



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 20 July 2010

12068/10

**INF 92
API 55
JUR 297**

"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 12065/10

Subject : Public access to documents
- Confirmatory application No 15/c/01/10

Delegations will find enclosed a draft reply from the Council to confirmatory application No 15/c/01/10, as it stands after examination by the Working Party on Information.

The Danish, Finnish and Swedish delegations indicated that they would vote against the draft reply. The following statements were made:

DK: *"Full disclosure should be given to document 6865/09 in accordance with the Turco judgment (joined cases c-39/05 and c-52/05). There is no reasonable foreseeable risk of undermining the interest of the protection of legal advice and there seems to be a compelling overriding public interest in disclosure. In addition, disclosure will not seriously undermine the institution's decision-making process."*

FI: *"FI cannot concur with the interpretation of the Article 4(2) of the Regulation 1049/2001 regarding the protection of legal advice."*

NL: *"The NL agrees with the conclusion of the draft reply. However, in the light of the arguments made by the applicant, and specifically his reference to the Turco case, some of the arguments used by the Council seem too general and abstract to justify refusal of access to the legal advice."*

SE: *"The draft reply is not in line with the judgment in the Turco-case (C-39/05 and C-52/05 P). Document 6865/09 should be released in its entirety."*

A majority of 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, with the Danish, Finnish and Swedish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION No 15/c/01/10
made by e-mail on 8 July 2010,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 6865/09

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 (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. The applicant refers to document 6865/09 which is an opinion of the Legal Service of the Council concerning the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) and in particular the European Parliament's recommended amendments contained in the Cashman report.
2. In its reply dated 17 June 2010, the General Secretariat granted public access to paragraphs 1-3 of the document. Access to the remaining parts was refused pursuant to Article 4(2), second indent, of Regulation (EC) No 1049/2001 (protection of legal advice) and Article 4(3), first subparagraph, of the Regulation (protection of the Council's decision-making process).
3. In her confirmatory request, the applicant challenges the General Secretariat's refusal to fully disclose the requested document based on the principles referred to by the Court of Justice in the Turco judgment. The applicant claims that the reasons set out in the General Secretariat's initial reply do not suffice to establish that the disclosure of the requested document would undermine the protection of legal advice for the purposes of the second indent of Article 4(2) of Regulation 1049/2001. Furthermore, the applicant challenges the fact that the General Secretariat invokes the first subparagraph of Article 4(3) of Regulation 1049/2001 in addition

to Article 4(2) of the Regulation. The applicant also claims that there is an overriding public interest in getting access to the legal opinion because the legal advice relates to a legislative process. Finally, the applicant submits that the General Secretariat did not properly examine the possibility of providing partial access to the document in question under Article 4(6) of the Regulation.

4. The Council has examined the above-mentioned document in the light of the applicant's arguments and has come to the following conclusion:
5. At the outset, the Council would recall that the second indent of Article 4(2) of the Regulation provides that the institution shall refuse access to a document where disclosure would undermine the protection of "*court proceedings and legal advice*", unless there is an overriding public interest in disclosure. It follows from that provision that once the institution is satisfied that the release of a document would undermine the public interest in the protection of legal advice, the document benefits from the protection against disclosure; however, a document containing legal advice may be made public if an overriding public interest justifying disclosure is established.
6. The Court of Justice clarified the scope of the exception relating to the protection of legal advice in its judgment of 1 July 2008 (Joined Cases C-39/05 and C-52/05 P). In that judgment, the Court held that the principle of increased openness, which enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy, is of particular relevance when the institution is acting in its legislative capacity. Consequently, documents containing legal advice relating to legislative procedures are, in principle, to be disclosed, unless they are "*particularly sensitive [in] nature*" or "*particularly wide [in] scope that goes beyond the context of the legislative process in question*".

7. First of all, document 6865/09 contains an opinion of the Legal Service of the Council concerning a Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast). The requested document contains legal advice, except for its paragraphs 1-3. Although the Commission submitted the recast proposal in April 2008, the decision-making procedure is still at an early stage: the proposal is currently being examined by the European Parliament in first reading. Negotiations between the European Parliament and the Council have not yet started on the proposal.

8. In view of its contents, the legal advice contained in the document is particularly sensitive in nature : in the requested document, the Legal Service provides internal legal advice to the Council's responsible Working Group on legal issues regarding both the procedure and the substance raised in the European Parliament's first reading of the Commission's recast proposal, notably the split of the European Parliament's vote on the amendments and the legislative resolution and the scope of the recommended amendments. Although the European Parliament's responsible committee has since drafted a new report on the recast proposal to take account of the entry into force of the Lisbon Treaty, the legal advice in question referring to the European Parliament's report of 17 February 2009 preserves a degree of sensitivity: the analysis of the European Parliament's recommended amendments of 17 February 2009 remains relevant in the European Parliament's first reading. Were it to be released to the public and thus to the European Parliament, the Legal Service's analysis of the European Parliament's amendments – intended to solely facilitate internal discussions within the Council on the legal matters referred to above – is likely to prompt divergences with the European Parliament and could negatively impact on the upcoming negotiations.

9. Given its particularly sensitive nature, the Council considers that disclosure of the legal advice contained in the requested document would undermine the protection of legal advice. If the internal legal advice analysing delicate issues relating to the European Parliament's recommended amendments were made public, and thus accessible to the European Parliament, it could lead the Council to take into account the risk of a possible disclosure in the future and decide not to request written opinions from its Legal Service. This would prejudice the Council's ability, in general, to carry out its tasks as co-legislator, by depriving it of an important instrument which ensures the compatibility of its acts with the law of the Union and would undermine the Council's interest in requesting and receiving frank, objective and comprehensive legal advice which is supposed to be internal to the institution.
10. In addition, and given the fact that the Council's Legal Service not only assists the institution in ensuring the legality of the acts it adopts but also represents it before the Union courts, disclosure to the public of an internal legal advice in the Council's decision-making process would seriously undermine the Legal Service's capacity in the future to present and defend, free from all external influences and on an equal footing with the legal representatives of the other parties, the Council's position in court proceedings, a position which may differ from the one previously recommended by the Legal Service. Moreover, the very fact for the Legal Service to consider, in the future, the possibility that its internal legal advice intended exclusively for the members of the Council in such a delicate area might be released to the public, could affect the way in which legal opinions are drafted and hence prejudice the possibility of the Legal Service to express its views in a free and independent manner.
11. Furthermore, and in view of the fact that the decision-making process is still at an early stage of the legislative procedure where the European Parliament has not yet adopted its position at first reading in accordance with Article 294(3) TFEU, disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations by impeding internal discussions of the Council on the European Parliament's draft amendments and would compromise the upcoming negotiations between the Council and the European Parliament on the proposal. In particular, when the aim or one of the aims of an internal legal advice is to help the Council in discussing issues with the European Parliament, making public such internal legal advice - and, therefore, accessible to the European Parliament - does not seem possible.

12. The Council has carefully weighed the public interest in the disclosure of the requested document against the public interest in the protection of legal advice and the institution's decision-making process in the light of the arguments raised by the applicant, in accordance with the relevant provisions of the Regulation, as well as the criteria laid down by the Court. It concluded that, with the exception of paragraphs 1-3 which are already publicly accessible, public access to the remaining parts of the requested document must be refused, since disclosure would prejudice two of the protected interests under Regulation 1049/2001, notably the protection of legal advice under Article 4(2) second indent and the institution's ongoing decision-making process under Article 4(3) first subparagraph of the Regulation. In view of the arguments exposed earlier, the Council concluded that the public interest in the transparency of the legislative procedure would not, in the present case, prevail over the interest in the protection of the legal advice and the institution's ongoing decision-making procedure.
