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Judgment of the Court of Justice in Joined Cases C-39/05 and C-52/05

Sweden and Turco v Council and Others

THE COURT AUTHORISES, IN PRINCIPLE, ACCESS TO LEGAL ADVICE GIVEN TO THE COUNCIL ON LEGISLATIVE QUESTIONS

The transparency of the legislative process and the strengthening of the democratic rights of European citizens are capable of constituting an overriding public interest which justifies the disclosure of legal advice

The Community regulation regarding public access to documents¹ provides that any citizen of the Union and any person residing in a Member State has a right of access to documents of the institutions. The regulation provides for exceptions to that general principle, inter alia where disclosure of a document would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in disclosure.

On 22 October 2002 Mr Turco submitted a request to the Council for access to the documents appearing on the agenda of the ‘Justice and Home Affairs’ Council meeting, including an opinion of the Council’s legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum in Member States.

The Council refused to disclose the document, on the grounds that the advice of its legal service deserves particular protection since it is an important instrument which enables the Council to be sure of the compatibility of its acts with Community law, and that disclosure of the legal service’s opinions could create uncertainty regarding the legality of legislative acts adopted further to those opinions. The Council took the view that in the circumstances there was no overriding public interest that would permit disclosure of the document. The principle of transparency and openness of the decision-making process relied upon by Mr Turco did not, according to the Council, constitute a relevant criterion in so far as it would apply to all documents of the legal service, making it practically impossible for the Council to refuse access to any opinion under Regulation No 1049/2001.

Mr Turco asked the Court of First Instance to annul the Council’s decision, but it declined to do so, on the ground that disclosure of legal opinions such as that in question could give rise to lingering doubts as to the lawfulness of legislative acts to which such advice related and could

¹ 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 2001 L 145, p. 43)

also compromise the independence of the opinions of the Council's legal service. The Court of First Instance held that the overriding public interest in disclosure must be distinct from the principles underlying Regulation No 1049/2001, in particular the principle of openness, relied on by Mr Turco.

Sweden and Mr Turco appealed to the Court, asking that the judgment of the Court of First Instance be set aside in so far as it refused to grant Mr Turco access to the legal opinion.

The Court points out that the examination to be undertaken by the Council before disclosing a document must be carried out in three stages. First, it must satisfy itself that, over and above the way a document is described, that document does indeed concern legal advice. Second, it must examine whether disclosure of the parts of the document in question would undermine the protection of legal advice. In that regard, the Court construes the exception relating to legal advice contained in Regulation No 1049/2001 as aiming to protect an institution's interest in seeking frank, objective and comprehensive advice. It points out that the general and abstract submission that disclosure could lead to doubts as to the lawfulness of a legislative act does not suffice to establish that the protection of legal advice will be undermined, since **it is precisely openness in this regard that contributes to greater legitimacy and confidence in the eyes of European citizens**. Similarly, the independence of the Council's legal service will not be compromised by disclosure of legal opinions where there is no reasonably foreseeable and not purely hypothetical risk of that institution's interest in seeking frank, objective and comprehensive advice being undermined. Thirdly, the Court states that it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure.

The Court takes the view that **disclosure of documents containing the advice of an institution's legal service** on legal questions arising when legislative initiatives are being debated **increases transparency and strengthens the democratic right of European citizens** to scrutinize the information which has formed the basis of a legislative act.

The Court concludes that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process. There are, however, exceptions to that principle as regards opinions given in the context of a legislative process, but being of a particularly sensitive nature or having a wide scope that goes beyond the context of the legislative process. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.

On the basis of those considerations, **the Court sets aside the judgment of the Court of First Instance in so far as it relates to the refusal of access to the legal opinion in question.**

Lastly, the Court avails itself of the possibility conferred upon it by its statute to give final judgment itself in the matter and **annuls the decision of the Council refusing Mr Turco access to the legal opinion in question.**

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Languages available: DE, EN, ES, EL, FR, IT, NL, PT, SV

The full text of the judgment may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-39/05>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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