EUROPEAN OMBUDSMAN COMPLAINT

ON ACCESS TO COUNCIL LEGAL OPINION ON TRANSPARENCY OF THE BENEFICIAL OWNERSHIP REGISTER

Version 28 November 2017

1. Mandatory Fields

Please complete all the compulsory fields. These are marked with a square (*).

First name: *	Helen
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On behalf of (if applicable):	
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2. Against which European Union (EU) institution or body do you wish to complain?

X Council of the European Union

3. What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

On behalf of the organisation that I direct, Access Info Europe, I am complaining about the Reply adopted by the Council 18 August 2017 in response to my confirmatory application (registered by the Council as 16/c/01/17), in which the Council denies me full access to Council Document 15655/16, being the Opinion of the Legal Service on the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC. This Reply is the Council's final decision to a request that I submitted on 19 May 2017 seeking to obtain full access to the Opinion of the Legal Service.

The full chain of the request and responses can be found here https://www.asktheeu.org/en/request/legal_opinion_beneficial_ownersh#outgoing-8556

And the chronological summary is as follows:

19 May 2017: request submitted by Helen Darbishire and acknowledgement received from Council.

15 June 2017: letter notifying of an extension to the time limit to 6 July 2017 received from Council

26 June 2017: decision on the request (initial application for the document) received from Council, along with a redacted version of the requested legal advice

18 July 2017: confirmatory application submitted by Helen Darbishire and acknowledgement received from Council

10 August 2017: letter from Council notifying extension to 1 September 2017

10 August 2017: response note from Helen Darbishire noting importance of having the information to participate in ongoing public debate

18 August 2017: Reply to confirmatory application received from Council along with slightly less redacted version of the legal advice, but still denying any access whatsoever to nine pages of text.

Please note with respect to time frames that the Council took around 22 working days (with public holidays discounted) to respond to the first requests, and 20 working days to respond to the confirmatory. I submitted the confirmatory one day over the statutory 15-day deadline, and the Council graciously agreed to declare it admissible.

4. What do you consider that the EU institution or body has done wrong?

Access Info Europe believes that the Council has erred in its invocation of two exceptions to deny full access to the requested Opinion of the Legal Services [hereinafter "the Opinion"], and that it has failed to give proper consideration to the public interest test.

As a result of this incorrect application of the exceptions, the Council has provided me only with the introductory, factual background, pages of the Opinion and has denied me access to nine pages of text containing the substantive legal analysis / arguments that the Council uses to reach its conclusion that the future registers of the beneficial owners of companies that will be (are being) set up across Europe by Member States should not be fully accessible to the public. Indeed, the precise conclusions of the Council Legal Services are also redacted in the document provided, and hence it is not possible to know what those conclusions are as well as not being possible to know the legal basis and analysis used to arrive at conclusions.

In denying me this information the Council has interfered with my right of access to documents as established in the treaties of the European Union (Article 15 TFEU). This is particularly serious as the document in question relates to an ongoing legislative process, an

area that both the EU treaties and the case law have established is an area should as a rule be subject to high levels of transparency.

As a result, the Council is denying both Access Info Europe and other organisations working on this issue at the national level, the possibility of participating fully in debate on this issue with government officials and more broadly, as we are not privy to the same information. The need to have this document for participation purposes is an issue that I raised both in the initial request and in the confirmatory application.

Nota bene: I note that Access Info has obtained the full, unredacted Legal Opinion (in more than one language), as it is a document that appears to have been widely circulating in Brussels and in some Member State. At this juncture, we have not published it. We do, however, refer to the content here in order to counter the arguments made by the Council in justifying their denial of the document. A copy is attached for the benefit of evaluation by the European Ombudsman.

We will also argue below that there is a skewed playing field for access to documents of this nature which acts as a barrier to civil society participation, both at the Brussels and Member State level. In this respect the decision of the Council not to provide access to the document, in spite of the public interest arguments presented, is a particularly serious breach of its obligation to "ensure the participation of civil society" as established by Article 15 TFEU.

LEGAL ANALYSIS

The Council has refused to provide the Opinion on the basis of two exceptions: protection of ongoing decision making (Article 4(3) first subparagraph), and on the basis of protection of Legal Advice (Article 4(2), second indent). It has found that there is no overriding public interest in making public the bulk of the Opinion, and the part which contains the substantive legal analysis.

(1) Protection of Decision Making

In the Reply at Paragraph 10 the Council argues that the full disclosure of the requested document would "seriously undermine" (with seriously underlined) decision making because it relates to ongoing negotiations with the European Parliament, and that these are at a "critical stage". The Council fails, however, to explain precisely how release of the Opinion, which supports the stance that it is taking in these negotiations, would undermine these negotiations. This assertion that damage would be caused is particularly puzzling in this context as it is to be assumed that the other parties involved in the negotiations are privy to the position that is being taken. Hence the Council has failed to justify this rationale for the exception being invoked.

In paragraph 12 of the Reply the Council argues that disclosure might affect their internal decision-making as the "*Member States' positions might still be diverging in this legislative process, depending also on the EP's position, and including still some of the legal issues, analysed in the requested Council document on that proposal*." What is stated clearly is how making the Opinion public would per se and directly affect Member States positions, since the Member States already have access to the Opinion (and in some countries at least not only

relevant government representatives but also parliamentarians have access to it, as Access Info Europe noted in our Confirmatory Application).

Implicit in this statement, however, is what is hinted at even more strongly in the following paragraph: "*full disclosure of the requested document now could prevent a genuine debate on the still prevailing legal issues, by shifting the focus of the discussions within the Council to the content of certain specific elements of the decision-making process, thereby seriously undermining and adversely affecting the good conduct of the latter.*" In other words, it seems that there is some concern that if the document were to be made public, and if there were to be debate about it, there might be a further discussion in the Council about the position it is taking. The problem with this approach is that it fails to accept that public debate about ongoing legislative processes is an inherent part of democratic decision making.

As the Court of Justice has stated: "openness … enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights." (*Sweden and Turco vs Council*, Paras 45 and 46).

In similar vein, Paragraph 14 argues there is ongoing debate in the legislative process about, for example, "the scope of persons who should have access to the beneficial ownership information" and that if this were to be revealed, there would be a "concrete and actual risk of seriously undermining the capacity of the Council to reach a final agreement on the legislative proposal." Again it is not stated precisely how this harm would occur, but it might be inferred that this would be because of public debate about the scope of the future regulation and who might have access. The Council is correct that this is an issue for debate: it is a matter that has been widely discussed in many fora (both EU, Member States, and globally) over the past few years and it is well known amongst those working on this issue that there is disagreement on how to resolve this. There are different perspectives: pro-transparency civil society groups and investigative journalists are in favour of wider access; at least some sectors of the business lobby are against. Release of the contested Opinion would in no way change this as the debate is ongoing. What it would do is contribute, in a positive and helpful way, to the resolution of this debate, but setting out what the legal options are that can be pursued. In that sense, rather than causing harm, quite the opposite is likely: disclosure of the requested document would have a beneficial effect, which could help ensure a correct outcome for the legislative process currently underway.

Hence the conclusion that Access Info already made in the confirmatory application is that more harm is likely to arise from not releasing the document. This includes harm to the credibility and legitimacy of the European Union's decision-making process in the eyes of

the European public when decisions are taken behind closed doors, as well as harm to the participatory principles of the EU as preventing the public from discussing with government representatives the pros and cons of different options under consideration. Civil society actors working in this field are unable to formulate and present arguments in favour of transparency if they cannot know precisely which arguments are being used to limit it (and we provided concrete examples of how this is happening). Hence, based on an analysis which is not vague and is not merely hypothetical, there is a demonstrable harm in not releasing this document.

(2) Protection of Legal Advice

There are four arguments used as part of the justification for applying the exception on protection of legal advice to the requested opinion:

That it is important that the Council has impartial legal advice (Paragraph 13)

That the document treats particularly "sensitive", "controversial", "complex", "delicate" and "contentious" issues (Paragraphs, inter alia, 7, 15, and 17)

That the is likely to be future litigation (Paragraph 16)

That the document is especially wide in scope (Paragraph 17 and 19)

With respect to the importance of the Council receiving impartial legal advice: In paragraph 13 the Council argues that "each co-legislator should be afforded access to impartial legal advice". Access Info Europe does not disagree with this and trusts that the Council Legal Services do indeed provide impartial legal advice. At the same time, the co-legislators are, at the end of the day, working for and accountable to the public – be it Member States who should be accountable to their parliaments and electorates, or MEPs who in turn are accountable to their electors. Hence it is essential that those persons are able to obtain and review the legal advice, which being a legal analysis should be impartial and rigorous, and should provide guidance on whether or not decisions are being taken in line with European Union law. A paradigm change is needed here and there needs to be an understanding that the ultimate "clients" for legal advice produced by government bodies are citizens. Only through such transparency can members of the public verify that the legal advice being provided is based on a thorough analysis of the relevant law; only through such transparency can the public be assured that decisions were taken only after reviewing carefully the legal options. So of course, legal advice should never be based on conjecture, opinions, the desires of interest groups, or other political considerations, and the public has a right to know if the legal analysis being used as a basis for making future EU laws that affect 505 million people is indeed impartial, rigorous, and comprehensive.

With respect to the sensitive / complex / controversial nature of the issue: This argument came as somewhat of a surprise. It is indeed the case that the Court has stated that refusal to disclose a particularly sensitive legal opinion, in the context of a legislative process, may be justified, "in such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal." In the Commission's reply, there is no such 'detailed' statement of reasons, firstly, as to why the issue is 'sensitive' as compared to other issues that the institution deals with. We note that, while a matter of importance in terms of

the fight against money laundering and organised crime, as well as routine tax evasion, there is nothing in the debate about beneficial ownership registers that is particularly sensitive compared with, for example, matters of public security or the fight against terrorism. Indeed, our review of the full Opinion gives no reason to see that the Council is justified in invoking the sensitivity of the document.

As to complex, while any discussion of balancing the rights of access to information and data protection may have a certain level of complexity, and while the balancing act often needs to be addressed on a case-by-case basis, there is nothing particularly complex about the beneficial ownership debate. Indeed, the average person is likely to be able to comprehend the essential arguments. This is a matter we addressed in detail in the Confirmatory application – noting that it is patronising to the European public to assert that the supposed complexity of this issue is a reason for not making the information public. Rather than addressing the arguments, the Council merely reiterated the assertion that that matter is complex.

The same goes for the "controversial" or "delicate" nature of the issue. In our Confirmatory, Access Info accepted that revelations such as those in the Panama Papers about tax evasion and money laundering, including by some senior politicians and other public figures, caused controversy. That is distinct from implying that the legal regulation in order to prevent that happening again in the controversial. Furthermore, there is not really a serious controversy about the beneficial ownership registers: it's primarily a debate among specialists, taking place via pretty civilised and well-argued discussions where various actors present differing perspectives. As such, this is a long way from being a raging controversy where every statement is likely to be taken out of context and manipulated. In this respect the beneficial ownership debate is unlike many issues that are truly controversial (think about debates over issues such as abortion rights, refugees, gay marriage, trade deals, copyright regulation, or many other hotly debated issues of recent times). And even if it were controversial, this would make it all the more necessary to contribute to the debate what should be, one hopes, the cool, level-headed, legal analysis from the CLS.

<u>With respect to possible future legislation</u>:

The Council argues that because the issues surrounding the regulation of beneficial ownership transparency are "particularly delicate and contentious, since they relate to serious business interests in the internal market" there is a high and realistic risk of future litigation, and that publication of the legal advice would prevent the Council from defending itself in Court.

It is hard to see, particularly having reviewed the un-redacted version of document, that all the redacted text could be covered by this concern, and we note that the Council has manifestly failed to specify which parts of the document on which types question might fall under this exception.

We also note that a future litigant might be privy to this Opinion, given that it has received wide distribution. In that respect the Council is weighing what appears to Access Info to

continue to be a hypothetical future situation against the clear public interest in obtaining the information in the present moment (see public interest arguments below).

Furthermore, almost any new regulation could be subject to litigation in the future, not necessarily the most "controversial" ones. With this line of logic, almost no documents relating to the preparation of future regulations and directives would be made public. This is clearly something that the legislators in developing the treaties of the EU in which they place a strong accent on the importance of openness of legislative proceedings, have considered and rejected as a way of thinking, presumably also out of consideration of the wider public interests at play in ensuring an open and accountable legislative process.

With respect to the document being wide in scope:

The Council asserts that because it is wide in scope, it may relate to other ongoing legislative files, and gives examples of a handful of legislative files where data protection is an issue. Access Info notes that the Court has accepted that in some instances there may grounds for refusing to disclose a particular legal opinion "*having a particularly wide scope that goes beyond the context of the legislative process in question.*"[1] Once again, however, the burden is on the institution to give a detailed statement of reasons for the refusal, which in this case the Council has failed to do, beyond the reference to other legislative files that raise issues of data protection. Having had the chance to review the full version of the Opinion, we see nothing that is specific to these other legislative files. Indeed, given that data protection is a transversal matter that runs across much of what the EU does, to argue that any legal advice on data protection cannot be revealed because data protection itself is wide, would seriously undermine transparency. Be that as it may, in this particular case, the Council has not been sufficiently specific about which paragraphs of the redacted text are affected by this exception, and so has applied the exception in an unacceptably overbroad manner.

3) Overriding Public Interest in Disclosure

The Council gives short shrift to the public interest arguments raised in the Confirmatory application. It argues that the settled case law requires more substantial justifications, referring to Joined Cases C-517/07 P, C-528/07 P and C-532/07 P Sweden and Others v. API and Commission, EU:C:2010:541; paras 157-158.

Access Info notes that a substantial difference here is that the API case is about infringement proceedings, which that case law has traditionally treated very differently from legislative procedures, as the starting point includes different presumptions about the democratic need for and benefits of transparency, given that infringement proceedings, by their nature are not presumed to benefit from the inputs likely to be accrued by legislative processes thanks to public participation in discussion and as a result of direct participation by interest groups. Hence, without taking a stance here on the merits of not of opening up infringement proceedings, Access Info argues that this case law is not especially relevant and that the

[1] Ibid. at 69

Council has failed to give due and proper consideration to the public interest arguments that made in my confirmatory application.

Furthermore, these public interest arguments were not vague, but were very specific, and include the following, made in the initial application:

- Access Info had been led to understand that the Opinion was being referred to by Member States in discussions with civil society in order to argue against the need for transparency of a future beneficial ownership register. These arguments included that according to the Council Legal Services, there is no link between public access to information on beneficial owners and effective suppression of money laundering and indeed that to consider that the public has any role in combatting corruption and organised crime is contrary to the values of democracy and rule of law, where only law enforcement and competent authorities can undertake such activities. We were also informed that the Council Legal Services have concluded that access of general public to information on beneficial ownership of all business and legal entities and trusts, as an instrument in supressing money laundering and tax evasion, is disproportionate and inappropriate.
- As a result, I argued that it is imperative that the European public is provided with such evidence in order to be able to participate in the debate on the future regulation, particularly as such a conclusion is at odds with both the jurisprudence of the European Court of Justice and with assertions contained in other European regulations and with experience in practice (of which I gave specific examples, such as Case C-398/15 Manni of 9 March 2017, and Regulation 1306/2013 of the European Parliament and the Council on the financing, management and monitoring of the common agricultural policy, notably at preamble paragraph 76, where it states that "the role played by civil society, including by the media and non-governmental organisations and their contribution to reinforcing the administrations' control framework against fraud and any misuse of public funds, should be properly recognised.").
- I argued that in the specific context of transparency of the beneficial owners of companies, there has been a clear demonstration through the Panama Papers leaks (2016) of the need for greater transparency in order to ensure public oversight of wrongdoing, particularly when public figures (precisely those who should be the guarantors of probity) are involved. Thanks to the disclosure of these documents there were multiple resignations of high level political figures, at least 150 criminal, civil, or regulatory investigations in 79 countries. Indeed, Europe's premier crime-fighting unit, Europol, found that almost 3,500 individuals and companies in the Panama Papers were probable matches for suspected criminals including terrorists, cybercriminals, and smugglers.
- It is for reasons such as these that numerous European governments have concluded that transparency of beneficial ownership brings numerous benefits. As a result, a number of countries have made commitments to ensure that their company ownership registries are open, and to open up future beneficial ownership registers. Such commitments have been made, inter alia, in fora such as the G20, London Anti-Corruption Conference, and Open Government Partnership Paris Declaration.
- Access Info has been directly involved in this work, as well as campaigning at the EU level on beneficial ownership transparency in specific sectors and generally.

- We therefore argued that, to the extent that that Council Legal Services has amassed some kind of quantitative or qualitative evidence and/or has arrived at a legal analysis that leads to a conclusion different from that reached by many international organisations, governments and civil society organisations after the latter have assessed the large quantity of empirical data available to them as well as the conclusion arrived at by some governments that transparency of these registers can be achieved.
- The importance of this directive is underscored by the ongoing public debate on the best way to configure the transparency in which I and the organisation I direct are involved and in order to participate in this debate, both at the EU and national levels, we need to know the position that is being taken by the Council in this respect and its legal analysis of the alternatives available for legislation.

The confirmatory application underscored some of these arguments, also pointing out, using data from the European Commission about the scale and nature of the problem being addressed, that it is important that the public know precisely how the legal advice is articulated in order that the future rules on beneficial ownership transparency have a solid base and are best structured to address the need to fight against this kind of illegal activity.

We now know that the Opinion contains the following statement: "*34. The nexus between public access to beneficial ownership information and efficient anti-money laundering enforcement is not established and, in the absence of relevant studies and statistics or even anecdotal evidence, cannot be inferred from common sense*." Given that this statement is at odds with much evidence that does exist, and is not per se a legal analysis, this underscores precisely why it is important that such legal advice be made public, so that there can be debate about the issues, and providing the opportunity for those with strong evidence to ensure that decision makers are able to review it before taking decisions.

To conclude: By not sharing its legal assessment of an initiative of public interest, the Council is stymying public debate on this topic, as the public is prevented from discussing and from comparing and contrasting the different legal perspectives. In particular, Access Info and other organisations have been excluded from our right to participate in a debate on an issue on which we are working. For civil society to be limited in its rights to freedom of expression and the right to participate is a serious matter and runs against the public interest.

5. What, in your view, should the institution or body do to put things right?

In order to put things right the Council should:

1) Provide me with the requested document in its entirety
2) Make public the requested document in full in the Consilium Register
3) Review the way in which it is handling requests for legal advice, and develop a new policy which will guarantee members of the public the widest possible access to legal advice in order to permit true participation in decision making, particularly on legislative files.

Access Info also requests that the European Ombudsman

1) Review the way in which the Council is handling requests for Council Legal Services, in particular those that relate to the legislative process and how they confirm with the ruling in cases such as Sweden and Turco vs. Council;
2) Review the mechanisms for distribution of Opinions of the Council Legal Services to bearing mind that there is need to ensure that relevant actors, including all national parliaments are able to access this information and exercise their oversight and accountability functions;
3) Consider developing guidelines or recommendations for the EU institutions on the provision of legal advice to relevant stakeholders in a proactive manner when it relates to ongoing legislative processes, particularly ones on issues where there has been public debate or discussion, in order to foster greater participation in EU processes.

6. Have you already contacted the EU institution or body concerned in order to obtain redress?

X Yes

As noted we have submitted a confirmatory application.

All the documents can be found at: https://www.asktheeu.org/en/request/legal_opinion_beneficial_ownersh#outgoing-8556

I also attach the relevant documents in PDF format.

7. If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

X Not applicable

8. Has the object of your complaint already been settled by a court or is it pending before a court?

X No

9. Please confirm that you have read the information below

X Confirmed

10. Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

X Yes

11. Do you agree to participate in a short survey (about one minute in length), once your case has been closed, to help us improve the service we provide to complainants?

X Yes