show why the massive transfer of personal data that it requires would be the only appropriate measure to achieve the objective pursued.
33. Moreover, the scope of the data transfer requested by the applicant is not proportionate in relation to the objective pursued. If the objective is to allow public control on the competence and qualifications of the members of the EU judicature, the Council fails to see why it would be necessary to transfer the data of those candidates that have not been appointed as judges or advocates-general.

The prejudice to a legitimate interest of the candidates

34. The Council considers that the disclosure of the requested personal data would inevitably cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.
35. This conclusion is straightforward in case of negative opinions. The demanding professional requirements associated with the post of Judge or Advocate-General attract usually individuals of a particularly high seniority and who often hold prominent positions, both at national and EU level, such as judges in the highest instances or renown professors. The reputation of individuals in such positions would inevitably suffer a greater damage should negative opinions concerning them were made public. Such a reputational damage could even have an effect on potential career prospects, both at the national and at an international level, even if the opinion of the Panel is on the suitability of the candidate to perform the functions of a Judge or Advocate-General in the Court of Justice or the General Court. In this respect, it is to be reminded that the criteria of evaluation identified by the Panel in its reports are broad and go well beyond the knowledge of EU law.
36. As regards positive opinions, it should be stressed that such opinions provide an assessment of the individual qualities of the candidate on the basis of which the Panel has reached the conclusion that the candidate in question is suitable to perform the functions applied for. It cannot be excluded that, even if positive, an opinion may contain remarks or observations; point out certain less solid elements in the candidate's qualifications or profile or make clear that the positive opinion has been decided by a majority vote (rather than unanimously). It is clear that, if disclosed, elements like those could affect the interests of the person already appointed as Judge and sitting at the Court.
37. Moreover, disclosing the positive opinions on the Judges in function may lead to an inevitable comparison of the qualities of those Judges which would be harmful to the persons concerned but also to their activity as members of the Court.

38. However, the applicant points out that the personal data relating to the professional competence of a public figure require a lower level of protection than the one applicable to personal data concerning the private sphere. In support of his argument, the applicant makes reference to the submission of the EDPS in the *Denekamp* case.¹⁵
39. In that regard Council points out that the *Denekamp* case concerned personal data of members of the European parliament and that the position of elected politicians is substantially different from the one of judges. While the lower degree of protection of personal data concerning a MEP public sphere can be justified by the need for elected representatives to be accountable to citizens and by their voluntary exposure to the public opinion, the same circumstances manifestly do not apply in case of judges. Judges are not elected and the serene and orderly exercise of the judicial function requires that judges are subtracted from the pressure of the public opinion.
40. In light of these considerations, the Council deems that the disclosure of the requested personal data would cause prejudice to a legitimate interest of the candidates and that, on balance, those interests prevail on the objectives pursued by the applicant. The requested opinion should therefore be refused.

D.2 The protection of the candidates' commercial interests

41. The Council further considers that the disclosure of the requested documents would undermine the protection of the candidates' commercial interests, in the event that they carry out or intend to carry out paid work as lawyer or legal advisers. As it was explained in the reply to the candidates' initial application, the risk that the commercial interests of the candidates is undermined becomes greater where the opinion to be disclosed is unfavourable to the appointment of the candidates but this cannot be excluded in case of positive opinions either, in light of the arguments developed in points 35 to 37 above.

¹⁵ See above note 12. The EDPS submission is retrievable at <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Court>

42. In its confirmatory application, the applicant considers that the argument put forward by the Council is not convincing. In the first place, it argues that the candidate has voluntarily submitted their candidature for a post of Judge or Advocate-General and in so doing it has accepted that his competences may be "publicly assessed".¹⁶ In that regard, the Council points out that, contrary to the applicant's suggestions, the procedure for the assessment of the candidates to the posts of Judge and Advocate-General is not at all a public procedure, as the operating rules of the Council make clear (see above point 8). In such circumstances, the voluntary character of the participation in the procedure cannot be deemed to imply acceptance of the disclosure of personal data that could harm the commercial interests of the candidates.
43. The applicant further argues that the candidates' commercial interests would not be affected by disclosure of an unfavourable opinion on their application because "the panel is not asked to verify the general competences of the candidate as a lawyer of legal adviser but a narrower set of skills required to the performance of a very specific job".¹⁷ Yet, while the positions of Judge and Advocate-General of the Court are indeed very specific positions, the fact remains that the evaluation made by the Panel takes into account the academic record, the professional experience and the performance of the candidates at the interview. All this information would be relevant for any other position both in the public or the private sector for which the candidates would eventually be considered since, overall, it shows the capabilities of the candidates as legal professionals. Therefore, it cannot be denied that, in particular, the disclosure of an unfavourable opinion could have a negative impact in the candidates' chances to succeed in other competitions.

¹⁶ See point B, page 5 of the confirmatory reply.

¹⁷ Ibidem.

D.3 The protection of the decision-making process

44. The Council also considers that disclosure of the requested documents would seriously undermine the decision-making process leading to the appointment of Judges and Advocates-General, and this would be so even after the concerned candidate has been appointed (Article 4(3) of Regulation 1049/2001).
45. To start with, the publication of Panel's opinions would affect the confidentiality of the procedure for the assessment of the candidature. In that regard, it has to be recalled that the principle of the secrecy of the proceeding of assessment bodies is widely acknowledged in EU law and finds its justification in the need to guaranteeing the independence of the assessment bodies and the objectivity of their proceedings, by protecting them from all external interference and pressures.¹⁸ This rationale applies of course all the more to Article 255 TFEU.
46. In the case of the Panel, the principle of confidentiality has been expressly enshrined in the Panel's operating rules which set out a number of specific provisions concerning the modalities for the conduct of Panel's meetings and a specific regime of circulation and access to documents (see point 8 above). It is clear that those rules pose a problem of coordination with the provision of Regulation 1049/2001.
47. According to well-established case law, when a potential conflict exists between the provisions of Regulation 1049/2001 and a specific set of rules regulating the regime of circulation and access to documents in the framework of a specific procedure, the conflict has to be solved by interpreting the exception provided in Regulation 1049/2001 in line with the special regime. This ensures that the procedure to which such a regime is associated operates correctly and guarantees that its objectives are not jeopardised.

¹⁸ See for instance in the domain of selection of personnel and Staff Regulations, Judgment in *Gonzalo de Mendoza Asensi v European Commission* (Case F 127/11, ECLI:EU:F:2014:14, paragraph 93).

48. Typically, such a normative coordination is carried out by the recognition of a general presumption. Such a presumption is based on the fact that access to a document involved in the specific procedure would be incompatible with the proper conduct of that procedure and aims at ensuring the integrity of the conduct by limiting the intervention of third parties.
49. In the present situation, there is no doubt that the disclosure of the requested documents would undermine the conduct of the selection procedure, and notably its confidential character, as expressly foreseen in the Panel's operating rules. It follows that, in line with the recent case law,¹⁹ the Council can in the present case effectively invoke a general presumption according to which the disclosure of the Panel's opinions would, as a matter of principle, seriously undermine the Panel's decision-making process.
50. The Council notes that even if the existence of a general presumption was put in question, the serious risk for the decision-making process leading to the appointment of members of the EU judicature results from a number of circumstances.
51. To start with, a number of elements and considerations developed above in relation to the prejudice to the candidates' reputation and commercial interests have broader systemic implications for the correct functioning of the selection procedure for Judges and Advocates-General. As the Council has pointed out in its first reply, disclosure of opinions, even if favourable, could dissuade future qualified candidates from applying in fear of the negative impact of the Panel's opinions in their reputation. This "chilling effect" is linked to the fact that, as mentioned above, potential candidates are usually individuals of particularly high seniority and visibility at the national level who could be deterred from participating in the selection procedure if their reputation could be at risk. The phenomenon is already taking place and various Member States have pointed out the difficulty to identify national candidates when a vacancy becomes available. In at least one recent case it seems that the reticence of a potential candidate was directly linked to the risk of a negative assessment by the Panel. Episodes like this will only aggravate should the publication of the Panel's opinions become systematic.

¹⁹ See in particular judgment in *Alexandrou. v Commission* (T-515/14 P and T-516/14 P, ECLI:EU:T:2015:844, paragraph 88 and following).

52. In reply to this argument, the applicant maintains that more transparency would rather mitigate the reputational risk, which today is multiplied by the "speculation, chattering and manipulation" that would affect the current confidential policy. The Council considers that this statement merely reflects an opinion, and it is not substantiated by any element of fact that would allow to reach such a conclusion.
53. Furthermore, disclosure of the requested opinions would affect the working methods of the Panel. In particular, as the Council has already pointed out in its first reply, the Panel could become more restrained and more guarded when drafting its written opinions. Such a development would however be unfortunate since, on the one hand, it would greatly reduce the usefulness of the Panel's opinions with the effect of rendering more difficult the work of the Intergovernmental Conference which is called to appoint Judges and Advocates-General.
54. On the other hand, the Panel could decide to have a more systematic recourse to the possibility, provided for in its operating rules, to present orally its opinions to the Intergovernmental Conference (point 8.2 of the operating rules). Thus, as the applicant correctly points out, an attempt to promote more transparency would in fact lead to less transparency. In that regard, the Council considers that the precedent *AccessInfo v Council*²⁰ mentioned by the applicant is not relevant in the present situation since the documents requested in that case pertained to a legislative procedure and therefore the principle of transparency was, unlike in the present situation, particularly pressing.

²⁰ Judgment in *Council v AccessInfo Europe* (C-280/11 P, ECLI:EU:C:2013:671).

55. The Council points also out that the Panel provides its opinions to an intergovernmental conference composed by the Representatives of the Member States that appoints the Judges and Advocates-General by common accord. Disclosure of the opinions of the Panel would inevitably attract the attention of the public and possibly of the media on the assessment of the candidates. This in turn could lead to a politicisation of the issue and the adoption of postured positions with the effect of significantly reducing the marge of manoeuvre of the Member States in the negotiations that are necessary for the adoption of a decision by common accord. In the framework of a political discussion on the appointments, the so far much respected opinion of the Panel could be put into discussion in light of considerations of political nature that would ultimately affect the quality of the selection of Judges and Advocates-General.
56. For all the reasons stated above, the Council considers that disclosure of the requested opinion would undermine the decision-making process leading to the appointment of Judges and Advocates-General and therefore has to be refused in line with Article 4(3) of Regulation 1049/2001.

D.4 The protection of court proceedings

57. The Council notes that the disclosure of the Panel's opinions could also undermine the orderly conduct and the serenity of court proceedings.
58. As it has already been pointed out,²¹ it cannot be excluded that positive opinions may contain remarks or observations or point out less solid elements in the candidate's qualifications or profile or make clear that the positive opinion has been decided by a majority vote (rather than unanimously).

²¹ See point 36 above

59. If disclosed, that assessment could become the topic of a public debate and cast a shadow on the profile of serving judges of the EU jurisdictions. Depending on the type of observations made in the positive opinion, the image of knowledge, expertise, objectivity or effectiveness of the Judge or Advocate-General concerned may be undermined or put in question in such a public debate. This would in turn affect the reputation of the Court as a whole in the eyes of the public, and even provoke requests or criticisms by the party to the proceedings. In short it could create problems for the orderly and serene conduct of the Court proceedings.
60. The same risks would of course also apply in case of positive opinions on renewal of mandates.
61. It results from the above that disclosure of the requested documents should be refused also in relation to the exception protecting court proceedings.

D.5 The overriding public interest in disclosure

62. When an Institution finds that one of the interests protected by the exceptions provided for in article 4(2) and 4(3) would be undermined by disclosure, it has to verify whether an overriding public interest exists that would nonetheless justify disclosure.
63. In the present case, the applicant considers that, in view of the crucial role played by the Court of Justice in the EU legal order, there is a particular pressing need for openness and transparency of the procedure leading to the appointment of Judges and Advocates-General of the EU Courts. According to the applicant, "the European public must have a way of establishing a check on the independence, qualifications and experience of the members" of the EU judiciary. This need would be especially time-sensitive given the ongoing implementation of the General Court's reform, entailing the doubling of its membership.
64. The Council acknowledges that transparency - and more specifically legislative transparency - plays a crucial role in the correct functioning of the EU democratic system as it clearly results from the Treaties, secondary legislation and the relevant case law.

65. However, the Council deems here useful to refer to the considerations that it has developed in points 29-32 of the present reply and to underline once more that in a democratic society transparency and public participation have not the same role in relation to the legislative activity and in respects of the role of the judiciary.
66. Magistrates are not accountable to the public at large but are subjected only to the law. As we have already pointed out, their position cannot be compared to that of politicians or citizens' representatives. As a consequence, the procedure for their appointment needs to strike a balance too between the need to select the candidates with the best legal expertise, professional experience and guarantees of objectivity and the principle of transparency.
67. In the present case the Council is of the view that such a balance is satisfied by the significant level of transparency that is already assured by the periodical publication of detailed reports on the activity of the Panel, which provides information about its working methods, the criteria for the assessment of the candidates and its overall yearly activity.
68. On the contrary, when it comes to the publication of individual opinions on the suitability of candidates for the post of Judge and Advocate-General, the Council considers that, on balance, the public interest in having access to those opinions does not override the interests for the protection of the decision-making, of commercial interests and of legal advice.
69. The Council would like to conclude by underlining that the difficult issues raised by the applicant requires to strike a delicate balance between opposing interests. Various alternatives are available and the Institutions shall be recognised a wide margin of appreciation in defining, in the full respect of the law of the Union, the solution that is deemed to better serve the interests at stake.

E. PARTIAL ACCESS PURSUANT TO ARTICLE 4(6) OF REGULATION NO 1049/2001

70. The Council has carefully reconsidered whether partial access could be granted to the requested opinions.
 71. In that regard, it has considered the sample of opinions to which partial access had been granted in the first reply but it has come to the conclusion that no further access can be granted beyond the second section of the opinions (see above point 17), since the remaining parts of the documents all fall within one of the exceptions identified above.
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