



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 May 2012

10343/12

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API 64
JUR 290**

NOTE

from : General Secretariat of the Council
to : Working Party on Information

Subject : Public access to documents
- Confirmatory application No 14/c/01/12

Delegations will find attached:

- request for access to documents sent to the General Secretariat of the Council on 23 April 2012 and registered on 24 April 2012 ([Annex 1](#))
- reply from the General Secretariat of the Council dated 7 May 2012 ([Annex 2](#))
- confirmatory application dated 23 May 2012 and registered on 24 May 2012 ([Annex 3](#))

[E-mail message sent on 23 April 2012 - 19:37]

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting the following:

- DS 1264/12
- DS 1270/12
- DS 1276/12

Please send these in electronic format if possible.

Many thanks.

Yours faithfully,

DELETED



**COUNCIL OF
THE EUROPEAN UNION**

GENERAL SECRETARIAT

*Directorate-General F
Press
Communication
Transparency*

*- Access to Documents/
Legislative transparency*

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Tel: (32 2) 281 67 10
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E-MAIL:

access@consilium.europa.eu

Brussels, 7 May 2012

DELETED

e-mail:

DELETED

Ref. 12/0718-mi/ns

Dear **DELETED**,

Your request of 23 April 2012 for access to documents DS 1264/12, DS 1270/12 and DS 1276/12 was registered on 24 April 2012 by the "Access to Documents" unit. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (Official Journal L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

Document DS 1264/12 is a meeting document from the Presidency to delegations and contains a draft compromise text for the recast of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

Document DS 1270/12 is a meeting document from the Presidency to delegations with a synoptic overview of the texts related to the recast of Regulation (EC) No 1049/2001.

Document DS 1276/12 is a meeting document from the Presidency to delegations containing an alternative drafting proposal regarding the recast of Regulation (EC) No 1049/2001.

On 7 May 2008, the Commission submitted a proposal to the Parliament and the Council for a recast of Regulation (EC) No 1049/2001 aimed at amending certain provisions of the Regulation, amongst others, to align the provisions of the Regulation with the "Aarhus Regulation" on access to information in environmental matters and of the case law on access to documents.

Moreover, following the entry into force of the Lisbon Treaty on 1 December 2009, it became necessary to bring the Regulation in line with the new Treaty provisions, notably to extend the public right of access to documents of all the Union's institutions, bodies, offices and agencies (Art. 15(3) of TFEU). The Commission therefore submitted a second proposal to that effect to the Council and the European Parliament on 21 March 2011.

The European Parliament adopted its position at first reading at its plenary session on 15 December 2011. This position incorporates the contents of the proposal for the alignment of Regulation (EC) No 1049/2001 with the Lisbon Treaty into the Parliament's report on the initial proposal for a Recast of that Regulation.

In the Council, the Working Party on Information has met several times to discuss both above mentioned Commission proposals. At present, there are still certain sensitive issues to be discussed within the Council's preparatory bodies before the opening of negotiations with the European Parliament.

The requested documents set out drafting suggestions for internal consideration for delegations at the Working Party on Information on a number of issues that may become part of an overall compromise. Disclosure of the documents to the public at this stage would prejudice the Council's capacity to conduct frank and candid internal discussions on certain highly sensitive issues, on which Member States still have divergent positions, and would therefore seriously affect the chances of finding a compromise on the legislative proposals within the Council. In addition, since the negotiations with the European Parliament are yet to take place, disclosure of internal drafting suggestions intended solely to facilitate discussions at the Council's preparatory body would risk having a significant impact on the Council's position in those negotiations.

In the absence of any element suggesting an overriding public interest to warrant disclosure of the documents in question, the General Secretariat has concluded that protection of the decision-making process outweighs the public interest in disclosure. Accordingly, pursuant to Article 4(3), first subparagraph of the Regulation (protection of the institution's decision-making process), the General Secretariat is unable to accede to your request for public access at this stage. Furthermore, as the exception to the principle of transparency applies to the content of the entire documents, the General Secretariat is unable to grant you partial access as provided for in Article 4(6) of the Regulation.

Nevertheless, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure, these documents and any other legislative document relating to Regulation in question will be made available to the public in full after the final adoption of the act, unless their content is covered by Article 4(1), (2) or (3), second subparagraph, of Regulation (EC) No 1049/2001.

According to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply¹.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

¹ Should you decide to do so, then please indicate whether you permit the Council to make your confirmatory application fully public in the Council's Register of documents. If you do not reply or reply in the negative, then your application will be dealt with confidentially. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

[Confirmatory application sent by e-mail on 23 May 2012 - 20:15]

Subject: Internal review of access to information request - EU transparency regulation - various Docs

Message:

Dear Mr Thomsen,

I am writing to request an internal review of your negative response to my request for three Council documents relating to the revision of the EU transparency regulation 1049/2001.

Your refusal to provide access to the entire content of all three documents requested rests on the idea that publication of the documents would "prejudice the Council's capacity to conduct frank and candid internal discussions on certain highly sensitive issues". However, this is a generic response that fails to even mention what those sensitive issues are, despite jurisprudence that responses to access to documents requests must be made on a case-by-case basis and in relation to the specific content of each document.

Furthermore, I fail to understand why the publication of these documents would "affect the chances of finding a compromise on the legislative proposals within the Council". If the documents originate from the Danish Presidency and present 1) a draft compromise text, 2) a synoptic overview of the texts and 3) an alternative drafting proposal, how will public access to these documents create a foreseeable and more than purely hypothetical harm to the decision-making process?

The fact that Member States have divergent views on certain issues is no secret, on the contrary it is only logical with 27 Member States. That the public should not be granted access to relevant documents until the common position has already been adopted, directly violates the Treaty of Lisbon which provides that "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen". The Treaty of Lisbon cannot be undermined by secondary law such as the Council's rules of Procedure.

The revision of this Regulation has been ongoing since 2008. In January 2009, you responded to an access to documents request for information about the revision of this Regulation stating that disclosure would harm the decision making process. It is now 2012, and still public access to documents about the EU's transparency regulation are withheld on the same grounds.

That citizens and organisations such as Access Info Europe are expected to wait 4 years before the Council makes its documents public violates the Lisbon Treaty's requirement that the institutions "maintain an open, transparent and regular dialogue with representative associations and civil society" on the issue. There can be no dialogue if the information is only made available once the decision has been taken and it's too late for the public to have a say.

In your response, you also suggest that the documents cannot be made public because that would harm the Council's position in the negotiations with the European Parliament. Is it the case then, that Members of the European Parliament do not have the right to access the documents requested, despite being part of the legislative process and being the citizens' only directly elected officials?

If this is the case, the public interest in accessing this information becomes all the more significant.

In any event, the public interest in these documents was not balanced against the alleged need to protect the decision-making process in your response, which curtly states that: "In the absence of any element suggesting an overriding public interest to warrant disclosure of the documents in question, the General Secretariat has concluded that protection of the decision-making process outweighs the public interest in disclosure".

Further consideration should have been given to the public interest in these documents, beyond one dismissive sentence. Given that access to EU documents is a fundamental right of European Citizens, the public interest in accessing documents related to the reform of the rules that govern this fundamental right is substantial. In fact, just today there was an article in the EU Observer about the reform of the access to documents Regulation.

Access to information is necessary for public participation in decision-making and for holding the EU institutions to account. Access to EU documents is a fundamental human right, and access to legislative documents is highlighted by the Treaty of Lisbon. The public interest in this information is therefore particularly high.

Given that you provided no arguments to substantiate the claim that publication would seriously and effectively undermine the Council's decision-making process, and since there was no evaluation in your answer of the public interest in accessing the documents requested, I respectfully ask you to review your answer to my access to documents request in the light of the requirements of the Lisbon Treaty, of the jurisprudence regarding the need for greater Council openness in legislative procedures, and of the critical need to regain citizen trust in the EU institutions.

Yours faithfully,

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A full history of my FOI request and all correspondence is available on the Internet at this address: http://www.asktheeu.org/request/eu_transparency_regulation_vario