



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT

The Director-General

Brussels
ENV.D.1

Mr Marius Münstermann
Fischerplatz 12
D 37688 Beverungen
GERMANY

Sent by email to:
ask+request-13366-234002f7@asktheeu.org

Subject: Your application for access to documents EASE 2023/4678

Dear Sir,

We refer to your request for access to documents sent on 7 August 2023 and registered on the same day under the case number 2023/4678 as well as to our letter of 10 August 2023 extending the initial deadline for replying to your request.

You request access to documents which contain the following information:

All documents related to the drafting of the proposal for the EC's "Soil Monitoring Law" (including its' annexes), including but not limited to:

- *Any assessment of the draft version(s)*
- *Any internal consultations (interservice consultation) concerning draft versions of the Soil Monitoring Law proposal*
- *Any e-mails, minutes, conversation notes and other documents concerning draft versions of the above mentioned proposal*

1. SCOPE OF YOUR REQUEST

We have identified the following documents falling into the scope of your request

- Interservice consultation ISC/2023/04946 launched by DG ENV:
 - o Note from DG ENV to consulted services - Ares(2023)3972721 – **1A**
 - o Draft Commission proposal for a Directive of the European Parliament and of the Council – **1B**
 - o Draft annexes to proposal for a Directive of the European Parliament and of the Council – **1C**
- Replies to the interservice consultation ISC/2023/04946 from the following Directorate Generals:

- AGRI (Positive opinion with comments) – **2A**
- BUDG (Positive opinion with comments) – **2B**
- CLIMA (Positive opinion with comments) – **2C**
- CNECT (Positive opinion)
- COMM (Positive opinion)
- COMP (Positive opinion)
- DEFIS (Positive opinion with comments) – **2D**
- DGT-EDIT (Positive opinion with comments) – **2E**
- EAC (Positive opinion)
- ECFIN (Positive opinion with comments) – **2F**
- ECHO (Positive opinion with comments) – **2G**
- EEAS (Positive opinion)
- EMPL (Positive opinion)
- ENER (Positive opinion with comments) – **2H**
- ESTAT (Positive opinion with comments) – **2I**
- FISMA (Positive opinion)
- GROW (Positive opinion with comments) – **2J**
- INTPA (Positive opinion)
- JRC (Positive opinion with comments) – **2K**
- JUST (Positive opinion)
- MOVE (Positive opinion with comments) – **2L**
- NEAR (Positive opinion)
- REFORM (Positive opinion)
- REGIO (Positive opinion with comments) – **2M**
- RTD (Positive opinion with comments) – **2N**
- SANTE (Positive opinion with comments) – **2O**
- SG (Positive opinion with comments) – **2P**
- Legal Service (Positive opinion with comments) – **2Q**
- TAXUD (Positive opinion)
- TRADE (Positive opinion)

We would like to inform you that only the Directorate Generals that have provided a positive opinion with comments have submitted documents as part of the interservice consultation. The other Directorate Generals have merely encoded the positive opinion in the dedicated IT platform. No further documents are therefore existing for these other Directorate Generals.

2. ASSESSMENT UNDER REGULATION 1049/2001

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we inform you that document **1A**, the above identified note ISC/2023/04946 from DG ENV to the consulted services, can be partially disclosed.

A complete disclosure of this document is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because it contains the following personal data: the names/initials and contact information of Commission staff members not pertaining to the senior management.

Article 9(1)(b) of the Data Protection Regulation ⁽¹⁾ does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, we conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Regarding documents **1B, 1C, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, 2I, 2J, 2K, 2L, 2M, 2N, 2O, 2P, and 2Q**, no access can be granted under the exception of Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001, related to the on-going co-decision process. In addition, as concerns the reply of the Legal Service to the Interservice consultation, document **2Q**, the exception under Article 4(2), second indent, of Regulation (EC) No 1049/2001 applies as well.

2.1. Protection of ongoing decision-making process (Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001)

We consider that, at this stage, a full disclosure of the requested documents would undermine the ongoing legislative process on the Soil Monitoring Law proposal. The relevant decision-making process to be protected is the legislative procedure until the final adoption by the EU Legislator of the Commission's proposal. In fact, the adoption of the Commission's proposal on 5 July 2023 is not a 'decision' but the act marking the beginning of a complex inter-institutional process, in the course of which this act might, and normally does, change even in a substantial way. It is the legislative process that needs to be protected and not the mere adoption of a Commission's proposal; artificially dividing the legislative process in different parts and thus excluding the documents concerned from the coverage of the exception in point in the course of this process would deprive the protection granted by the first subparagraph of Article 4(3) of the Regulation of its intended effect.

The disclosure of these documents would reveal preliminary views and policy options which are currently under consideration. The co-legislators must be free to explore all possible options in preparation of their final decision. In the present case, in particular, the disclosure of the requested documents at this stage could be artificially exploited to influence the positions taken by the two branches of the EU Legislator in their quest for a political compromise.

Furthermore, the replies to the interservice consultation from the different services contain their remarks in the course of the internal discussions and preparation of the Commission's Proposal for the Soil Monitoring Law. In such a process, the services

⁽¹⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

should be free to express their opinions, also of a critical nature, independently and without being unduly influenced by the consequences of a disclosure at a premature stage that would affect the legislative process. Close cooperation and effective coordination between all Commission services concerned is essential to the quality and consistency of the Commission's work. If such preliminary opinions of the Commission's services are disclosed at such an early stage of the process, this would make services more hesitant to express their opinions possibly limiting a critical internal review of all aspects and policy options. Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process' ⁽²⁾.

2.2. Protection of legal advice (Article 4(2), second indent, of Regulation (EC) No 1049/2001)

Full disclosure of the reply from the Legal Service to the Interservice consultation ISC/2023/04946 would undermine the protection of legal advice, which, as recognised by the Court of Justice, represents an exception that must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Such disclosure would make known to the public legal assessments of a preliminary nature intended for internal discussions with the Commission's services responsible for the draft proposal at stake and with the members of the European Commission. Indeed, this proposal implements the EU Soil Strategy for 2030 which announced that the Commission would propose a Soil Health Law. The initiative is a crucial centrepiece of the European Green Deal and an instrument to achieve EU policy objectives such as climate neutrality, resilient nature and biodiversity, zero pollution, sustainable food systems, human health and well-being. There is currently no dedicated EU legislation on soil and the proposed directive contains new concepts and obligations regarding soils which will mainly affect public authorities and stakeholders in agriculture, forestry and industrial sectors (the business sectors expected to be affected by the initiative are numerous and include agriculture, forestry and related extension services, business activities that have contaminated the soil, business activities related to remediation of contaminated sites, research and laboratories). The proposal puts in place a solid and coherent soil monitoring framework for all soils across the EU, which will address the current gap of knowledge on soils. In that context, the proposal raised a number of political and legal considerations in particular in relation to Member States' obligations resulting from the future act. We consider that the disclosure of the content of a legal advice of its Legal Service given at an early stage of the decision-making process and containing critical remarks is susceptible to make more difficult the defence of Union acts in Court proceedings. This situation may lead the Commission's Legal Service to refrain to take position on certain subjects which are likely to give rise to legal challenges in order to ensure that these positions are not used against the defence of the Union act in Court proceedings, undermining its capacity to provide an informed and frank advice to the Commission.

⁽²⁾ Judgment of the General Court of 15 September 2016, Phillip Morris v Commission, T-18/15, EU:T:2016:487, paragraph 87. 30 Judgment of the Court of Justice of 21 July 2011, Sweden v MyTravel and Commission, C-506/08, EU:C:2011:496, paragraph 79

Moreover, whilst the case-law has confirmed that, in principle, there is a public interest in the access by the public to the opinions of the Legal Service, a refusal to disclose a legal opinion given in the context of a specific legislative process is permitted in cases such as this one due to the particularly sensitive nature of the opinion expressed in the requested document and of the overall context in which this opinion is issued, also taking into account the stage of the relevant legislative process. Consequently, a mere assertion that the legal advice in question was drawn up in the context of a legislative process is not in itself sufficient to establish an overriding public interest.

In the light of the foregoing, we consider that disclosing the internal legal assessment contained in the refused documents at this stage of the legislative process would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of sensitive matters. The frankness, objectivity and comprehensiveness of the legal advice would be seriously affected if legal advice on sensitive subjects, as in the present case, would be disclosed, depriving thus the Commission of an essential element in its work.

2.3. Partial access

We have considered whether partial access could be granted to the documents requested in accordance with Article 4(6) of the Regulation 1049/2001. However, partial access is not possible considering that the documents concerned are covered in their entirety by the exception under Article 4(3), first subparagraph, of Regulation 1049/2001. In addition, partial access is not possible for the reply from the Legal Service to the Interservice consultation ISC/2023/04946, document **2Q**, considering that the document concerned is covered in its entirety by the exception under Article 4(2), second indent, of Regulation (EC) No 1049/2001.

Nevertheless, we consider that the documents already disclosed or made publicly available by the Commission in relation to this proposal, in particular its explanatory memorandum and the impact assessment, give sufficient insight and information on the choices made by Commission and the reasons thereof.

2.4. Overriding public interest

The exceptions laid down in Article 4(3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the document. We have examined to which extent the exception laid down in Article 4(3) of Regulation 1049/2001 may be waived in case of an overriding public interest in disclosure. Having analysed your request, we have not found any elements which could justify the existence of an overriding public interest in the sense of the Regulation, which would outweigh the exception stipulated in Article 4(3) mentioned above. Therefore, we have concluded that access to the aforementioned documents cannot be granted.

3. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it in one of the following ways:

by asking for a review via your portal account (<https://www.ec.europa.eu/transparency/documents-request>) (available only for initial requests submitted via the portal account),

or by mail:

European Commission

Secretariat-General

Transparency, Document Management & Access to Documents (SG.C.1)

BERL 7/076

B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Electronically signed

Florika FINK-HOOIJER