



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 11 October 2013**

**14520/13**

**INF 165  
API 85**

**NOTE**

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Subject: Public access to documents  
- Confirmatory application No 19/c/01/13

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Delegations will find attached:

- request for access to documents sent by the applicant and exchange of e-mails between the General Secretariat of the Council and the applicant concerning this request ([Annex 1](#)).
- reply from the General Secretariat of the Council dated 24 September ([Annex 2](#))
- confirmatory application dated 7 October 2013 and registered on the same day ([Annex 3](#))

[Initial request - sent by fax on 3 September 2013 - 10:24]

Brussels, 3 September 2013

Sir/Madam,

**RE: Access to the complete opinion of the Council Legal Service, document 15856/11 of 21 October 2011 - "Subject: Draft agreement on the European Union Patent Jurisdiction (doc. 13751/11) - compatibility of the draft agreement with the Opinion 1/09" - Confirmatory request**

I refer to my letter sent by registered post on 31 July 2013.

In that letter, I requested access to the full content of the opinion of the Council Legal Service, document 15856/11 of 21 October 2011, "Subject: Draft agreement on the European Union Patent Jurisdiction (doc. 13751/11) - compatibility of the draft agreement with the Opinion 1/09", in accordance with 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.

In fact, the public has been granted only limited access to this document.

You have not responded to my letter of 31 July 2013 within the deadline established by Article 7(1) of Regulation (EC) No 1049/2001.

I hereby expressly confirm my wish to receive the full content of the above-mentioned opinion.

Please send the full version of the document to the following address: **DELETED**.

[complimentary close]

**DELETED**

**[Email message sent on 9 September 2013 - 15:24]**

**From:** SECRETARIAT DGF Access  
**Sent:** Monday, September 09, 2013 3:24 PM  
**To:** **DELETED**  
**Cc:** **DELETED**  
**Subject:** Request for access to document 15856/11

For the attention of **DELETED**

Sir,

I refer to our telephone conversation today, during which I explained that unfortunately the "Document Access" unit of the General Secretariat of the Council did not receive your initial request submitted in August. Please accept our apologies for this.

I have taken careful note of the fact that you have agreed to withdraw your confirmatory application dated 3 September 2013 (received 5 September) and that your request for access to document 15856/11 can therefore be processed as an initial request.

Your request will be processed as quickly as possible.

[complimentary close]

**[Email message sent on 9 September 2013 - 16:16]**

**From:** **DELETED**

**Sent:** Monday, September 09, 2013 4:16 PM

**To:** SECRETARIAT DGF Access

**Cc:** **DELETED**

**Subject:** RE: Request for access to document 15856/11

Dear Madam,

I confirm that I agree to withdraw my confirmatory application provided, naturally, that this withdrawal can under no circumstances be interpreted or used in order to refuse the requested access to the document which is, may I remind you, a right.

[complimentary close]

**DELETED**

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**COUNCIL OF  
THE EUROPEAN UNION**

**GENERAL SECRETARIAT**

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Transparency*

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Legislative Transparency*

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Brussels, 2 October 2013

**DELETED**

**Email:**

**DELETED**

**ref.: 13/1511/lS/mj/mi/mf**

Dear **DELETED**,

We have registered your request of 3 September 2013 for access to document 15856/11 on 5 September 2013. Thank you for your interest.

The General Secretariat of the Council has examined your request on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents<sup>1</sup> (hereafter the "Regulation") and specific provisions of the Council's Rules of Procedure<sup>2</sup> and has come to the following conclusion:

Document **15856/11** is an opinion of the Council Legal Service relating to the Draft agreement on the European Union Patent Jurisdiction. The opinion analyses the compatibility of the said draft agreement with Opinion 1/09 of the Court of Justice of the European Union. It therefore contains legal advice, except for its paragraphs 1, 2 (first sentence), and 4 to 15, which are already public.

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<sup>1</sup> Official Journal L 145, 31.5.2001, p. 43.

<sup>2</sup> Annex II to the Council's Rules of Procedure – Council Decision No 2009/937/EU; Official Journal L 325, 11.12.2009, p. 35.

The legal advice covered by this opinion deals with questions which are contentious and closely linked to issues raised in cases subject to litigation before the Courts<sup>1</sup>. It is therefore very sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure in relation to the protection of legal advice under Regulation (EC) No 1049/2001, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interest so as to justify disclosure of the document.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to this document. However, it would like to provide you with the attached version which is already accessible to the public".

#### Statutory remedy notice

Pursuant to Article 7(2) of the Regulation, you may submit a confirmatory application requesting the Council to reconsider this position, within 15 working days of receiving this reply<sup>2</sup>.

Yours sincerely,

For the General Secretariat

Jakob Thomsen

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<sup>1</sup> Cases C-146/13 Spain vs. Parliament and Council and C-147/13 Spain vs. Council.

<sup>2</sup> Confirmatory applications are published in the Council's Register of documents. Please indicate whether you would like your personal data to be removed from Council documents related to your confirmatory application. Your reply will in no way prejudice your rights under Regulation (EC) No 1049/2001.

**[Confirmatory application - sent by fax on 7 October 2013 - 9:07]**

Brussels, 7 October 2013

Sir,

**RE: Confirmatory application for access to the opinion of the Council Legal Service, document 15856/11 of 21 October 2011**

**Your ref.: 13/1511-ls/mj/mi/mf**

I refer to your letter dated 24 September 2013 in which you refuse to send me the above-mentioned document.

The content of that letter and, more specifically, the reasons given to justify the refusal came as a surprise to me.

For you state in that letter that disclosure to the public of legal opinion 15856/11 may lead the Council to display caution when requesting written opinions from its Legal Service.

Unless the opinion contains gross and manifest legal errors, I cannot understand why the simple public disclosure of a legal opinion could influence the Council's behaviour or its confidence in its Legal Service.

You also indicate that the disclosure of a legal opinion could affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts.

I am again astonished that the Council should make such statements, which inevitably imply that the Council takes no notice of the opinions provided by its Legal Service, and takes decisions which contradict these legal opinions entirely, at the risk of seeing them subsequently called into question in court rulings.

In support of the refusal, you also claim that the Council Legal Service could come under external pressure due to the disclosure of the legal opinion I wish like to consult.

Once more, unless the opinion of the Council Legal Service was carelessly drawn up and contains gross and manifest legal errors, I fail to see why the Council Legal Service should be afraid to disclose it and be subjected to external comments.

I would also hope that the lawyers making up the Council Legal Service are capable of legally justifying the positions they have taken, which make up the opinion in 15856/11, and that they are not liable to let themselves be influenced or impressed by any "external pressure" they may come under ...

Finally - *and most importantly* - your letter leaves me perplexed by the fact that you seem to consider the principle of transparency to be rather unimportant.

In fact, transparency is evidently a fundamental principle of the European Union. Allowing European citizens access to texts which may be important to them or have an impact on their circumstances seems to me to be of crucial importance.

I am dismayed to see that transparency seems to be becoming, in practice, not a principle but an exception, and am not at all surprised by the current low level of trust in and enthusiasm for Europe among its citizens, since their leaders take decisions affecting their lives without informing them beforehand, thus presenting them with a fait accompli.

Moreover, by acting in this manner, that is to say by arrogating to yourselves the right to refuse, on unfounded grounds, to disclose a text of interest to citizens, you are draining Regulation No 1049/2001 of its substance.

Therefore, I hereby request you, in accordance with Article 7(2) of Regulation (EC) No 1049/2001, to reconsider your position and to send me a copy of the full version of legal opinion 15856/11, as I have already requested in my registered letters dated 1 August 2013 and 3 September 2013 respectively.

[complimentary close]

**DELETED**

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