



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 May 2009

8738/09

**INF 105
API 56
JUR 188**

"I/A" ITEM NOTE

from : Working Party on Information
to : Coreper (part 2)/Council

No. prev. doc.: 8737/09

Subject : Public access to documents
- Confirmatory application 11/c/01/09

Delegations will find enclosed a draft reply from the Council, as it stands after examination by the Working Party on Information at its meeting on 14 May 2009, to confirmatory application 11/c/01/09.

The German and Irish delegations indicated that they would vote against the draft reply. The German delegation made the following statement:

DE: *"In its draft, the General Secretariat refers to Article 4(3) first sentence concerning refusal of access to documents on issues on which the institution has not yet taken a decision. The decision on the Sanctions Directive being imminent, the General Secretariat concludes that the exception in Article 4(3) is no longer applicable and that full access should be granted. This does not take into account Article 4(3) second sentence providing for refusal "even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process..."*

DE considers that this applies to documents such as these outcomes of proceedings in general, because the footnotes record Member States' negotiating positions. These positions are not always correctly recorded, because there may have been misunderstandings during

the meeting which are only clarified – orally most of the time – during the following meeting, without being corrected in the report. This (non bureaucratic) practice would certainly be affected by the release of the documents. In addition, the footnotes make it possible to identify where Member States have made concessions during negotiations. It must be assumed that such concessions (in the sense of "package deals") will only be made if they stay confidential. It is for these reasons that DE thinks that full access to these documents would seriously undermine future decision making."

A majority of delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item, with the German and Irish delegations voting against,
- decide to publish the result of the vote.

The Annex is available in English only.

DRAFT
REPLY ADOPTED BY THE COUNCIL ON
TO CONFIRMATORY APPLICATION 11/c/01/09
made by e-mail on 15 April 2009,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to documents 14916/07, 6136/08 and 7286/08

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 (OJ L 145 of 31.5.2001, p. 43) and Annex II to the Council's Rules of Procedure (Council Decision 2006/683/EC, Euratom - OJ L 285 of 16.10.2006, p. 47) and has come to the following conclusion:

1. The applicant refers to documents 14916/07, 6136/08 and 7286/08 concerning the proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals. Documents 14916/07 and 6136/08 contain the outcomes of proceedings of the meetings of the Working Party on Migration and Expulsion on, respectively, 5-6 November 2007 and 31 January 2008. Document 7286/08 is a Note from the Presidency to this Working Party.
2. In its reply dated 15 April 2009, the General Secretariat granted access to the content of the documents, including delegations' positions, but excluding those parts which enable the delegations concerned to be identified. Access to those parts was refused pursuant to Article 4(3), first subparagraph, of the Regulation (protection of the Council's decision-making process).
3. Following the applicant's confirmatory application dated 15 April 2009, the Council has thoroughly examined the documents concerned and carried out new internal consultations within the relevant services of its General Secretariat, taking into account the current state of play of the discussions on the draft Directive.

4. In the light of these consultations and given that the Council is expected to adopt the draft Directive in its Agriculture and Fisheries session on 25/26 May 2009, the Council has come to the conclusion that the exception provided for in Article 4(3) of the Regulation no longer applies to the documents under scrutiny. The applicant may therefore have access to documents 14916/07, 6136/08 and 7286/08 in their entirety.
