



Council of the  
European Union

Brussels, 21 November 2016  
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12943/16

LIMITE

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#### 'I/A' ITEM NOTE

From:	Working Party on Information
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	12941/16
Subject:	Public access to documents - Confirmatory application No 22/c/01/16

Delegations will find enclosed a draft reply from the Council to confirmatory application No 22c/01/16, approved by written consultation which ended on 21 November 2016, with the Greek delegation voting against.

EL delegation made the following remark:

*"Greece disagrees with the draft reply as to its conclusion (partial disclosure) and considers that the argumentation on the basis of article 4.3 of the regulation 1049/2001, in this case, pleads in favour of denying the disclosure of the requested document in its entirety."*

NL delegation made the following remark:

*"The Netherlands can agree with the outcome proposed in the draft reply. However, the Netherlands cannot fully agree with the proposed reasoning, we are not fully convinced that article 4(3) is being applied correctly."*

Delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item
- decide to publish the result of the vote.

The annex is available in English only.

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**DRAFT**

**REPLY ADOPTED BY THE COUNCIL ON .....  
TO CONFIRMATORY APPLICATION 22/c/01/16,  
made by email on 4 October 2016,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to document 11061/2/16 REV 2**

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 of 31.5.2001, p. 43) and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 5 September 2016, the applicant submitted a request for access to document 11061/2/16 REV 2 which is a working document from the General Secretariat of the Council to Delegations containing a Non-paper from the Commission drafted to facilitate EU co-ordination regarding the preparation of the 16th meeting of the HELCOM Maritime Group (Tallinn, Estonia, 6-8 September 2016).
2. In its reply dated 4 October 2016, the General Secretariat of the Council refused access to this document pursuant to Article 4(1)(a), third indent of Regulation No 1049/2001, since its disclosure would undermine the protection of the public interest as regards international relations.

3. In the confirmatory application dated 4 October 2016, the applicant asks the Council to reconsider this position. The applicant considers that the requested document relates to the 16th meeting of the HELCOM maritime group which already took place in September and, for this reason, it is no longer subject to the political sensitivity that surrounds negotiations prior to these meetings. In addition, the applicant claims that its disclosure would not hamper future discussions. Finally, the applicant states that it is undemocratic not to release documents as this one, since it relates to the discussion of pollution-related policies which are public health concern.
4. The Council has carefully considered the confirmatory application. Having thoroughly examined the document concerned by the request and carried out renewed consultations, it has re-assessed in full consideration of the principle of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comments, whether public access can be provided to the requested document and has come to the conclusions set out below.

#### **The requested document**

5. By way of introduction it is noted that both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities. The requested document was not drawn up in the context of legislative activities, and the wider access which is also referred to in recital 6 of Regulation 1049/2001 does therefore not apply.
6. Document 11061/2/16 REV 2 is a working document from the General Secretariat of the Council to Delegations containing a non-paper from the Commission drafted to facilitate EU co-ordination regarding the preparation of the 16th meeting of the HELCOM Maritime Group (Tallinn, Estonia, 6-8 September 2016).

7. The HELCOM is the governing body of the Helsinki Convention of the Marine Environment of the Baltic Sea Area. HELCOM adopts recommendations on measures to address certain pollution sources or areas of concerns and these recommendations are to be implemented by the contracting parties through their national legislation.
8. The participation of the EU and its member States in the HELCOM Maritime Group is an important element in the EU's action in this area. In order to build an effective common position in this area, the EU shapes its common position through a coordination between the EU Member States.
9. The requested document contains the recommendations of the Commission for a common position of the representatives of the Union and of the Member States for 16th meeting of the HELCOM Maritime Group meeting revised in the light of discussions at the Shipping Working Party on 15 July 2016 and as agreed following that meeting. This document details the agenda items with EU relevance and the proposed line to take.

#### **The invoked exceptions of Regulation (EC) No 1049/2001**

10. In order to define the EU position in the context of international and intergovernmental framework, the EU shapes its position through a coordination between the Member States. This implies a regular and on-going flexible coordination process. The agreement on a EU common position regarding the HELCOM Maritime Group meeting is thus preceded by complex discussions within the Council and its preparatory bodies.
11. It is important that in such a context with a direct impact on international relations, the periodic discussions of EU Member States can take place without revealing elements that can also be of relevance for future discussions. Moreover, it should be noted that the collective work with a view to achieve a EU coordinated approach is an essential element of the effectiveness of the EU position in international fora.

12. Having regard to the main objectives of the issues dealt within the requested non-paper in view of the preparation of the 16th meeting of the HELCOM Maritime Group, the Council considers that release to the public of the information regarding the proposed lines to take in this framework would affect their effectiveness and would thus jeopardise the EU coordination work.
13. The EU lines to take proposed in the document and agreed at the Shipping Working Party are part of the broader EU coordination process in an international context and are also the basis for the internal negotiations on the strategy and EU position regarding the preparation for further coordination of EU positions in view of meetings in the IMO and also the 17th meeting of the HELCOM Maritime Group in two years. The preparation of upcoming IMO meetings and the next HELCOM Maritime Group and future ones involves a regular coordination between EU Member States and demands flexibility in order to achieve a common position of the representatives of the Union and of the Member States in this international context. Disclosure under such circumstances would therefore involve a concrete risk of undermining the decision-making process, even after the specific decision for this particular HELCOM meeting has been taken.
14. In view of the above, release of the information related to the lines to take set out in document 11061/2/16 REV 2 which are still relevant for future discussions in this framework as well as footnotes 1 and 2 which contain reservations of some Member States would weaken the efforts to reach a EU position with a concrete risk of undermining the EU international position in this context and the decision-making process. In the light of the above considerations, the Council confirms that full access to the requested document should be refused under Article 4(1)(a), third indent (protection of the public interest as regards international relations) and also under Article 4(3), second subparagraph, of Regulation No 1049/2001 (protection of the decision-making process of the Council).

15. It must be noted that Article 4(1)(a) of Regulation 1049/2001 contains a mandatory exception for the protection the public interest as regards international relations. Once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. Article 4(1)(a) of the Regulation does not allow the institution to balance the protected interest against other interests. As it has been set out above, there is a concrete risk that the publication of the requested document would harm the Union's international relations. That is why the exception under Article 4(1)(a), third indent, of the Regulation must be applied.
16. The Council has weighed the public interest relating to the efficiency of its internal decision-making process against the public interest in increased openness. It has come to the conclusion that, on balance, all possible factors which would, at the present stage, plead in favour of releasing the requested document in its entirety are outweighed by the need to protect the Council's decision-making process. The Council therefore concludes that in the case at hand and at this point in time, the protection of the Council's decision-making process outweighs the applicant's interest in the disclosure of the withheld information.

**Extended partial access - Article 4(6) of Regulation (EC) No 1049/2001**

17. Having carefully examined the context in which the document was drafted and the current state of play on such matters the Council is of the opinion that the applicant may have partial access to the content of the undisclosed text, excluding only those parts which fall under the exceptions in Article 4(1)(a), third indent and in Article 4(3), second subparagraph, of Regulation No 1049/2001.
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