



Council of the  
European Union

Brussels, 22 May 2018  
(OR. en)

8906/18

INF 75  
API 51

**NOTE**

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From: General Secretariat of the Council  
To: Working Party on Information  
Subject: Public access to documents  
- Confirmatory application No 12/c/01/18

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Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 23 March 2018 and registered the same day ([Annex 1](#));
- reply from the General Secretariat of the Council dated 15 May 2018 ([Annex 2](#));
- confirmatory application dated 15 May 2018 and registered the same day ([Annex 3](#))

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 23 March 2018 - 08:29]

From: Mathias Schindler <**DELETED**@asktheeu.org>  
Sent: Friday, March 23, 2018 8:29 AM  
To: SECRETARIAT DGF Access <Access@consilium.europa.eu>  
Subject: access to documents request - Council Legal Service opinion on Spitzenkandidaten

Dear Council of the EU,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

The Council Legal Service has written documents about the Spitzenkandidaten system. I am requesting a copy of these documents.

Yours faithfully,

Mathias Schindler

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**Council of the European Union**

General Secretariat

Directorate-General Communication and Information

Knowledge Management

Transparency

*Head of Unit*

Brussels, 15 May 2018

Mr Mathias Schindler

Email: Mathias Schindler <**DELETED**@asktheeu.org>

Ref. 18/0620-ws/ns

Request made on: 23.03.2018

Deadline extension: 18.04.2018

Dear Mr Schindler,

Thank you for your request for access to a document of the Council of the European Union.<sup>1</sup>

Please find attached a partially accessible version of document 7038/16.<sup>2</sup> However, I regret to inform you that full access cannot be given for the reasons set out below.

The requested document comprises an opinion of the Council Legal Service on the European Parliament's Proposal for a Council decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage<sup>3</sup> (the "Proposal").

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<sup>1</sup> 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).

<sup>2</sup> Article 4(6) of Regulation (EC) No 1049/2001.

<sup>3</sup> Decision 76/787/ECSC, EEC, Euratom of the representatives of the Member States meeting in the Council of 20 September 1976 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage.

The legal advice relates to a legislative decision-making process which is currently ongoing. In this respect, the legal opinion discusses a number of issues which are novel and remain controversial among the Member States and which are a crucial element not only of discussions in the Council but also for the future inter-institutional negotiations with the European Parliament. In that regard, it should be further stressed that, according to the relevant legal basis (Art. 223 TFEU), the Council is required to adopt the reform of the electoral law by unanimity and that the new provisions shall enter into force only following their approval by the Member States in accordance with their respective constitutional requirements.

In such circumstances, the disclosure of the document could have a negative influence on already complex and sensitive discussions and could consequently risk compromising the capacity of institutions and Member States to reach an agreement on the proposal. The disclosure of the opinion would thus undermine the protection of the decision-making process.<sup>4</sup>

Moreover, the legal advice deals with complex issues which are novel and highly contentious. In particular the requested document analyses in detail the Articles of the Proposal, which include numerous modifications with respect to the European Electoral Act currently in force. Many of the issues examined in the requested document touch upon fundamental rights of the individual and are likely to lead to litigation in the future. The legal advice dealt with in the opinion appears therefore to be of a particularly sensitive nature. Moreover, most of these issues also have a particularly wide scope since they address fundamental horizontal issues in the fields of, inter alia, human rights and the powers of the institutions. As a consequence, its disclosure could undermine the public interest relating to the protection of legal advice.<sup>5</sup>

As a consequence, disclosure of the requested document would make known to the public an internal opinion of the Legal Service intended for the members of the Council. This in turn would impair the capacity of the Legal Service to defend the future decisions of the Council in all relevant fora and to express its views freely in future opinions and contributions. 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, 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 from external influences. Disclosure of the legal opinion could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Consequently, disclosure of this document would undermine in a reasonably foreseeable and not merely hypothetical way the interest of the Council in protecting legal advice.

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<sup>4</sup> Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

<sup>5</sup> Article 4(2), second indent, of Regulation (EC) No 1049/2001.

The General Secretariat has furthermore examined the context in which the document was drafted and the current state of play on this matter, in particular duly taking into account recent discussions at ministerial level, but on balance could not identify any evidence suggesting an overriding public interest in its full disclosure at the present point in time.

As a consequence, the General Secretariat has to refuse full access to the document at this stage.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).<sup>6</sup>

Yours sincerely,

Sally BLISS

Enclosure

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<sup>6</sup> Article 7(2) of Regulation (EC) No 1049/2001.  
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[E-mail message sent to [access@consilium.europa.eu](mailto:access@consilium.europa.eu) on 15 May 2018 - 14:40]

From: Mathias Schindler <**DELETED**@asktheeu.org>  
Sent: Tuesday, May 15, 2018 2:40 PM  
To: SECRETARIAT DGF Access <Access@consilium.europa.eu>  
Subject: Internal review of access to documents request - Council Legal Service opinion on Spitzenkandidaten

Dear Council of the EU,

Please pass this on to the person who reviews confirmatory applications.

I am filing the following confirmatory application with regards to my access to documents request 'Council Legal Service opinion on Spitzenkandidaten'.

There are no reasons not to disclose the document. There is an overriding interest to release the document. The document should have been made public already proactively.

A full history of my request and all correspondence is available on the Internet at this address:  
[https://www.asktheeu.org/en/request/council\\_legal\\_service\\_opinion\\_on](https://www.asktheeu.org/en/request/council_legal_service_opinion_on)

Yours faithfully,

Mathias Schindler

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