



Council of the
European Union

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
No. prev. doc.:	6721/17
Subject:	Public access to documents - Confirmatory application No 04/c/01/17

Delegations will find enclosed a draft reply from the Council to confirmatory application No 04/c/01/17, as adopted by the Council by written procedure on which ended on 7 April 2017.

The majority of the delegations agreed to publish the result of the vote.

The annex is available in English only.

**DRAFT REPLY ADOPTED BY THE COUNCIL ON ...
TO CONFIRMATORY APPLICATION 04/c/01/17,
made by email on 24 February 2017,
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

1. On 15 December 2016, the applicant submitted a request for access to the following documents: "[...] the minutes of the Agriculture and Fisheries Council held on 12-13 of December 2016, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2017 [...] all preparative and supporting documents related to this issue, including any scientific advice or social/economic arguments used and/or referred to by the EU institutions and/or the Member States, and any correspondence exchanged."
2. In its reply dated 3 February 2017, the General Secretariat of the Council transmitted to the applicant all the requested documents in its possession.

3. In the confirmatory application dated 24 February 2017, the applicant first claims that, the relevant section of the minutes of the Council meeting at which political agreement on the TACs was reached as well as all other documents disclosed, fail to record the deliberations that reconciled the different Member State and Commission positions on the relevant TACs in a non-arbitrary and predictable manner.
4. To this effect, reference is made to the judgment of the General Court of 25 April 2007, in case *WWF European Policy Programme v Council* (T-264/04, ECLI:EU:C:2006:402) and to the judgment of the Court of Justice of 1st July 2008 in case *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374).
5. Second, the applicant claims a breach of the provisions of Regulation (EC) No 1367/2006 based on the argument that the TACs for 2017 constitute “environmental information” within the meaning of Article 2(d) of the Aarhus Regulation, and Regulation (EC) No 1376/2006 guarantees access, not only to documents, but to information.
6. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the request and carried out renewed consultations, it has re-assessed the request in full consideration of the principles underlying Regulations (EC) No 1049/2001 and 1367/2006, with the aim of ensuring the widest possible public access to documents and information.

II. Request under Regulation (EC) No 1049/2001

7. As indicated above, in its reply dated 3 February 2017, the General Secretariat of the Council transmitted to the applicant all the requested documents in its possession. After careful re-examination of its files, the Council has not identified any other preparative and supporting documents related to the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2017.

8. 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 concerned¹. 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 exist².
9. As a result, 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.

III. Request under Regulation (EC) No 1367/2006

10. According 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 [...]".
11. 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.
12. 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 exist³.

¹ Judgment of the Court of justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 38.

² Judgment of the Court of justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 36.

³ 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.

IV. Documentation of the decision-making process

13. Beyond its obligations under Regulations (EC) No 1049/2001 and 1367/2006, the Council can provide the applicant with the following information regarding the documentation of its decision making process, which was done in full compliance with the Council's Rules of Procedure and any other relevant provisions. All the documents mentioned in parentheses have been communicated to the applicant.
14. The Commission Proposal of 27 October 2016 for a Council Regulation fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters (*documents 13797/16 + ADD 01 + ADD 02*) was examined during five meetings of the Working Party (4, 9, 17 and 23 November 2016 and 7/8 December 2016) and one COREPER session on 7 December 2016 before unanimous political agreement was reached at the Agriculture and Fisheries Council on 12-13 December 2016.
15. The documentation of the discussions has been as following:
 - a) Subsequent to the receipt and circulation of the proposal, Commission non-papers providing updates to the proposal were circulated to the members of the Working party on Internal and External Fisheries Policy (*documents 14351/16 + CO1 and 14457/16 + CO1 of 15 and 16 November 2016 respectively*).
 - b) Delegations' comments on these proposals, received between 17 November and 8 December 2016, were circulated in *document 14552/16* and its *ADD1 to ADD13*. These comments clearly set out delegations' positions on specific issues of the proposal.
 - c) New Commission non-papers providing updates were received and circulated to the members of the Working Party on 21, 22, and 23 November 2016 (*documents 14611/16, 14754/16 and 14786/16*).
 - d) During the discussions, the delegations and the Commission took into account the scientific analyses available.

- e) Following discussions in the meetings of the Working Party on Internal Fisheries Policy, and taking into account delegations' written comments and Commission non-papers received, the General Secretariat of the Council had prepared an "Outcome of Proceedings" on 28 November 2016, referred to by the applicant as "the bible" (*doc.14854/16 + ADDs and REVs*). This document was complemented and updated until 8 December 2016. Over its 132 pages, it sets out an overview of delegations' positions on the Commission proposal and, where relevant, additional explanations from the Commission regarding the reasons behind its proposal and including all the delegations' positions thereto.
- f) A further update from the Commission was received on 30 November 2016 (*document 15023/16*).
- g) The Presidency informed on 7 December 2016 the Permanent Representatives Committee (COREPER) on the outcome of the meetings of the Working Party inviting them to address the outstanding issues and outlined some guidelines on which to base a compromise package to the Council (*document 15054/16*). In the note to the COREPER, a reference was made for more details to written comments from delegations (*doc. 14552/16 + ADD 1-12*) and outcome of proceedings ("*bible*", *doc. 14854/16*) (see b) and c)).
- h) Further updates from the Commission were circulated on 6 and 8 December 2016 (*documents 15102/16 and 15384/16*).
- i) On 12 December 2016, the General Secretariat of the Council transmitted to the Council a consolidated version of the 2017 TAC and Quotas Proposal prepared by the Commission services (*documents 14928/16 + ADD 1 + ADD 2*).
- j) Based on this consolidated version, the Presidency submitted to the Council a compromise proposal on 13 December 2016 (*document 15486/16*).

- k) This compromise proposal was complemented and modified by *document 15555/16 and its COR1* from the Presidency to the Council of 14 December 2016.
- l) In the light of the unanimous political agreement reached at the Agriculture and Fisheries Council on 12-13 December 2016, a consolidated text of the proposal was circulated on 16 December 2016 (*document 15650/16 + ADD1 +ADD2*).
- m) A list of statements by the Council, the Commission and delegations was published on 6 January 2017 (*document 15664/16*).
- n) The minutes of the Agriculture and Fisheries Council of 12-13 December 2016, document 15541/16 of 12 January 2016, were drafted in accordance with Article 13 of the Council's Rules of Procedure.

This list of procedural steps and documentation provides a full overview of the Council decision making process.

- 16. The Council notes and confirms that taking into account the above, all documents relevant to the initial request of the applicant have been transmitted and have been made public.

IV. 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.
18. Finally, according to Article 7 of Regulation (EC) No 1367/2006, "[w]here [an Union] institution or body receives a request for access to environmental information and where this information is not held by that [Union] institution or body, it shall, as promptly as possible, but within 15 working days at the latest, inform the applicant of the [Union] institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant [Union] institution or body or the public authority and inform the applicant accordingly."
19. The Council does not have any specific information whether other EU institutions or bodies or a national public authority holds the environmental information sought by the applicant. However, it may not be excluded that such information could be held by the Commission and by the national competent authorities within the meaning of Directive 2003/4/EC which were involved in the discussions leading up to the adoption of the Council Regulation fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.
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