



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 May 2009

9716/09

**Interinstitutional file:
2008/0090 (COD)**

LIMITE

**INF 128
API 67
CODEC 708**

NOTE

From : General Secretariat
To : Working Party on Information
Subject : Proposal for a Regulation of the European Parliament and of the Council
regarding public access to European Parliament, Council and Commission
documents (recast)

In view to the meeting of the Working Party on 14 May 2009, delegations will find attached a proposal made by Denmark, Estonia, Finland and Slovenia concerning Article 4, paragraph 2, point (c) of the Commissions proposal.

17 April 2009

Proposal by Denmark, Estonia, Finland and Slovenia

Article 4, paragraph 2, point (c) “Legal advice and court proceedings”

Commission proposal: 2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(c) legal advice and court proceedings, arbitration and dispute settlement proceedings.

Proposal of the Danish, Estonian, Finnish and Slovenian delegations:

Delete Commission proposal and uphold the existing article 4, para 2, (c)

Justification:

Several delegations have raised the need for an absolute exception relating to legal advice. We believe, however, that the existing wording of Article 4, par 2 (c) should be upheld. The exception, as interpreted by the European Court of Justice in C-39/05P (Turco), represents a fair and balanced approach. The ruling establishes that while access to legislative documents is the main rule, access can be denied if the requested document is particularly sensitive or wide in scope. All categories of documents held by the institutions are covered by the regulation on access to documents. Access to such documents can only be denied following a case-by-case assessment if they are covered by one of the exceptions provided for in the regulation. Moreover, the Court has established that the risk of harm to a protected interest needs to be reasonably foreseeable and not purely hypothetical.

It is much welcomed that the Legal Service of the Council following the judgment in C-39/05P has taken all necessary measures in order to implement in the fullest possible way the just mentioned judgment. A list on “CLS opinions to which public access has been granted following the ECJ judgment as of 26 November 2008” has been distributed to the WPI working group. According to this list access or partial access was at that time granted to 24 legal opinions.

The Legal Service of the Council has informed that in total 50 requests for access to legal opinion had been decided by the Council at that time.

In our view, this list illustrates that following a concrete analysis of the application of existing article 4, par 2 (c) access to some legal opinions should rightly be granted. It has not been demonstrated that access to these specific legal opinions would have caused damage to the protected interest, i.e. the effectiveness of the Council decision-making. It has furthermore not been established that access to these specific legal opinions would be detrimental to the capacity of the Council Legal Service to offer frank, objective and comprehensive legal advice.

The Commission proposes to add: “arbitration and dispute settlement proceedings” to the existing exception. According to the Commission this new wording clarifies the exception only. However, we have certain doubts in this regard and ask for further legal clarification cnf. doc. 5671/09 ADD1. In this context the Commission has made reference to the need to protect, when necessary, the proceedings before the WTO trade panels. We ask for clarification as to which other specific, known proceedings, would be covered by this new wording.
