



Council of the
European Union

Brussels, 27 February 2023
(OR. en)

6876/23

INF 42
API 42

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Public access to documents - Confirmatory application No 06/c/01/23

Delegations will find attached:

- the request for access to documents sent to the General Secretariat of the Council on 11 February 2023 and registered on 13 February 2023 (Annex 1);
- the reply from the General Secretariat of the Council dated 24 February 2023 (Annex 2);
- the confirmatory application dated 26 February 2023 and registered on 27 February 2023 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on Saturday 11 February 2023, 20:48]

From: **DELETED**

Sent: 11 February 2023 20:48

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Consilium - Electronic Request for Access to documents [ENGLISH]

DELETED

Family name **DELETED**

First name **DELETED**

E-mail **DELETED**

Full postal address **DELETED**

Requested document(s): The advice of the Legal Service of the Council issued in relation to the adoption of Regulation (EU) No 1026/2012 and its implementation with regard to the Faroe Islands and its fishery on Atlanto-Scandian herring.



Council of the European Union

General Secretariat

Directorate-General Communication and Information - COMM

Directorate Information and Outreach

Information Services Unit / Transparency

Head of Unit

Brussels, 24 February 2023

DELETED

Email: **DELETED**

Ref. 23/0399-adb/nb

Request made on: 11.02.2023

Registered on: 13.02.2023

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union¹.

We have identified the document that you have requested as document **ST 8439/12**.

Document 8439/12, dated 30 March 2012, contains an opinion of the Council Legal Service (CLS) on the "Proposal for a Regulation of the European Parliament and the Council on certain measures in relation to countries allowing non-sustainable fishing on the purpose of the conservation of fish stocks" (COM(2011) 888 final).

In this document, the CLS examines the compliance of the abovementioned Proposal with the rules of the World Trade Organisation (WTO), the Law of the Sea as defined in the United Nations Convention on the Law of the Sea (UNCLOS) and the United Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) as well as agreement on the European Economic Area (EEA Agreement) and other rules of public international law.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

Except for paragraphs 1 to 6 of the requested document, which have already been disclosed to the public, the remaining parts of the document contain legal advice which the General Secretariat of the Council (GSC) considers particularly sensitive and contentious in nature.

It should be noted that the CLS's analysis is wide in scope and goes beyond the Proposal in the context of which the requested opinion was issued. Indeed, the legal advice addresses horizontal questions which remain acutely relevant in the context of ongoing legislative files for which the risk of future litigation is considered reasonably foreseeable.

Thus, the GSC considers that the full disclosure of the requested document would undermine the protection of legal advice under Article 4(2), second indent of Regulation (EC) No 1049/2001. Further disclosure 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.

As regards the existence of an overriding public interest in fully disclosing the requested document in relation to the protection of legal advice under article 4(2) of Regulation No 1049/2001, the GSC considers that, on balance, the principle of transparency which underlies that Regulation would not, in the present case, prevail over the above indicated interest in receiving frank, objective and comprehensive legal advice so as to justify full disclosure of the requested document.

Pursuant to Article 4(6) Regulation 1049/2001, the GSC has assessed whether partial access could be granted to the some of the parts of the requested document. However, the GSC has reached the conclusion that, with the exception of the paragraphs 1 to 6 of the requested document which have already been disclosed, all the remaining parts of the requested document fall within the scope of the abovementioned exception.

In view of the foregoing, the GSC is unable to grant further access to document 8439/12, pursuant to Article 4(2), second indent of Regulation (EC) No 1049/2001 (protection of legal advice).

Please find attached a courtesy copy of the partially accessible document; it can also be retrieved via the Council's Public Register.

You may ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).

Yours sincerely,

Fernando FLORINDO

Enclosure: 1

[E-mail message sent to access@consilium.europa.eu on Sunday, 26 February 2023, 15:35]

From: **DELETED**

Sent: 26 February 2023 15:35

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Re: Ref. 23/0399-adb/nb

Dear Madam/Sir,

Thank you for the message. Please find attached my confirmatory application.

Best regards

DELETED

[REDACTED]
[REDACTED]
[REDACTED]

Brussels, 26 February 2023

Mr Fernando Florindo

Ref. 23/0399-adb/nb

Request made on: 11.02.2023

Registered on: 13.02.2023

Dear Mr Florindo,

Thank you very much for your letter of 24 February 2023 with the results of my access to documents request of 11.02.2023. I appreciate the work of the Secretariat in managing to find Document 8439/12, dated 30 March 2012.

I would like to take this opportunity to avail myself of the right under Article 7(2) of Regulation 1049/2001 to which you also referred in your letter. In particular, my request to have the decision reconsidered is on the basis of the following considerations.

First, while I would not want to be in any way prejudicing the Council's workings, I would like to ask for a reconsideration of the part of the decision which refuses releasing even part of the substance of the document (beyond the first few descriptive paragraphs). In particular, I do not see how it would prejudice the Council for at least certain *meta* information to be publicly available. In particular, you mentioned that "the legal advice addresses horizontal questions" and I would like to at least know specifically what these questions were on which the Legal Service provided its opinion. I want to know this not only in order to satisfy my access request but also to be able to direct my inquiry through this confirmatory application. That is, with the current available information, I am unable to fully substantiate my confirmatory application. Furthermore, apart from the horizontal questions, whatever they may be, the opinion ought to address the *in casu* questions and provide an opinion on them and horizontally-related redactions cannot be extended to the whole opinion. The redacted version you provided me with does not provide any information whatsoever on the *in casu* questions and most importantly the legal conclusions reached in the context of the legislative proposal at hand.

Second, I am afraid that I cannot fully agree with the reasons you provided for refusing access. In your letter you consider that disclosing with the public the document "may lead the Council to display caution when requesting similar written opinions from its Legal Service". This view

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contradicts the whole idea of transparency within the EU administration. Much more recent opinions of the Legal Service of the Council as well as Commission and the European Parliament have been shared on equally if not more sensitive matters such as the EU-Morocco agreement on the question of Western Sahara. It is incompatible with the ideas of transparency and good administration that the Council may display caution in requesting such opinions just because the public may eventually access these opinions. These opinions are by definition a matter of public concern because the Council exercises public power and is bound to observe the rule of law, as the Legal Service opinions undoubtedly profess. The Council may only display such caution if it is unwilling to observe the rule of law, which I doubt is what you meant in your letter.

This position is not affected by your consideration that the questions addressed “remain acutely relevant in the context of ongoing legislative files for which the risk of future litigation is considered reasonably foreseeable”. This is because you seem to suggest that the Legal Service would contradict itself in its submissions to the Court. Although the Legal Service may want to protect certain parts of its opinion as part of its litigation strategy, such protection must be directed and cannot serve as a catch-all reason for any and all opinions or, as in the present case, for an opinion that, as you said, deals with a big number of issues. Furthermore, this opinion was issued just about 11 years ago and this redacted version was made public over 9 years ago. While at the time, I can appreciate the EU was in the middle of its spat with the Faroe Islands directly related to the instrument this opinion relates, this circumstance has long passed, let alone that it did not reach the Court in the first place.

In light of these considerations I would like to formally ask the Council to review its decision. Due to the lack of relevant information to which I referred above, I was unable to fully substantiate my confirmatory application and I reserve the right to supplement if further once I receive your reaction on this initial part of my confirmatory application. Thank you in advance for the consideration and I am looking forward to your answer.

Best regards



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