



Council of the
European Union

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7014/19

LIMITE

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'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	7012/19; 7013/19
Subject:	Public access to documents - Confirmatory application No 06/c/01/19

Delegations will find enclosed a draft reply from the Council to confirmatory application No 06/c/01/19, approved unanimously by the Working Party on Information by written consultation which ended on 28 March 2019.

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:

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

The annex is available in English only.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx
TO CONFIRMATORY APPLICATION No 06/c/01/19,
sent by email on 28 February 2019,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document ST 6346/19 INIT**

The Council has considered the 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) and 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 conclusion:

1. On 19 February 2019, the applicant requested access to document 6346/19. This document is a Working Document, dated 13 February 2019, from the General Secretariat to the Delegations concerning the 6th session of the International Maritime Organisation (IMO) Sub-Committee on Pollution Prevention and Response (PPR 6) which took place in London on 18-22 February 2019.
2. On 28 February 2019, after consulting the Commission, the General Secretariat of the Council granted partial access to the requested document. The only parts which were not released were those revealing the proposed EU common or coordinated positions for PPR 6, pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, since their disclosure would undermine the protection of the public interest as regards international relations.
3. On 28 February 2019, the applicant submitted a confirmatory application asking the Council to reconsider the GSC's position. He argued that the meeting referred to in the document had already taken place and was of historic interest only. He considered that the decision not to fully disclose the requested document was a *"disservice to the purported democratic, transparent decision-making processes"* of the Council.

4. The Council has carefully considered the confirmatory application in the light of the applicant's arguments. Having thoroughly examined the document which is the subject of the request and carried out further consultations, it has re-assessed the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001.

I. THE REQUESTED DOCUMENT

5. Document 6346/19 is a Working Document from the General Secretariat of the Council to the Delegations containing a non-paper from the Commission drafted to facilitate EU co-ordination for the 6th session of the International Maritime Organisation (IMO) Sub-Committee on Pollution Prevention and Response which took place in London on 18-22 February 2019.
6. The Sub-Committee on Pollution Prevention and Response deals with all matters relating to pollution prevention and response which falls within the IMO's remit. This includes, inter alia, all annexes of the International Convention for the Prevention of Pollution from Ships (MARPOL), the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The objective of this convention is to preserve the marine environment in an attempt to completely eliminate pollution by oil and other harmful substances and to minimise accidental spillage of such substances.
7. The participation of the EU and its Member States in the Sub-Committee on Pollution Prevention and Response is an important element of the EU's action in this area. In order to build an effective common position in this forum, the EU shapes its common position through coordination between the EU Member States.
8. The requested document details the agenda items of the 6th session of the International Maritime Organisation Sub-Committee on Pollution Prevention and Response which are of relevance to the EU. It contains background information and presents the Commission's recommendations for a common position of the representatives of the EU and of the Member States. Thus, several parts of the document specifically propose the line of conduct to be followed by the Member States and the Commission in PPR 6.

II. ASSESSMENT OF THE REQUEST UNDER REGULATION (EC) No 1049/2001

9. The Council has carefully scrutinised the content of the document which is the subject of the request. It has also conducted a further consultation with the European Commission which confirmed its view that access to the undisclosed parts of the requested document should be refused.
10. The Council wishes to point out that, as mentioned earlier, the only parts of the requested document that were not disclosed at the stage of the initial application were those reflecting the proposed EU common or coordinated positions for PPR 6 which set the line of conduct to be followed by the Member States and the Commission in that context.
11. As a preliminary remark, 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, therefore the wider access which is also referred to in recital 6 of Regulation (EC) No 1049/2001 does not apply.

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

12. Based on its content, the requested document falls within the scope of the exception provided for on the grounds of protection of the public interest as regards international relations (third indent of Article 4(1)(a), of Regulation (EC) No 1049/2001).
13. The Council wishes to state from the outset that, according to the established case-law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001 are subject to a different regime than the other exceptions included in Article 4.

14. On the one hand, "the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"¹.
15. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because "it is clear from the wording of Article 4(1)(a) of Regulation (EC) No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests".²
16. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations but is barred from taking into account other legitimate interests that might override the conclusion that giving access to a document would harm the protected interest and granting access nonetheless. It also follows from the above that the Council has no choice but to refuse access to a document that falls within the scope of the exception concerning international relations and whose publication would undermine the public interest protected by it.
17. In order to define the EU position in the context of international and intergovernmental frameworks, the EU shapes its position through coordination between the Member States. This implies a regular and on-going flexible coordination process.
18. It is important to note that in such a context with a direct impact on international relations, the content of past periodic discussions of the EU Member States is also of relevance for future discussions. Moreover, it should be noted that the collective work aimed at achieving a coordinated EU approach is an essential element of the effectiveness of the EU's position in international fora.

¹ Court of Justice, *Sison v. Council*, C-266/05 P para. 34; General Court, *Besselink v. Council*, T-331/11; General Court, *Jurašinović v. Council*, T-63/10.

² Court of Justice, *Sison v. Council*, C-266/05 P, para. 46; *Besselink v. Council*, T-331/11, para. 44.

19. Having regard to the main objectives of the issues dealt with in the requested non-paper with a view to the preparations for the 6th session of the International Maritime Organisation Sub-Committee on Pollution Prevention and Response, the Council considers that releasing information to the public on the future developments and suggested approach to be taken in this framework would affect the effectiveness of, and thus jeopardise, the EU's coordination work.
20. The EU lines to take proposed in the document are part of the broader EU coordination process in an international context and also form the basis for internal negotiations on the EU's strategy and position when preparing for further coordination of EU positions for meetings in the IMO. The agreement on a common position to be taken by the EU regarding the IMO Pollution Prevention and Response Sub-Committee sessions is preceded by complex discussions within the Council and its preparatory bodies. The preparation of upcoming IMO meetings involves regular coordination between EU Member States and requires 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 session referred to in the requested document has taken place.
21. This is particularly true for those agenda items where future coordination is likely to take place, based on previous coordinated positions, for example, agenda item 7 (Consideration of the impact on the Arctic of emissions of Black Carbon from international shipping), agenda item 8 (Consistent implementation of Regulation 14.1.3 of MARPOL Annex VI) and agenda item 12 (Development of measures to reduce risks of use and carriage of heavy fuel oil as fuel by ships in Arctic waters). Indeed, it should be underlined that decision-making and negotiations in the International Maritime Organisation usually take several years and that the request concerns the coordination document for a recent IMO Sub-Committee meeting which reveals positions on which negotiations are still ongoing.

22. Under these circumstances, disclosure of the comments made by the Commission as well as of the proposed EU positions (including the changes made to those positions after deliberations in the Council preparatory bodies) would make it possible for third parties to have clear foreknowledge of the European Union's negotiating position at upcoming IMO sub-committee and committee meetings and, in particular, at the next Marine Environment Protection Committee meeting in May 2019 (MEPC 74).
23. Such disclosure of the EU's internal views and negotiation strategy would seriously weaken the position of the European Union in these multilateral negotiations. It would make public any "red lines" and possible "landing zone" for negotiations on those issues. In turn, this would greatly affect the EU's ability to negotiate effectively and would seriously weaken its negotiating position.
24. In view of the above, releasing the information related to the suggested approach set out in document 6346/19 - which is still relevant for future discussions in this framework - would weaken the efforts to reach an EU position and involve a concrete risk of undermining the EU's international position in this context as well as the decision-making process. In any case, as far as the latter risk is concerned, having examined the context in which the document was drafted and the current state of play on this matter, on balance, the Council could not identify any evidence suggesting an overriding public interest in full disclosure.

Partial access pursuant to Article 4(6) of Regulation (EC) No 1049/2001

25. The Council has also examined the possibility of granting an extended partial access to the document, as provided for in Article 4(6) of the Regulation, and has come to the conclusion that the parts of the document to which access was refused by the General Secretariat are still covered by the abovementioned exceptions and cannot therefore be disclosed.

III. CONCLUSION

26. In the light of the above considerations, the Council confirms that access to the parts of the requested document that were not disclosed at the initial stage should be refused pursuant to the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) and also, on a subsidiary basis, pursuant to Article 4(3) of Regulation (EC) No 1049/2001 (protection of the decision-making process).
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