



Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	5943/20
Subject:	Public access to documents - Confirmatory application No 04/c/01/20

Delegations will find attached a draft reply to confirmatory application No 04/c/01/20
(see 5943/20).

DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION 04/c/01/20,
made by email on 06 February 2020,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001 and
Regulation (EC) No 1367/2006.

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, 31.5.2001, p. 43), under Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13) and under 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 conclusions:

I. Introduction and background

1. The current confirmatory application is substantially similar to those submitted by the same applicant in 2017, 2018 and 2019¹. It concerns the decision-making process leading to the yearly adoption of a Council Regulation fixing for the following year the fishing opportunities for certain fish stocks (Total Allowable Catches, from now on "TACs Regulation") in the Northeast Atlantic for 2020.
2. The decision-making process concerning the adoption of the Council TACs Regulation for 2020 started on 24 October 2019 with the submission to the Council of the related Commission proposal.² It ended at the Council ("Agriculture and Fisheries") meeting of 27 January 2020³ with the adoption of Council Regulation (EU) 2020/123 (OJ L 25, 30.1.2020, p. 1).

¹ Cfr. documents 6722/1/17 REV1, 10391/18 and 8433/19.

² Cfr. documents 13438/19 + ADD1 + ADD2.

³ Cfr. documents 5240/20, 5351/20, 51867/20, and 15319/19 + COR1 + COR 2 + ADD 1-2.

3. The applicant submitted four requests in 2019, dated of 21/11, 29/11, 9/12 and 16/12.
4. The examination of these four requests was therefore carried out by the General Secretariat of the Council (GSC) between 22 November 2019 and 16 January 2020 (date of the reply to the applicant). That examination and the necessary consultations allowed the GSC to identify 50 documents as matching the scope of those four requests.
5. Unfortunately, due to a clerical error, 8 of the identified documents⁴ were not included in the GSC's reply of 16 January 2020.⁵ Those documents constitute the so called "Bible" which is a compilation of the relevant Member States' positions expressed (orally or in written format) at the Working Party meetings during the decision-making process.
6. Upon a fifth request submitted on 17 January 2020, the GSC has sent to the applicant on 29 January 2020 all the requested documents (24), including the above-mentioned 8 documents that were not included, by mistake, in the reply to the first request. Although the GSC's reply to this latest request was not included in the Confirmatory application, it should be noted that a total of 66 documents have become public with the two replies.
7. The GSC has examined the applicant's five requests together with a similar request submitted by another applicant on 2 December 2019 concerning the same 2020 TACs decision-making process. The reply to this request was also sent on 16 January 2020 and included a set of 19 documents which had already been included in the reply to the current applicant.
8. The replies to these 6 requests focused exclusively on documents that were not public. As mentioned above, from the 66 disclosed documents, 42 were made public on 16 January 2020 and the remaining 24 (including the "Bible") on 29 January 2020.

⁴ Cfr. documents 14458/19 + ADD1 + ADD2 + ADD 2 REV1 + ADD1 REV1 + REV2 + ADD1 REV2 and ADD2 REV2.

⁵ The documents included working papers (WKs) 11790/2019 INIT, 11790/2019 ADD 1, and standard (ST) documents 13761/19, 13918/19, 14134/19, 14134/19 COR1, 14134/19 COR 2, 14385/19, 14471/19, 14471/19 ADD1, 14471/19 ADD 2, 14471/19 ADD 3, 14471/19 ADD 4, 14471/19 ADD 5, 14471/19 ADD 6, 14471/19 ADD 7, 14471/19 ADD 8, 14471/19 ADD 9, 14471/19 ADD 10, 14471/19 ADD 11, 14471/19 ADD 12, 14471/19 ADD 13, 14471/19 ADD 14, 14471/19 ADD 15, 14471/19 ADD 16, 14471/19 ADD 17, 14471/19 ADD 18, 14471/19 ADD 19, 14471/19 ADD 20, 14471/19 ADD 21, 14471/19 ADD 22, 14471/19 ADD 23, 14471/19 ADD 24, 14471/19 ADD 25, 14558/19, 14684/19, 14684/19 ADD1, 14684/19 ADD2, 14724/19, 14767/19, ST 14790/19, ST 14947/19.

9. In the confirmatory application dated 6 February 2020, the applicant puts forward a number of arguments to support the request for re-examination:
- a) an alleged tendency for relevant documents to escape identification by the Council as coming within the scope of the requests;
 - b) the claim that the requested documents contain "*environmental information*" within the meaning of Article 2(1)(d) of Regulation (EC) No 1367/2006;
 - c) an alleged failure to record Member State positions at relevant Council meetings being in breach of Article 2 of Regulation (EC) No 1049/2001;
 - d) an alleged failure to disclose the requested documents while the decision-making process was still ongoing;
 - e) and finally that the requested documents are not covered by the exception under Article 4(3) of Regulation (EC) No 1049/2001.

II. Examination of the Requests under Regulation (EC) No 1049/2001 and Regulation (EC) No 1367/2006

10. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the requests and carried out renewed consultations, it has re-assessed the requests in full consideration of the rules and principles underlying Regulations (EC) No 1049/2001 and 1367/2006, with the aim of ensuring the widest possible public access to documents and information.
11. In this context, it should be noted that several documents directly linked to the decision-making process were issued as public documents, notably, the following:
- the summary records of the COREPER meetings of 11 December 2019 (document 5094/20) and 22 January 2020 (document 5916/20) were published in the Council's public Register on 8 January 2020 and 10 February 2020, respectively;
 - the minutes of the Council "Agriculture and Fisheries" Council meeting of 16-17 December 2019 (document 15189/19) were published on 13 January 2020;
 - the minutes of the Council "Agriculture and Fisheries" Council meeting of 27 January 2020 (document 5556/20) were published on 3 February 2020.

12. Moreover, with the exception of the above-mentioned two WKs, all the documents produced in the context of the decision-making process leading to the adoption of TACs for 2020 were systematically issued as STANDARD (ST) documents. This not only allows to identify those documents in the Council's register, it also enabled the applicant to ask for access to specific documents which were all granted within the time limits prescribed in Regulation (EC) No 1049/2001. To be noted that although the two WKs did not bear the ST marking, they were also released on 16 January 2020⁶, as they fell into the scope of the applicant's requests. Where, due to a clerical error, 8 documents were not included in the reply, this error was swiftly remedied and access was granted to the relevant documents. Therefore, the Council has shown to grant access to all the documents within the scope of the five requests within the time limits prescribed by Regulation (EC) No 1049/2001.
13. Regarding the alleged breach of Article 2 of Regulation (EC) No 1049/2001 and the alleged failure to record Member States' positions, it should be recalled that according to established case-law of the Court of Justice, the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 applies only to existing documents in the possession of the institution concerned⁷. Regulation (EC) No 1049/2001 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist⁸. Moreover, the principle of transparency underlying Regulation (EC) No 1049/2001 does not require to produce minutes of certain meetings⁹.
14. In the same vein, pursuant to Article 3(1) of Regulation (EC) No 1367/2006, "Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies [...]". As indicated above, the Council has fully complied with its obligations under Regulation (EC) No 1049/2001 by disclosing all documents in its possession falling within the scope of the initial request. By doing so, it has also complied with its obligations under Regulation (EC) No 1367/2006.

⁶ See above paragraph 4.

⁷ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 38.

⁸ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 46.

⁹ Judgement of the General Court 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 63.

Moreover, as confirmed by the General Court, Regulation (EC) No 1367/2006 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist¹⁰.

15. As regards the exception under Article 4(3) of Regulation (EC) No 1049/2001 and the ongoing decision-making, it should be noted that the Council did not invoke this exception but rather granted access to the requested documents while the decision-making on the TACs for EU fish stocks in the Northeast Atlantic for 2020 was still ongoing within the time limits prescribed by Regulation (EC) No 1049/2001. Where a clerical error occurred, it was swiftly remedied and access to the documents was granted.
16. After careful re-examination of its files, the Council has not identified any other preparative and supporting documents related to the requests of the applicant and concerning the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2020.

III. Conclusions

17. For the above-mentioned reasons, the Council concludes that:
 - a) the requirements of Regulation (EC) No 1049/2001, have been fully complied with and all documents relevant to the request of the applicant have been disclosed;
 - b) the requirements of Regulation (EC) No 1367/2006, have been fully complied with and all relevant documents and information have been disclosed.

¹⁰ Judgment of the General Court of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, T-245/11, ECLI:EU:T:2015:675, paragraph 259.