



SGS18/07960

Council of the European Union
General Secretariat

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

Brussels,

09 -10- 2018

Ms Anne Friel

Email: ask+request-5395-d6c8665b@asktheeu.org

Subject: your confirmatory application

Dear Madam,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 21 June 2018.

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 Court¹ or to make a complaint to the Ombudsman². 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

¹ 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/

² 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 9 OCTOBER 2018
TO CONFIRMATORY APPLICATION 15/c/01/18,
made by email on 21 June 2018,
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 11 April 2018, the applicant submitted a request for access to the following documents:
"[...] the minutes of the Agriculture and Fisheries Council held on 11-12 of December 2017, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2018. [...] 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. [...] written comments from Sweden and France on the Commission's proposal, if these exist [...] any additional documents used by Member States to support deviation from the Commission's proposal; records, minutes or notes of the Council Working Party discussions held in the lead-up to December Council; a full table of all proposed and agreed quota top-ups (in tonnes and %) and TACs before the top-ups were applied."
2. In its reply dated 31 May 2018, the General Secretariat of the Council transmitted to the applicant all the requested documents in its possession.

3. In the confirmatory application dated 21 June 2018, the applicant claims that the minutes do not contain any information on how the different Member State positions published in the Council's documents register were ultimately reconciled, leading to the adoption of TACs. Similarly, the applicant claims that "the Council's documents register does not contain any record or minutes of the discussions that took place at the various working party meetings in the lead up to the Agriculture and Fisheries Council, nor has the Council provided the applicant with such documents".
4. References are made to Article 10(3) of the Treaty on European Union, to the Regulation 1049/2001, Article 2 and Recital 2, to the judgment of the Court of First Instance of 25 April 2007 in Case T-264/04 in case *WWF European Policy Programme v Council*.
5. The applicant also claims a breach of the provisions of Regulation (EU) No 1380/2013 on the Common Fisheries Policy based on the argument that reasons for any departure from the Commission's proposal and the reflected scientific advice must be recorded.
6. Other references are made to Ombudsman requirement of transparency in the Council. The applicant also compares the level of transparency in trilogues to the level of transparency in negotiations that result in the Council Regulation setting the TACs and fishing quotas.
7. In addition to this, the applicant specifically requested access to documents on the proposed and agreed quota top-ups and TACs before the top-ups were applied. No information on this has been provided and almost nothing has been published in the Council's document register according to the applicant.
8. Finally, the applicant contests that the initial list of documents was complete and requests the Secretary General to conduct a verification of whether all documents falling under the scope of the request have been identified at the initial stage.
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 31 May 2018, the General Secretariat of the Council transmitted to the applicant all the requested documents in its possession. Not only relevant parts of document 15686/17 INIT covered by the initial request of the applicant, but also all written comments by Delegations of 15 Member States were released. 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 2018.
11. 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 concerned¹. 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 exist².
12. 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

13. 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 [...]".
14. 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.
15. 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 exist³.

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

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

³ 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

This list of procedural steps and documentation provides a full overview of the Council decision making process.

16. 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 any other relevant provisions. All the documents mentioned below in parentheses have been communicated to the applicant.
17. The Commission Proposal of 7 November 2017 for a Council Regulation fixing for 2018 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 13780/17 + ADD 1 + ADD2+*) was examined during seven meetings of the Working Party (9, 15/17, 23 and 30 November 2017 and 5 December 2017) and one COREPER session on 6 December 2017 before a political agreement was reached at the Agriculture and Fisheries Council on 11-12 December 2017.
18. The documentation for the discussions has been 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 14316/17 of 14 November 2017, 14317/17 of 16 November 2017 and 14777 of 22 November 2017*).
 - b) Delegations' comments on these proposals, received between 23 November and 8 December 2017, were circulated in *document 13780/17* and its *ADD1 to ADD26*. 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) A new Commission non-paper providing updates was received and circulated to the members of the Working Party on 24 November 2017 (*document 14915/17*).
 - d) During the discussions, the delegations and the Commission took into account the scientific analyses available.

- e) 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 28 November 2017, referred to by the applicant as "the bible" (*doc.14912/17 + ADDs and REVs*). This document was complemented and updated until 8 December 2017. Over its 241 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.
- f) Further updates from the Commission were received on 29 November 2017, 1 and 5 December 2017 (*documents15198/17, 15324/17, 15348/17 and 15422/17*).
- g) The Presidency informed on 6 December 2017 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 14842/17*).
- h) On 6 December 2017, the General Secretariat of the Council transmitted to the Council a consolidated version of the 2017 TAC and Quotas Proposal prepared by the Commission services (*documents15398/17 + ADD 1 + ADD 2*).
- i) Further updates from the Commission were circulated on 8 December 2017 (*documents14845/17 and 15619/17*).
- j) Based on the consolidated version, the Presidency submitted to the Council a compromise proposal on 12 December 2017 (*document 15666/17*).
- k) This compromise proposal was complemented and modified by *document 15687/17 and its REV1* from the Presidency to the Council of 13 and 14 December 2017 respectively.
- l) In the light of the political agreement reached at the Agriculture and Fisheries Council on 11-12 December 2017, a consolidated text of the proposal was circulated on 18 December 2017 (*document 15807/17 + ADD1 + ADD2*).
- m) A list of statements by the Council, the Commission and delegations was published on 16 January 2018 (*document 5382/18*).
- n) The minutes of the Agriculture and Fisheries Council of 11-12 December 2017, document 15686/17 + ADD1 of 15 January 2018, were drafted in accordance with Article 13 of the Council's Rules of Procedure.

19. 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.

IV. Conclusions

20. 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.
21. 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."
22. 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. However, it may not be excluded that such information could be held by the Commission and by the national competent authorities within the meaning of Directive 2003/4/EC which were involved in the discussions leading up to the adoption of the Council Regulation fixing for 2018 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.
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