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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Public access to documents - Confirmatory application No 09/c/01/25

Delegations will find attached a draft reply to confirmatory application No 09/c/01/25
(see 8065/25).

REPLY TO CONFIRMATORY APPLICATION 09/C/01/25

made by email on 15 April 2025 and registered on the same day

A. INTRODUCTION

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 and Annex II to the [Council's Rules of Procedure](#) and has come to the following conclusion:

1. On 14 February 2025, the Applicant submitted a request for public access to "*tous les documents concernant les questions et réponses données lors de [l'] audition [du 31 janvier 2025 visé par la demande], qui ont constitué la base de l'avis du comité [prévu à l'article 255 du TFUE], à savoir :*
 - *[...] une copie de l'enregistrement de [l'] audition, au cas où l'audition aurait été enregistrée;*
 - *[...] aussi le compte-rendu, procès-verbal, de l'audition, avec [la] présentation de 10 minutes et toutes les questions posées et réponses données "*
2. On 1 April 2025, the General Secretariat of the Council replied to the Applicant that it had not identified documents falling within the scope of the application.
3. On 15 April 2025, the Applicant submitted a confirmatory application reiterating the request to obtain access "*à tous les documents concernant les questions et réponses données lors de [l'] audition, qui ont constitué la base de l'avis du comité*". In particular, the Applicant requests once again access "*à l'enregistrement phonographique et au compte-rendu de [l'] audition*" and supports the request by the following:

- "1- *Il était public et notoire que tous les dispositifs d'enregistrement phonographique de la session étaient disponibles lors de [l'] audition. [Le requérant] demande une copie de l'enregistrement phonographique de [l'] audition (avec [la] présentation de 10 minutes et toutes les questions posées et réponses données).*
- 2- *Si la session n'a pas été enregistrée, [le requérant] demande au Secrétariat général du Conseil de le préciser. En d'autres termes, [il] demande au Secrétariat général du Conseil de confirmer que la session n'a pas été enregistrée.*
- 3- *[Le requérant] demande aussi le compte-rendu, procès-verbal, de l'audition. L'audition était accompagnée d'un secrétaire qui prenait des notes. [Il] demande l'accès à ces notes et au compte-rendu de l'audition".*
4. Pursuant to Article 8 of Regulation (EC) No 1049/2001, in response to a confirmatory application, the institution can either grant access to the requested documents or confirm the previous refusal and state the reasons for this. All other issues raised in this confirmatory application do not fall within the scope of Regulation (EC) No 1049/2001.
5. The Council confirms that it has not identified any documents falling within the scope of the Applicant's initial and confirmatory applications. It nevertheless finds necessary to make the observations set out below.

B. THE CONTEXT

6. According to Article 255, first paragraph, of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), "[a] panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court (...)".
7. The panel - which is composed of seven persons chosen among former members of the Court of Justice of the European Union (hereinafter "CJEU") and the General Court, members of national supreme courts and lawyers of recognised competence - provides its opinions to the intergovernmental conference that, according to Articles 253 and 254 TFEU, appoints the Judges and Advocates-General of the CJEU and the General Court by common accord.
8. The panel operates according to operating rules that have been laid down by Council Decision 2010/124/EU of 25 February 2010 (OJ L 50, 27.02.2010, p. 18-19), in line with Article 255, second paragraph, TFEU.
9. Under point four of those operating rules, "*The General Secretariat of the Council shall be responsible for the panel's secretariat. It shall provide the administrative support necessary for the working of the panel (...)*".
10. The operating rules establish a principle of confidentiality of the activity of the panel and one of limited circulation of the relevant panel documents (candidacies submitted to the panel and panel's opinions):
 - i) According to point five of the rules, "*the deliberations of the panel shall take place in camera*";

- ii) Point seven makes clear that "*Except where a proposal relates to the reappointment of a Judge or Advocate-General, the panel shall hear the candidate; the hearing shall take place in private*";
- iii) Point six provides that "*As soon as a Government of a Member State proposes a candidate, the General Secretariat of the Council shall send that proposal to the President of the panel*";
- iv) Point eight states that the "*panel's opinion shall be forwarded to the Representatives of the Governments of the Member States*". Moreover, at the request of the Presidency, "*the President of the Panel shall present that opinion to the Representatives of the Governments of the Member States' meeting within the Council*".

C. THE REQUESTED DOCUMENTS

11. The Council notes that the Applicant does not request access to the panel's opinion delivered following the hearing referred to in the request, as confirmed in the confirmatory application.
12. As regards the request of the Applicant for access to the audio recording of the hearing referred to in the request, the Council can confirm that such a recording does not exist. Contrary to what the Applicant seems to argue, no devices were placed in the room in which the hearing was conducted to record the hearing. That room is equipped with interpretation booths in which simultaneous interpretation from English to French and vice-versa was provided during the hearing. The Council thus states that the General Secretariat of the Council did not perform any audio nor video recording of the hearing. In addition, the Council finds necessary to underline that the General Secretariat of the Council has never recorded the hearings of the candidates conducted by the panel.

13. Concerning the Applicant's request for access to the *compte-rendu* and the *procès-verbal* of the hearing, the Council reiterates that such documents do not exist either. Indeed, after the hearings the panel deliberates *in camera* and prepares its opinions. The panel does not produce *comptes-rendus* nor *procès-verbaux* of the hearings of the candidates and has never produced such documents. For this reason, the secretariat of the panel has never contributed to the establishment of *comptes-rendus* nor *procès-verbaux* of the hearings of the candidates. The assessment of the written file and of the performance of the candidate in the hearing is reflected in the panel's opinion, which is the only deliverable in written form produced by the panel at the end of a given hearing. Concretely as regards the hearing referred to in the request, it is affirmed that the secretariat of the panel did not take notes of the ten-minute introductory presentation at the beginning of the hearing nor of the questions asked by the members of the panel and the answers provided. Any handwritten notes taken by the secretariat of the panel at any point during the hearing are of administrative nature and concern the handling of the meeting, they do not reflect the content of the oral exchanges between a candidate and the members of the panel, do not serve for the establishment of a *compte-rendu* or a *procès-verbal* of the hearing and are destroyed immediately after the meeting. The Council confirms that any such notes taken while the hearing referred to in the request was on-going were destroyed after the meeting in which that hearing took place.
14. At this point, it should be recalled that pursuant to Article 2(3) of Regulation (EC) No 1049/2001, public access to documents is limited to "*documents held by an institution, that is to say, documents drawn up or received by it and in its possession*".

15. By virtue of the presumption of legality attaching to EU acts, it would be incumbent on the Applicant to rebut the Council’s statement in paragraphs 12 and 13 above that it does not hold any such documents by relevant and consistent evidence¹. In this regard, the Council notes that the Applicant does not attempt to do so and merely assumes that an audio recording of the hearing concerned must exist as “[i]l était public et notoire que tous les dispositifs d’enregistrement phonographique de la session étaient disponibles lors de [l’] audition” and that a *compte-rendu, procès-verbal* of the hearing with the panel must exist as well because, allegedly, “[l’]audition était accompagnée d’un secrétaire qui prenait des notes”, which, as explained above, does not reflect what happened and what the consistent practice is. According to the case-law, however, such “*relevant and consistent evidence*”, capable of putting into question the institution’s statement that it does not hold any documents that would fall within the scope of the request (whether because they do not exist or the institution is not in possession of them²), goes well beyond a mere ‘belief’ that the documents should exist^{3,8}.
16. Finally, the Council observes that it has no obligation to create a document which it has been asked to grant access to but which does not exist⁴.

D. CONCLUSION

17. In the light of the above, the Council confirms that it does not hold documents which would be covered by the Applicant’s request.

¹ See judgment of the General Court of 23 April 2018 in case T-468/16, *Verein Deutsche Sprache v Commission*, EU:T:2018:207, paragraph 35, and the case-law cited (judgment confirmed in the Order of the Court of Justice of 30 January 2019 in appeal case C-440/18P, *Verein Deutsche Sprache v Commission*, EU:C:2019:77, paragraph 14, and the case-law cited); judgment of the General Court of 25 September 2018 in joined cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, EU:T:2018:602, paragraph 33, and the case law cited.

² See judgment of the General Court of 11 June 2015 in case T-496/13, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50.

³ See judgment of 25 September 2018 in joined cases T-639/15 to T-666/15 and T-94/16, *Psara et al. v European Parliament*, above, paragraph 34 et seq.

⁴ See judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 46.