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## NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Summary of procedures applicable for the handling of initial and confirmatory applications for public access to documents of the Council and the European Council and for approval of replies to related Ombudsman inquiries

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1. In response to requests from delegations, this note provides an overview of: (1) the practical arrangements for the handling of initial requests for access to documents held by the Council and by the European Council; and (2) the procedures for the approval of replies to confirmatory requests and to related Ombudsman inquiries.
2. The procedural rules for the handling of requests for public access to documents are set out in the European Council's Rules of Procedure (Article 10(2)) and the Council's Rules of Procedure (Article 10), notably Annex II thereto. This note clarifies certain practical aspects of the application of those rules.

3. As regards Ombudsman inquiries concerning a complaint against a decision taken by the Council or the European Council to reject (fully or partially) a confirmatory request for public access to their documents, delegations' attention is drawn to the GSC's intention to return to the system in place before 2012. The reply to the Ombudsman will therefore be approved by the Council or the European Council as applicable. Indeed, in order for the remedies offered by the Ombudsman to be effective, an institution should always be in a position to take into account the Ombudsman's recommendations and, where appropriate, reconsider its initial position. This implies that the follow-up to the Ombudsman's recommendations has to be decided using the same procedure used for the adoption of the contested decision in the first place.
4. This requirement has been reinforced by the recent reform of the Ombudsman's Implementing Provisions. In order to speed up the handling of complaints, it is now possible for the Ombudsman to propose 'solutions'<sup>1</sup> in the letter giving notification of the opening of an inquiry. As a consequence, replies to the Ombudsman in the framework of inquiries may also require early reconsideration of the institution's initial position.
5. This intention to revert to the earlier practice is already taken into account in the overview set out in the annex.
6. This note is sent to delegations for information purposes.

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<sup>1</sup> Article 5 of the Ombudsman's Implementing Provisions uses the term 'solutions', which corresponds to a recommendation from a legal point of view.

**OVERVIEW OF THE PROCEDURES APPLICABLE FOR THE HANDLING OF INITIAL REQUESTS FOR  
PUBLIC ACCESS TO COUNCIL AND EUROPEAN COUNCIL DOCUMENTS AND  
FOR THE APPROVAL OF REPLIES TO CONFIRMATORY APPLICATIONS AND TO RELATED  
OMBUDSMAN INQUIRIES**

**Initial applications**

1. Initial applications are handled by the General Secretariat of the Council (GSC) in accordance with Article 7 of Annex II to the Council's Rules of Procedure. This means that the General Secretariat sends a letter to the applicant containing a reply to his or her initial application. The GSC carries out any necessary consultations before sending its reply to the applicant.
2. Documents originating from Member States acting in their capacity as members of the Council are considered as Council documents<sup>2</sup>. Delegations must, however, be consulted, individually or collectively<sup>3</sup>, at the stage of an initial application whenever a document originating from them is deemed to be a third party document, unless it is clear that the document shall or shall not be disclosed, pursuant to Article 4(4) and (5) of Regulation No 1049/2001.
3. In addition, (one or more) delegations may be consulted in cases where the requested document is not a third party document but has been drawn up by a delegation (acting as a member of the Council) as a contribution to the Council's work<sup>4</sup>, whenever such consultation is deemed useful for the assessment of the document concerned under Regulation No 1049/2001. This consultation is usually done by email.

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<sup>2</sup> See 5108/02, approved by COREPER in its meeting of 23 July 2002, and 6898/02, item 22.

<sup>3</sup> See 6120/2/16 REV 2 for an optional procedure for collective consultation of Member States in the margins of a meeting of the Working Party on Information.

<sup>4</sup> For the distinction between a third party document originating from a Member State and a Council document drawn up by a delegation acting as a member of the Council, please refer to 5108/02 and to 6203/02, as approved by Coreper at its meeting of 6 and 8 March 2002 (cf. 6898/02, item 22).

4. This practice is equally applied to documents held by the European Council. It should be pointed out, in this connection, that pursuant to Article 10(2) of the European Council's Rules of Procedure, the provisions of Annex II to the Council's Rules of Procedure are applicable *mutatis mutandis* to requests for public access to European Council's documents.

### **Confirmatory applications**

5. A confirmatory application is an administrative appeal which can be lodged by the applicant in cases where – in the case of the Council – the General Secretariat has refused (partially or fully) access to one or more documents covered by the initial request.
6. Pursuant to Article 8 of Annex II to the Council's Rules of Procedure, confirmatory applications are decided upon by the Council. This means that the normal three-stage procedure for the preparation and approval of a Council decision – Working party → Coreper → Council – applies.
7. Confirmatory applications addressed to the European Council are decided upon by that institution, by virtue of Article 10 (2) of its Rules of Procedure and Article 8 of Annex II to the Council's Rules of Procedure.
8. The decision of the European Council or the Council is then notified to the applicant by the General Secretariat.

### **Preparatory work in the Working Party on Information**

9. Upon reception of a confirmatory application, the General Secretariat issues a first document containing the initial application, the General Secretariat's reply to the initial application, and the confirmatory application.<sup>5</sup>

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<sup>5</sup> Personal data is deleted from documents concerning confirmatory applications, unless the applicant has explicitly given his or her consent to the release of such data.

10. The GSC then carries out fresh internal – and where necessary external – consultations in order to re-assess the possibilities for full or partial release of the requested document(s), taking into account the applicant's arguments (as appropriate). Upon completion of these consultations, the GSC prepares a note for the Working Party on Information, setting out a draft reply to the confirmatory application.
11. This note is then put on the agenda of a meeting of the Working Party on Information, if the meeting calendar and the deadline for reply (15 working days that can be extended once by another 15 working days for justified reasons) so allow. If not, a written consultation<sup>6</sup> of the Working Party is launched.
12. Although the Working Party on Information is a preparatory body of the Council, and not of the European Council, confirmatory applications addressed to the European Council are in practice submitted to the Working Party in the same way, for the sake of convenience and in order to give delegations the opportunity to properly discuss the draft replies to the applications.

#### Approval by the Council

13. Once approved by the Working Party on Information, the proposed reply from the Council is issued in the form of a 'I/A' item note and put on the agenda of Coreper II and the Council for final approval. If it is not possible to submit the draft reply for approval by the Council within the deadline provided for in Article 8 of Regulation 1049/2001, the draft reply is submitted to delegations for approval by a formal written procedure.

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<sup>6</sup> It is important to distinguish this written *consultation* from a written *procedure*. The former replaces discussion in the Working Party, while the latter replaces approval in Coreper and Council. In exceptional cases – although the General Secretariat will always do its utmost to avoid such situations – members of the Working Party on Information might therefore receive the same question twice, first as a written *consultation* and shortly thereafter as a formal written *procedure*.

14. The Council approves the reply by a simple majority. Matters involving the handling of documents, including decisions on their publication, are matters of 'internal organisation' of the Council and thus 'procedural' within the meaning of Article 240(3) TFEU<sup>7</sup>. This is confirmed by the Council's Rules of Procedure, which set out detailed rules on access to documents, and by the constant practice of the Council.

#### Approval by the European Council

15. As mentioned above, the provisions of Annex II to the Council's Rules of Procedure are applicable *mutatis mutandis* to the European Council (pursuant to Article 10(2) of the European Council's Rules of Procedure), which means that confirmatory applications addressed to the European Council are decided upon by that institution (*mutatis mutandis* application of Article 8 of Annex II to the Council's Rules of Procedure).
16. To that end, the General Secretariat prepares a draft reply to be submitted for approval by the European Council by written procedure on the proposal of its President (Article 7 of the European Council's Rules of Procedure).<sup>8</sup>

#### Ombudsman complaints

17. An applicant can lodge a complaint with the Ombudsman against a negative decision taken by an institution following a confirmatory application for public access to documents. The Ombudsman then examines the complaint and if they find grounds for an inquiry, they may contact the institution concerned. The Ombudsman may also decide to open an inquiry on their own initiative on a reply given to a specific request for access or more generally on the way the institutions handle categories of requests. In any case, the Ombudsman may ask the institution concerned for authorisation to inspect the requested documents in order to assess the merits of the decision(s) taken. In their letter to the institution, the Ombudsman can ask for clarifications on specific issues or even suggest a reconsideration of certain aspects of the decision (e.g. an extended partial access).

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<sup>7</sup> See in this connection Case C-58/94, *Netherlands v Council*, paragraph 37.

<sup>8</sup> The only alternative to a written procedure would be to submit a draft reply to a confirmatory application to an actual meeting of Heads of State and Government, which does not really seem feasible.

18. The institutions are required to cooperate with the Ombudsman and thus to authorise such inspections, but the Ombudsman in turn cannot pass on to the complainant any information that has been transmitted to the Ombudsman by the institution concerned on a confidential basis.
19. The Working Party on Information is informed of any complaint lodged with the Ombudsman concerning a Council/European Council decision to refuse access to one or more of its documents at the confirmatory stage.

### Inspections

20. Where an inspection concerning the Council is requested, the reply letter to the Ombudsman, containing the authorisation and setting out the practical arrangements for the inspection, is as a rule approved by Coreper (point (k) of Article 19(7) of the Council's Rules of Procedure).<sup>9</sup>
21. In cases where the complaint concerns a refusal by the European Council to grant access to documents held by it, the reply letter authorising the inspection and setting out the practical arrangements for it has to be approved by written procedure by the European Council.

### Reply to the Ombudsman's inquiry

22. A reassessment of the requested document(s) is carried out by the General Secretariat in the light of the complainant's arguments and the Ombudsman's preliminary analysis of the case, including any early 'solution' proposed.

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<sup>9</sup> Coreper agreed to arrangements regarding the consultation by the Ombudsman of LIMITE and classified documents in the framework of the Ombudsman's inquiry into complaints 944/2008/OV, 90/2009/(JD)OV, 523/2009/TS and 1170/2009/KM - see ST 15584/09.

23. A proposal for the institution's reply to the Ombudsman is then submitted to the Working Party on Information using the same procedure as that which applies for approval of replies to confirmatory requests.
24. The final approval, by the Council or the European Council, of the reply to the Ombudsman's inquiry also takes place using the procedure applicable for the approval of replies to confirmatory requests submitted to either of those institutions. In the case of an own-initiative inquiry concerning the Council, the reply may be approved either by Coreper or by the Council, depending on the matter and on the procedure used for the adoption of the contested decision, if any.

Follow-up to Ombudsman decisions concerning handling of confirmatory requests

25. When the Ombudsman closes an inquiry concerning the handling of a confirmatory request and recommends solutions or makes suggestions for improvement, the General Secretariat reassesses the Council's position in the light of the reasoning put forward in the Ombudsman's decision.
  26. A proposal for the institution's reply to the Ombudsman's decision is then submitted to the Working Party on Information using the same procedure as that which applies for approval of replies to confirmatory requests.
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