

REPLY ADOPTED BY THE COUNCIL ON 28 June 2021
TO CONFIRMATORY APPLICATION 20/c/01/21,
made on-line through the website asktheEU.org on 10 May 2021¹,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to "*All correspondence (emails, calls, minutes of meetings) between 1.10.2017*
and 31.12.2017 between the council legal service unit JUR2 and those working in the Finnish
and Estonian government (emails ending in mmm.fi or mfa.ee)"

The Council has considered the 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) (hereafter referred to as "Regulation (EC) No 1049/2001") and 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 conclusion:

1. On 1 March 2021, the applicant made an on-line application for access to "*All correspondence (emails, calls, minutes of meetings) between 1.10.2017 and 31.12.2017 between the council legal service unit JUR2 and those working in the Finnish and Estonian government (emails ending in mmm.fi or mfa.ee)"*".
2. In its reply of 22 March 2021, the General Secretariat of the Council ("GSC") identified 9 emails as corresponding to the scope of that request. Those emails had been exchanged between the representative from the Council Legal Service ("CLS") and representatives of the Estonian government, which held the rotating presidency of the Council at that time. The GSC identified no email exchanged between the representative of the CLS and representatives of the Finnish government. Furthermore, no records of calls or minutes of meetings have been identified.

¹ It appears that the applicant sent a message to the GSC on 2 April 2021 but due to a technical issue, this message was not received by the Transparency service.

3. Regarding the content of the emails identified by the GSC, they concern discussions of legal and technical issues that arose in the framework of the legislative procedure that led to the adoption of the Regulation (EU) No 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ L 156, 19.6.2018, p. 1, hereafter referred to as “LULUCF Regulation”).
4. In its reply to the request, the GSC took the view that these emails qualify as “legal advice” within the meaning of Article 4(2), second indent of Regulation (EC) No 1049/2001 in that they express preliminary legal opinions and were necessary for the smooth functioning of the legislative decision-making process that led to the adoption of the LULUCF Regulation. Besides, the legality of this regulation had been under review by the General Court in the framework of a case (see Order of 8 May 2019, *Carvalho and others v Parliament and Council*, T-330/18, EU:T:2019:324) and that order of the General Court was, at the time of the reply to the request, under appeal before the Court of Justice (case C-565/19 P, *Carvalho and others v Parliament and Council*).
5. Therefore, in the light of the relevant case-law², access to those emails has rightly been considered by the GSC as falling within the exception related to the protection of judicial proceedings and legal advice as foreseen by Article 4(2), second indent of Regulation (EC) No 1049/2001, which justified at the time to refuse access to them.
6. On 10 May 2021³, the applicant submitted an on-line confirmatory application, asking the Council to reconsider the GSC's position.

² See, as for emails exchanged in the framework of a legislative procedure, Judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Council*, T 710/14, EU:T:2016:494; and, as for exchanges in the frame of another kind of decision-making process, see Judgments of 7 February 2018, *Access Info Europe v Commission*, T 851/16, EU:T:2018:69, paragraph 94, and T-852/16, EU:T:2018:71, paragraph 88).

³ As abovementioned, it appears that a first message was sent by the applicant to the GSC on 2 April 2021 but it was not received by the Transparency service due to a technical issue.

7. In that regard, it must be underlined, first, that the Court has in the meantime dismissed the above-mentioned appeal by judgment of 25 March 2021 (Carvalho and others v Parliament and Council, C-565/19 P, ECLI:EU:C:2021:252), putting an end to the judicial proceeding that justified the application of the exception foreseen in Article 4(2), second indent of Regulation (EC) No 1049/2001.
8. Second, the decision-making process that led to the adoption of the LULUCF Regulation is closed while, against this background, the legal advice provided in the framework of the exchanges of emails at issue appears limited in scope.
9. Therefore, from now on there is no reason to oppose to the release of the emails at issue. Besides, the Council identified 10 further emails, including mere forwards, which can also be released for the same reason.

CONCLUSION

10. In the light of the above considerations and after consultation of third-parties involved under Article 4(4) of Regulation (EC) No 1049/2001, the Council decides to grant access to the 19 emails identified as falling within the scope of the applicant's request, with the exception of personal data contained in those emails, pursuant to Article 4(1)(b) of that Regulation.
11. The present decision is based on the specific examination of the requested documents and it can under no circumstances be considered as a precedent for the future, since each application is assessed and judged on its own merit, pursuant to the established practice of the Council.
