



Ildikó GÁLL-PELCZ
Vice-President

REGISTERED LETTER
WITH ACKNOWLEDGEMENT OF RECEIPT

312107 08.07.2015

[REDACTED]
Fundamental Rights European Experts Group,
[REDACTED]

Dear Mr De Capitani,

Re: Your confirmatory application for access to European Parliament documents
Our reference: A(2015)4931 (to be quoted in any future correspondence)

On 15 April 2015, the European Parliament received your application, under Regulation (EC) No 1049/2001, seeking public access to documents related to early agreements in the current co-decision procedure, and in particular to multi-column tables submitted to trilogues.

Parliament identified 40 co-decision/ordinary legislative procedures falling within the scope of your initial request, concerning 119 documents in total.

On 3 June 2015, Parliament refused public access to these documents on grounds that, due to the very large number of documents involved by your application, its processing would have created an excessive administrative burden for Parliament, contrary to the principles of proportionality and good administration, as recognised by settled case law¹.

On 22 June 2015, Parliament received your confirmatory application under Article 7(2) of the above-mentioned Regulation, by which you asked the institution to reconsider its initial position, while narrowing the scope of your request, in order to take into account Parliament's arguments about the very large number of documents involved by your initial application and the excessive administrative burden that its processing would have implied for Parliament's administration.

Parliament therefore assumes that it was your intention to limit the scope of your confirmatory application to multi-column tables related to legislative procedures based on Article 16 of the Treaty on the functioning of the European Union (TFEU) or falling within the scope of Title V of TFEU, "*Area of Freedom, Security and Justice*".

¹ Judgment of the Court of Justice of 2 October 2014 in case C-127/13, *Strack v Commission*.

Pursuant to Rule 116 (4) and (6) of the Rules of Procedure of the European Parliament and to Article 15 of the Decision of the Bureau of the European Parliament, dated 28 November 2001, on public access to European Parliament documents, I, as Vice-President responsible for matters relating to access to documents, am responding to your confirmatory application, on behalf and under the authority of the Bureau.

Parliament has identified the following procedures as relevant to your application:

<i>Legislative procedure</i>	<i>Number of multi-column tables concerned</i>
2012/0360(COD)	2 documents: JURI-2012-0360-01 JURI-2012-0360-02
2013/0081(COD)	1 document: LIBE-2013-0081-01
2013/0091(COD)	3 documents: LIBE-2013-0091-01 LIBE-2013-0091-02 LIBE-2013-0091-03
2013/0408(COD)	1 document: LIBE-2013-0408-01

Preliminary remarks

Multi-column documents are the main working tool of the institutions when they discuss legislative proposals with a view of reaching an agreement. They stem from the conciliation procedure, although they are at present used also for negotiating first reading and early second reading agreements in trilogues. Trilogues are usually conducted in an informal framework and multi-column documents are intended to help reconciling the positions of the three institutions with a view to clearing the way for the adoption of the act concerned at an early stage of the procedure². From this perspective, multi-column documents have been developed as a pragmatic way of ensuring that the negotiations progress in an orderly fashion, that all parties involved receive the latest information and the internal transparency of the negotiation process is guaranteed.

According to Parliament's Rules of Procedure, multi-column documents are conceived as joint documents, indicating the position of the respective institution with regard to each individual amendment and also including any compromise texts distributed at trilogue meetings. Whereas the first column (Commission proposal) and second column (Parliament position, a committee report, plenary amendments or plenary resolution) are public, the third column (Council mandate) and fourth column (compromise text) often contain text elements that have not yet been adopted.

Under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, access to documents related to a matter where the decision has not been taken by the institution may be refused, if disclosure of such documents would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure.

Therefore, as your application for public access concerns documents drafted in the course of a procedure for adoption of a legally binding act, at a stage when a final decision has

² Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on practical arrangements for the codecision procedure, OJ C 145, 30.6.2007, p. 5.

not yet been taken, the documents at hand might be covered by the exception provided for in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, intended to protect internal decision making.

According to settled case law³, in order to defend a full or partial refusal to public access to documents established in the context of a legislative procedure, pursuant to Article 4(3) of Regulation (EC) No 1049/2001, the institution has to demonstrate that public disclosure of such documents would specifically and effectively undermine its decision making process.

Individual assessment of the documents concerned

In order to strike the appropriate balance between the public interest in disclosure and the protection of the institution's decision making process, Parliament has individually assessed each document concerned by your confirmatory application, with a view to determining whether access to a given multi-column document may be partially or fully granted. Such individual assessment led Parliament to conclude as follows:

A) 2012/0360(COD) - Insolvency proceedings

Full access to the two documents related to this procedure can be given.

B) 2013/0081(COD) - Third-country nationals: conditions of entry and residence for the purposes of research, studies, pupil exchange, training, voluntary service and au pairing

Full access to the document related to this procedure can be given.

C) 2013/0408 (COD) Procedural safeguards for children suspected or accused

Full access to the document related to this procedure can be given.

D) 2013/0091(COD) European Union Agency for Law Enforcement Cooperation and Training (Europol)

Full access can be given to document LIBE-2013-0091-01.

As regards documents LIBE-2013-0091-02 and LIBE-2013-0091-03, only partial access can be granted, pursuant to Article 4(6) of Regulation (EC) No 1049/2001, read in conjunction with the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In this regard, columns 1 to 3 contain publicly available information and can therefore be disclosed. Column 4 cannot be disclosed as disclosure would risk seriously undermining the institution's decision-making process, as referred to in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Documents LIBE-2013-0091-02 and LIBE-2013-0091-03 were drawn up by Parliament in the context of ongoing trilogue negotiations. They relate to a matter where the final

³ Council vs Access Info Europe, T-233/09 (and C-280/11 P) and Sweden and Turco vs Council, C-39/05 P and C-52/05 P

decision has been taken neither by Parliament nor by the co-legislators currently negotiating these legislative files. The decision-making process has thus to be considered as ongoing.

Public disclosure at this stage of column 4 of documents LIBE-2013-0091-02 and LIBE-2013-0091-03 containing the "provisional compromise text" and "preliminary positions of the presidency" would actually, specifically and seriously undermine the decision-making process of the institution as well as the inter-institutional decision making-process in the context of the ongoing legislative procedure.

The area of police cooperation only recently became subject to the ordinary legislative procedure. It is a very sensitive area, in particular for Member States, and trust is an important factor, not only between Member States but also with regard to the European institutions. Cooperation between the institutions is functioning well and there is a foreseeable risk that disclosing the Presidency's position before the end of the negotiations would harm the overall good cooperation and negatively affect the negotiation process. A loss of mutual trust and time would be the consequence. Working methods agreed so far between the parties would need to be revised. All these effects will negatively impact Parliament's internal decision-making and hinder attempts to find a common political line. Furthermore, on neither of the documents in question have negotiations been concluded. The risk of negatively affecting the decision-making process can only be excluded once agreement on all parts of the documents has been reached and both sides have approved the agreement.

Moreover, as regards the specific legislative procedure concerned, on certain points further internal discussions between rapporteur, shadow rapporteurs and political groups are still not finished at this moment. These discussions concern the very sensitive issues of data protection and the management board of Europol. Disclosure would most likely lead to public pressure being exerted on Members involved in the negotiations, making finding a common line within Parliament either impossible or at least much more difficult. Such external pressure will most likely focus on partial issues while trilogues are supposed only to arrive at a globally balanced approach. As a consequence, the internal decision-making process and, subsequently the inter-institutional negotiations would risk to become blocked.

Besides, disclosure of the relevant column at this stage would make the Presidency more wary about sharing information and cooperating with the parliament negotiating team, and in particular with the rapporteur, who is the central contact point and who has the task of building the common negotiating position on the Parliament side. Being no longer able to cooperate with the Presidency, however, would have a negative impact on the standing of the rapporteur vis-à-vis his fellow colleagues. This would again complicate the internal decision-making for finding a common line. Furthermore, the relationship of trust established with the Presidency would be queried in a serious manner.

Parliament's negotiating team would, due to increased public pressure namely by national authorities and interest groups, based on the document being made available, be faced prematurely with strategic choices to be made between where to give in to the Council and where to demand more from the Presidency. Disclosure at this moment in time would put the negotiating team in the highly uncomfortable position to decide on this question before it had the intention to do. This would complicate dramatically the finding of an agreement on a common line.

Finally, the importance of the principle "*nothing is agreed until everything is agreed*" for the well-functioning of the legislative procedure has to be stressed. This principle plays a key role when negotiations are prepared by the negotiating team, also when defining their common line, i.e. for the internal decision-making process, and when they take place. Public disclosure of one element, even if in itself not sensitive, can have negative consequences on all other parts of a dossier. Such disclosure of positions which do not necessarily reflect the final positions of the institutions might also give an inaccurate idea of what the positions of the institutions actually are.

In the light of all the foregoing, Parliament comes to the conclusion that access shall be refused to the entire column 4 of both documents as long as the agreed text has not yet been approved by both sides. Disclosure at this stage of the procedure would specifically, actually and seriously undermine the ongoing decision-making process within Parliament and with regard to the inter-institutional negotiations.

Absence of an overriding public interest in disclosure and conclusions

Against this background, Parliament considers that public access to documents JURI-2012-0360-01, JURI-2012-0360-02, LIBE-2013-0081-01, LIBE-2013-0091-01 and LIBE-2013-0408-01 can be granted in full.

With regard to the documents LIBE-2013-0091-02 and LIBE-2013-0091-03, however, Parliament considers for the above outlined reasons that full disclosure would adversely affect the on-going negotiations and reduce the possibility to reach an overall agreement, thereby jeopardising the effectiveness of the legislative procedure. Full public disclosure would thus seriously undermine the decision-making process, within the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 within the institution.

As regards the existence of an overriding public interest in full disclosure of documents LIBE-2013-0091-02 and LIBE-2013-0091-03, Parliament has not at this stage identified such an interest which would outweigh the public interest in protecting the effectiveness of the legislative procedure, nor have you produced valid arguments in this regard.

Indeed, in your confirmatory application you claim that the Treaty of Lisbon provides for a general "overriding public interest" as you consider the standards set out in the Treaty even higher than the ones foreseen by Regulation (EC) No 1049/2001. However, the principle of transparency and the higher requirements of democracy do not constitute in themselves an overriding public interest. As it has been held by the Court of Justice of the European Union, the overriding public interest capable of justifying the disclosure of a document must in principle be distinct from the principles underlying Regulation (EC) No 1049/2001.

Moreover, Parliament holds the view that the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001 would be deprived of all practical effects, if a general rule were accepted according to which in the context of a legislative procedure, transparency, as general interest, would always outweigh the specific interests protected under Article 4 of the Regulation.

Although it follows from the applicable case law that a *maximum* of transparency has to be ensured by the institutions in the legislative field, such obligation may not amount to a situation in which the well-functioning of the legislative procedure and the very existence

of procedural "tools" such as the trilogues were queried. This, however, would be the case if the requested documents were fully disclosed.

Undeniably, Article 294 TFEU and the Joint Declaration of the European Parliament, the Council and the Commission on practical arrangements for the codecision procedure, setting out the general rules and guidelines on the ordinary legislative procedure, leave the institutions with some room for manoeuvre and a certain degree of flexibility to determine, for each legislative proposal, the most suitable approach and working arrangements that may help them reconciling their positions with a view to clearing the way for the adoption of the legislative act concerned at the earliest possible stage of the procedure.

Indeed, the existence of the trilogue procedure requiring a minimum of confidentiality of preliminary positions in the course of the negotiations, as outlined above, is inherent to the special features of the legislative process in the EU, which consists in finding compromise solutions between the two co-legislators by granting flexibility to Parliament and to the Council as to their negotiating strategy, with a view to successfully reaching an agreement. An obligation to fully disclose four column-documents at any stage of the procedure would query the well-functioning of the trilogue procedure as such and, thus, the well-functioning of the legislative procedure, as designed under the applicable rules and protected, *inter alia*, by Articles 293 to 299 TFEU. Article 15 TFEU and Regulation (EC) No 1049/2001 therefore have to be interpreted in a way that these rules are not deprived of their practical effect.

Against this background, Parliament comes to the conclusion that in the case under consideration, the protection of a *minimum* of confidentiality of the negotiating positions, as reflected in the four-column-documents, with a view to ensuring the well-functioning of the decision-making process of the institution outweighs transparency interests of the general public even in the legislative context.

As a consequence, I regret to inform you that only partial access can be granted to documents LIBE-2013-0091-02 and LIBE-2013-0091-03, as their full disclosure at the current stage of the legislative procedure would "seriously undermine the institution's decision-making process" within the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Finally, I would draw your attention to the means of redress available against this decision according to Article 8 of the Regulation (EC) No 1049/2001. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in the Treaty on the Functioning of the European Union. I equally draw your attention to the fact that filing complaint with the European Ombudsman does not have suspensory effect.

Yours sincerely,



Ildikó GALL-PELCZ

Encl. USB stick containing the requested documents.